

Rule of Law and the Ethical Lawyer

June 21, 2017

By

ICJC members are often required to distill everyday questions of law and practice through a prism of rule of law. We ask ourselves: would the proposed solution or decision advance or harm the rule of law in this country?

The Supreme Court also adopted this test in declaring the requirements of an effective secession by Quebec from the Canadian federation. The exercise of democratic rights was limited to ensure the rule of law and constitutionalism in this country, and their preservation was explicitly linked to the protection of minorities.

These lofty principles and goals federalism, democracy, constitutionalism and the rule of law, and respect for minorities – underlie the legal obligations that courts, governments and legislatures create and enforce daily.

What about lawyers as individuals and as professionals? They also carry out everyday tasks in commercial, property, social benefits, and many other areas of law – that are much less grandiose, although no less important.

Which of the following tasks is a lawyer's ethical obligation?

- Improving the administration of justice.
- Providing legal services pro bono, or on legal aid, court challenges or other reduced rate arrangements.
- Mentoring and advising young lawyers and law students.
- Assisting community, charitable and other non-profit organizations with their legal needs.
- Promoting and advancing equality in law firms and other legal organizations.
- Serving the legal profession and professional organizations.
- Challenging and working with courts and administrative tribunals to remove systemic racism, sexism, and other barriers that impede access to justice for disadvantaged litigants.

In my view, the answer is “all of the above”.

After many years of examining and applying professional responsibility principles on the one hand, and constitutional and human rights imperatives on the other, it is clear to me that these concepts are closely intertwined. These important tasks are not only the responsibilities of the institutional players in our democratic and constitutional structures, they are aspects of the promotion and protection of the rule of law in Canada. In a variety of ways, they are central to the definition of an ethical lawyer.

When lawyers are called to the bar, they are told that they will become the foot soldiers of the administration of justice. The rules of professional conduct specify that lawyers must encourage respect for the administration of justice, and seek to improve it. The rights and obligations that are proclaimed in common law or statutory regimes are meaningless if the public cannot secure them through fair and timely resolution or enforcement.

When we think of the professional obligations of lawyers, our minds usually turn to issues such as competence, financial responsibility, conflict of interest, and governability. These are the stock in trade of disciplinary decisions at Law Society tribunals across Canada. Yet when panels consider the penalties to be imposed when misconduct is proven, they look at a variety of mitigating circumstances. The tribunal's goal is to protect and advance the public interest.

When they examine the lawyer's career before, during and after the events in question, they are attentive to evidence about the lawyer's contributions to the community, to the profession, and to the administration of justice. These good works can involve pro bono or community work, mentoring, or breaking down barriers for the disadvantaged in society. In short, all of the interests listed earlier that benefit society and the rule of law – also assist in satisfying the governing body that the public interest will be protected through ethical lawyering.

A few years ago, the Federation of Law Societies of Canada published a consultation document on entrance requirements for admission to the bar. The goal was to promote consistency among the fourteen law societies and their adjudicative tribunals when they decide whether a candidate meets the “good character” requirement to be called to the bar.

The Federation put forward four pillars of good character: respect for the rule of law and the administration of justice; honesty; financial responsibility; and governability. In Ontario, our Law Society suggested that the criteria should be broadened to give greater discretion to take into account other aspects of a person's suitability to practise. Notably, we put forward respect for human rights and equality principles as an important pre-requisite, and as a message that the legal profession should send to the public about its values.

In considering both admission and disciplinary standards, the foremost objective is the maintenance of public confidence in the self-regulation of the legal profession. Judicial councils apply a similar principle in discipline cases: the goal is to maintain or restore public confidence in the integrity of the judiciary. In both cases, the focus is on vindication of the rule of law as an objective to be achieved by the actions of individual players in the justice system.

It is therefore not surprising that several recent policy initiatives in professional regulation updating and modernizing the conception of the ethical lawyer are directed at the many ways in which lawyers can support the rule of law in their work. They are being asked to integrate concepts such as equality, access to justice, mentoring and community service into the competent advice and respectful relationships that will characterize their practice in the office, in public and in appearances before courts and tribunals. By conducting their practice in this way, they fulfil the essential role of lawyers in maintaining the rule of law.

The advancement of the public interest has increasingly been recognized as the role of individual lawyers, and not only their regulators. As one example, the quest for a more representative legal profession has emerged from the understanding that it is a win-win-win proposition. Clients benefit from a diversity of lawyers in terms of gender, race, religion, disability, and linguistic skills, among other aspects of their background and understanding. Firms are able to attract the best law students by creating inclusive workplaces. Members of these groups advance in social and economic standing, and their community sees them in respected and powerful positions. Diverse workplaces can be more respectful and productive. Law firms and other professional organizations can gain in terms of reputation within the profession and the community. It is the right thing to do.

Alongside all of these benefits, a profession that reflects the community it serves is better placed to remove the often unconscious barriers that impede the advancement of minorities in society. The promotion of equality in turn enhances access to justice, the administration of justice and the reputation of the legal profession.

That was the clear conclusion that emerged from a Law Society of Upper Canada investigation and research project over the last four years. In late 2016, the Law Society adopted measures that require each lawyer and paralegal in Ontario to take steps that are designed to reduce systemic racism in the profession. These professional obligations include education, quantitative and qualitative

surveying of professional workplaces, self-assessment of practices within firms, development of policies within firms, and enforcement by the Law Society.

Many law societies have adopted policies and professional obligations that are designed to reduce discrimination on racial and other grounds, notably gender. The rate of departure of women lawyers from the profession, and from particular sectors of the profession, can erode all of the benefits of a diverse profession, quite apart from the individual and unnecessary loss of opportunity.

The work of modern law societies in these areas reflects the intersection of equality, the administration of justice and the rule of law as central preoccupations of the public interest today. As part of the Ontario measures, every lawyer and paralegal licensed by the Law Society will adopt and abide by a statement of principles acknowledging their obligation to promote equality, diversity and inclusion in their behaviour toward colleagues, employees, clients and the public. The promotion of equality is an ethical responsibility of every member of the profession, so that each lawyer will play a part in dismantling the hurdles that exist for the entry and advancement of traditionally disadvantaged groups in society.

Similar strategies voluntary measures, incentives and ethical obligations have begun to appear in a second component of the rule of law access to justice. Pro bono legal services, long a hallmark of Canadian law student clinics, have become mandatory at some faculties of law. Many law societies require law school programs in ethics and professionalism, to engender the culture of professional obligations and service to the public as foundational elements of an entry level lawyer, alongside academic and experiential learning.

Legal insurers often provide financial concessions for pro bono work and continuing education in professional responsibility. Law firms have recognized that all of the win-win-win factors I cited earlier apply in a similar way to encouragement and valuing of pro bono, legal aid or comparable work by the firm: community involvement, professional reputation, client development, student recruitment, and happy workplaces.

A third strategy of incorporating the rule of law into professional practice has emerged in recent years. Law societies across Canada are considering the regulation of "entities" firms, professional organizations, clinics, for example rather than only individual lawyers.

Policy makers are increasingly recognizing that ethical obligations such as the management of a practice, clients, files, finances and professionals is done by the collectivity, particularly in large legal organizations. The professional conduct of individual lawyers is usually influenced, and often dictated, by the rules and practices of the entity as a whole. Alongside this recognition has come the understanding that proactive improvement of those rules and practices, rather than reactive, disciplinary enforcement, will better advance the public interest.

Law societies across the country have adopted different definitions of the practice management principles that the entities will have to meet. The Law Society of Upper Canada has included, in addition to the conventional areas of law office management that I listed above, two significant new measures: equity, diversity and inclusion; and access to justice.

Entity regulation, and the self-assessment that the organizations will be required to undertake in order to meet ethical standards, will therefore encompass these two vital areas of the promotion of the rule of law. A lawyer's ethical standards will be gauged by adherence to these principles in their daily professional work.

In this short essay, I have only scratched the surface of exciting developments that will continue to propel lawyers to a greater consciousness of the public interest that underlies their work. It is not primarily, or even largely, a matter of imposing rules. The evolution of professional regulation to a more proactive system will inevitably shine greater light on the increasing extent to which the everyday practice of law must develop in tandem with the evolution of the rule of law in Canada.

This essay was originally published in the International Commission of Jurists (Canadian Section) book, Canada and the Rule of

Law: 150 Years after Confederation / Le Canada et la primauté du droit: 150 ans après la Confédération. This is just one of 35 essays by jurists from across Canada featured in the book. The book can be purchased by donating to ICJ Canada, or by joining as a 2017 member. For more information, please [click here](#).

For more information or inquiries:

Toronto

Email:

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035