

NOTEBOOK ON ETHICS, STANDARDS OF PRACTICE AND LEGAL ISSUES FOR COUNSELLORS AND PSYCHOTHERAPISTS

Dr. Glenn Sheppard

Professional Regulation: Some Expert Advice

Steinecke Maciura LeBlanc is a Canadian law firm that has been practicing in the field of professional regulation for twenty years and are experts in Administrative Law, the law that governs the activities of regulatory agencies. They publish a regular newsletter entitled **Grey Areas** in which they address a wide range of issues of interest to regulators and all regulated professionals. Since counsellors and psychotherapists are now regulated in a number of Canadian provinces and others are striving to achieve it, I have selected for this Notebook, with their permission, newsletter No. 217, June 2017. In this issue some members of the firm report on lessons learned after twenty years of practice with professional regulation. You may freely subscribe to their newsletter by visiting their website at <http://www.sml-law.com/resources/newsletters/>.

Twenty Things We Have Learned in Twenty Years

by Julie Maciura and Richard Steinecke

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As we mark our firm's twentieth anniversary practising professional regulation, we have reflected back on the lessons we have learned. Of course, there are many of them, but here are our top twenty.

1. ***You can never say "public interest" too often.*** The only reason regulators exist is to serve the public interest. Some members of the public will assume that regulators protect their own. Even the profession itself, which elects the majority of their Council or Board members, sometimes get this foundational concept confused. It is prudent to constantly remind oneself of one's mission.
2. ***The public interest means more than public safety.*** While the physical and emotional safety of patients is important, unethical or dishonest conduct is also extremely harmful. In some ways, intentional acts are more destructive than honest mistakes.
3. ***A professional regulator's public interest may be different than someone else's public interest.*** Regulators do not have to solve all of the world's problems. And they should not usurp the role of government in trying to make societal-level policy decisions, recent examples being the medical assistance in dying and cannabis issues.
4. ***Having said that, regulators should be part of the solution.*** This has been illustrated by the role that some regulators have played in enhancing labour mobility. Regulators have a unique perspective and expertise to bring to many issues such as the flow of labour across the country and internationally.
5. ***Be open-minded.*** Even fundamental "truths" change. For example, the concept that the public should not be informed about significant complaint outcomes because no "finding" of wrongdoing has been made is now "old thinking". The public today expects to have access to information that is relevant to their choice of practitioner.

6. ***Be transparent.*** Regulators are increasingly posting their processes and decision-making criteria online. While sometimes this permits some to tailor their submissions to the regulator (e.g., avoiding providing original documents for registration and providing less revealing alternative sources of information), overall it helps make for a more efficient process when the relevant information is provided the first time.

7. ***Legislation is slow.*** Regulators constantly struggle with obsolete provisions in statute and even in regulations. They are constantly engineering work-arounds such as publishing standards and guidelines. Trouble brews when this is not possible, such as when statutory confidentiality provisions are inconsistent with current societal expectations of access to information.

8. ***Court decisions are not immutable.*** Rigidly relying on old cases that no longer reflect public and judicial thinking is a prescription for disappointment. It is hard to believe that at one time the leading case on disclosure in discipline hearings explicitly said that witness statements did not need to be provided to practitioners.

9. ***Regulators cannot do it alone.*** Today most professions practice in teams or in settings where others share responsibilities. Regulating just the individuals without considering those with whom practitioners work or the practice environment itself is ineffective. Regulators, as well as practitioners, must learn how to collaborate in order to achieve their mandate.

10. ***It is difficult to be “too fair” to the practitioner.*** Giving notice of the regulator's concerns and offering an opportunity to comment not only avoids judicial review, it results in better decision making. Being fair sometimes requires repeating the submissions process as new information or new concerns arise.

11. ***There are always exceptions.*** Sometimes the risk of harm to innocent third parties or clients requires regulators to withhold certain information at least for a while (e.g., the contact information of a vulnerable informant) or to oppose production orders (e.g., of the counselling records of a complainant). Rigidly following established procedures without considering their purpose can be inappropriate at times.

12. ***Complainants also need to be considered.*** Since the practitioner's livelihood is at stake, fairness to them is proper and necessary. However, this should not be at the expense of re-victimizing the complainant, particularly in cases where the alleged misconduct relates to their vulnerability (e.g., sexual abuse cases).

13. ***Social science helps.*** We all know about the frailty of memory because of studies on the issue. Similarly, social science has taught us important lessons on the nature and impact of sexual abuse that has fundamentally altered how regulators approach those issues. More recently, an increased interest in cognitive fallacies has provided invaluable information on how regulators can assist practitioners to make better decisions. Of course the risk of relying on pseudo-science must be carefully considered.

14. ***Most practitioners are competent and ethical.*** In our experience, the vast majority of practitioners take pride in their professionalism, diligently serve their clients and work well with their colleagues. To remain relevant and effective, regulators need to design their programs with this reality in mind (see "proactive regulation" below).

15. ***A few practitioners are deceptive.*** Fortunately this is not common. However, the schemes of rogue practitioners can be elaborate, creative and persistent. Regrettably, this means that regulators must be sceptical of the initial explanations offered by some practitioners in response to complaints or concerns.

Sometimes an explanation doesn't make sense for good reason.

16. ***Proactive regulation matters.*** Focusing on complaints (i.e., reactive regulation) means that the regulator's message to practitioners is "do the bare minimum and you will be fine". Whereas the regulator's message when administering continuing professional development, inspection, and quality assurance programs is "excellence is important".

17. ***Professional buy-in matters.*** Unless the regulator has the respect of the profession, its members will not cooperate with investigators, report wrongdoing by peers, act as expert witnesses or serve on committees. A regulator cannot be effective without the widespread assistance of practitioners. Of course, the regulator must always be diligent against being co-opted by the profession it is supposed to govern.

18. ***Regulators tend to attract the best and the brightest.*** Most people who serve on the staff, Councils or Boards and committees of regulators are exceptional professional and community leaders. In our observation, they tend to have excellent track records of public service in various organizations and they want to make a positive difference.

19. ***One dysfunctional person can disrupt an entire organization.*** While rare, we have seen one individual with a strong personal agenda, or an unrelenting personality, consume all of the time and energy of the organization such that little else can be accomplished. In these cases, good people leave the organization rather than engage in constant conflict and the reputation of the regulator can be damaged for years to come.

20. ***Professional self-regulation may be disappearing.*** This regulatory model has been replaced in much of the rest of the world. Even in Canada the model has been adapted to provide for greater accountability and is under active reconsideration in many places. Regulators must constantly prove themselves worthy of the task. That was not always the case.

It is a privilege to work in this field. One is on the side of truth and justice, working with great people achieving important things. We cannot think of a better practice area. We thank everyone with whom we have had contact these past twenty years.