

Private Comments – Public Harm

by Richard Steinecke
June 2015 - No. 197

When CityNews reporter Shauna Hunt confronted fans shouting degrading comments during a live interview at a soccer match, the video of her doing that went viral. One of the men trying to justify his actions was employed by a government agency. He was fired almost immediately after the video became public.

Earlier this month, Lori Widmer wrote an article for a risk management magazine entitled: “Risky Rhetoric: When Personal Opinions Damage Corporate Brands”. While completely unrelated to the Shauna Hunt incident, it set a context for the broader discussion.

These developments highlight the risk to a regulator when its representatives make comments in their private lives that could be seen to affect the reputation and credibility of the regulator. Consider the following scenarios:

- An employee of a regulator that deals with complaints about sexual abuse of clients posts a comment on social media that uses “locker room” language that, if taken literally, appears to condone sexual violence.
- A regulator’s in-house legal representative who is going through a separation writes a letter to the editor of a local paper attacking the neutrality and impartiality of a local judge that heard his case. The regulator often appears before this judge.
- A senior manager of the regulator is a campaign volunteer for an opposition

candidate in the riding of the Minister who oversees the regulator. The senior manager is recorded as saying that the Minister is “either incompetent or a liar” in respect of the closing of a major manufacturer in the riding.

- A 35-year old employee of the regulator is caught on a cell phone camera pushing a 50 year old woman to the ground during a road rage incident and kicking the woman’s nine year old grandson in the abdomen.
- An employee posts an entry on her private blog about her religious belief that while men and women are equal in status, nature assigns the role of leadership to men.

These scenarios raise the thorny issue of how far regulators should become involved in the private opinions, comments and actions of their employees. On the one hand, there is little doubt that such actions in the private lives of its employees can have a significant impact on the reputation and, as a result, the effectiveness of the regulator. Members of the profession, the public being protected by the regulator and those who supervise the regulator may have legitimate questions as to the values demonstrated by the regulator that continues to employ such a person. Failing to take decisive action can lead the public to believe that the views of the employee are reflective of the regulator.

On the other hand, employees of regulators are entitled to have private lives and to hold and express sincere personal opinions on non-regulatory issues. Freedom of expression is an important component of the *Canadian Charter of Rights and Freedoms*. If every employee is bland and without any exceptional views or passions, the regulator will not have the varied perspectives needed to be effective.

FOR MORE INFORMATION

This newsletter is published by Steinecke Maciura LeBlanc, a law firm practising in the field of professional regulation. If you are not receiving a copy and would like one, please contact: Richard Steinecke, Steinecke Maciura LeBlanc, 401 Bay Street, Suite 2308, P.O. Box 23, Toronto, ON M5H 2Y4, Telephone: 416-626-6897
Facsimile: 416-593-7867, E-Mail: rsteinecke@sml-law.com

WANT TO REPRINT AN ARTICLE

A number of readers have asked to reprint articles in their own newsletters. Our policy is that readers may reprint an article as long as credit is given to both the newsletter and the firm. Please send us a copy of the issue of the newsletter which contains a reprint from Grey Areas.

Grey Areas

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

Widmer suggests in her article that organizations run two risks. The first risk is harm to their reputation. The second risk is legal liability in at least some circumstances where the organization knew of the employee's tendency to engage in such activities and did nothing (e.g., looking at child pornography using company technology).

To be able to withstand these challenges, Widmer suggests that the organization have a policy in place to expressly address private behaviour that is contrary to its values. In addition, organizations should have a crisis management plan that can be adapted to these situations. She even recommends that organizations have a public relations firm on retainer. She points out that some insurers will not provide insurance coverage for related risks unless these safeguards are in place.

In addition Widmer identifies a number of "mitigation options" that can reduce the risks associated with inappropriate statements or actions by employees of organizations. She says the goal of these measures is for the organization to distance itself as far as possible from the statements or actions of their employees.

Measures include the following:

- Having a social media policy that addresses these concerns.
- Including in employment contracts the right to inspect and audit the use of any company-issued technology.
- Asking employees to acknowledge that they do not have the authority to speak on behalf of the regulator and to always make clear in any opinions expressed that might reflect on the

regulator that they are not speaking on behalf of the regulator.

- Taking action when an inappropriate statement or action occurs that could reflect on the regulator. Failing to do so could result in the allegation that the regulator condoned the behaviour if the action later re-occurred in a more significant way.

Perhaps the greatest protection, as noted above, is to maintain a policy notifying employees that they must take care in their private communications or actions to avoid behaviour that is inconsistent with the values of a public-interest, fair-minded, respectful and inclusive regulator. Many regulators have developed standards or guidelines on this very issue for their regulated members. In fact, regulators have disciplined practitioners for actions in their private life, especially dishonesty and breach of trust, that reflect on their suitability to be a member of the profession. At a minimum, regulators could advise their employees that the same principles apply to their suitability to be an employee of the regulator.

Widmer also suggests that when an incident occurs, the key to preserving the reputation of an organization is a quick and decisive response. So long as the response is not excessive, the message will be sent to the public and all stakeholders that the statements or actions of the employee do not reflect on the organization itself.

Ms. Widmer's article is found at: <http://www.rmmagazine.com/2015/06/02/risky-rhetoric/>.