Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
SML Steinecke Maciura LeBlanc Barristers & Solicitors

Cozy Counsel

by Richard Steinecke
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Regulators tend to develop good working relationships with their legal counsel. Staff in particular who work regularly with counsel usually develop a friendly comradery. Where the regulator employs in-house counsel, the day to day contact can become even closer.

A problem can arise, however, where the board or members of adjudicative committees also develop close relationships that appear to go beyond the professional. In *DeMaria v Law Society of Saskatchewan*, 2015 SKCA 106 the Law Society used in-house counsel. As such, the counsel would regularly advise the Benchers (i.e., the Law Society's board of directors) and appear before Benchers when committees would sit in an adjudicative capacity.

Mr. DeMaria's application for membership was refused because of concerns about his suitability to be a member of the profession. There was a hearing in which evidence was heard. There was then an internal appeal to different Benchers. Mr. DeMaria was found to have failed to have demonstrated his suitability. He sought a further review by the courts.

The main issue before the Court of Appeal was whether Mr. DeMaria had established a reasonable appearance of bias. There were three main areas of concern. The first was that the chair of the hearing committee sent in-house counsel a copy of the hearing committee's final decision before it was sent to Mr. DeMaria and, at the same time, invited counsel to play golf. The Court concluded that, while it was noteworthy that the decision was sent to one party before the other, it was not significant since the decision was final. In terms of the invitation to play golf, the Court said:

> In my assessment, the relevant evidence is insubstantial and does not support a *reasonable* apprehension of bias, except—perhaps—to the 'very sensitive or scrupulous conscience'. Put another way, in the light of a *strong* presumption of impartiality and the institutional context at play here, the impugned conduct—a single flippant display of familiarity between a Bencher and the in-house counsel for the Law Society—simply would not demonstrate to a *reasonable* and *informed* person that the chairman had not been open to persuasion on the evidence and arguments presented in Mr. DeMaria's case.

A second concern was that the internal review panel had breakfast on the day of the review with in-house counsel and then in-house counsel stayed in the hearing room with the review panel for at least ten minutes after the review was finished. While concerned about the appearance that this created, the Court concluded:

> In my assessment, the evidence, when considered *realistically* and *practically* in the institutional context of the matter, does not give rise to a *reasonable* apprehension of bias on the part of the Benchers.

The third concern was that one of the Benchers was a Facebook friend of in-house counsel. The Court was unconcerned with this circumstance:

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> Lastly, in today's world, a reasonable and informed person would place little or no weight on the fact a Bencher is 'friends' on Facebook with the Law Society's in-house counsel. Without more, that unadorned fact is indicative of nothing more than the two individuals know each other, which would be presumed in any event from their respective offices within the corporate structure of the Law Society. This fact does not add anything to the balance.

The Court accepted that legal counsel could act as both counsel to the Benchers and as the regulator's counsel in adjudicative hearings before its committees. However, in those circumstances, board and committee members "should have been *particularly* keen to abstain at all times when acting as adjudicators from public displays of too-cosy familiarity with the Law Society's counsel, whether in-house or a retained private lawyer, in all administrative and disciplinary matters."

The appeal dealt with another allegation by Mr. DeMaria that the hearing committee's decision had been "doctored". This was based on suspicious aspects about the appearance of the decision and reasons. For example, there were multiple footers to various pages of the document. However, the Court accepted the explanatory evidence from the Law Society that there were formatting errors brought on by the use of different versions of word processing software. The only role of Law Society personnel in the document was administrative and clerical.

Yet the Court was critical of the Law Society, on this point, however, stating:

> That said, I would strongly echo the Chambers judge's statement that the irregularities and concerns that underpin this ground of appeal "all raise legitimate concerns about the integrity of the process itself." The A&E Panel and the Law Society handled the A&E Panel's final decision in a sloppy manner. The evidence bears out an absence of impropriety, but the Law Society can take no pride in that result because it should not have had to prove an absence of impropriety at all.

While the Court did not find there was an appearance of bias, it indicated that the circumstances were suspicious enough that Mr. DeMaria was warranted in "fearlessly" raising them. Even though the Law Society succeeded in the appeal, it was not awarded costs.

The *DeMaria* case can be found at: www.canlii.org.