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

Protect the Informant?

by Erica Richler
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In school yards and other circles, disclosing the bad behaviour of others is frowned upon. However, for regulated practitioners there is an expectation that they will make disclosure, where necessary, to protect the public.

In fact, most professions have mandatory reporting duties. These duties vary but generally include a duty to disclose adverse information about oneself (e.g., a criminal charge or finding) and about other practitioners (e.g., events that demonstrate a risk of harm to the public such as sexual abuse).

An interesting debate is going on in Quebec right now over a proposal to allow regulators to give immunity to practitioners who come forward to report on misconduct in which they may have been a participant. Bill 98 contemplates that such immunity may assist regulators in gathering difficult to obtain evidence in cases where there may have been a conspiracy to harm the public. This tool might be particularly valuable where the client is a willing participant in the misconduct (e.g., various forms of financial misconduct like automobile insurance fraud).

The June 10th issue of the Lawyers Weekly presents different perspectives on the debate within Quebec ("Questions raised over Quebec ethics bill flowing from Charbonneau Commission"). One observer noted the benefit to regulators (and the public) of being able to obtain evidence to prove misconduct that might not otherwise be available. Another observer commented on the disconcerting picture of Bill 98 offering absolute immunity to practitioners while offering no protection to members of the public who complain about practitioners.

More generally, the debate raises a number of issues. Certainly concerns have been raised in the criminal law arena with "immunity deals". Perhaps the biggest issue, from a policy perspective, is the perception created by taking no action against practitioners who admit they have acted unprofessionally. This concern is aggravated by the active, ongoing registration of the practitioner which creates a continuing, public "seal of approval" by the regulator. Perhaps this concern could be mitigated by ensuring that the regulator can post relevant information in the public register about the "immune" practitioner.

Another issue is whether the evidence of the person granted immunity will carry much weight in the ensuing proceeding. In criminal cases it is common to challenge the testimony of a witness who has received an "immunity deal" on the basis that the person is exaggerating, or even "making up" the evidence in order to obtain that immunity.

Another practical issue is the timing of the offer of immunity to a practitioner. If the immunity is offered before the regulator knows the details of the misconduct, the regulator may unwittingly be offering immunity to the most culpable party (along the lines of the Karla Homolka "deal with the devil"). However, the practitioner is unlikely to reveal much to the regulator before obtaining the assurance of immunity.

A related practical issue is that there may be a race to get to the regulator by participants in the misconduct

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to obtain the immunity. The person who approaches the regulator first may, in fact, be the most culpable participant in the event. If so, that person may provide the least reliable information in order to make it appear that the other practitioners deserve prosecution while the informant should receive immunity.

Another practical problem is that the immunity agreement would typically have a provision that the immunity protection can be withdrawn if the person applying for immunity is not completely candid and forthright. This creates a delicate relationship between the regulator and the practitioner during the remainder of the process. There may be ongoing anxiety as to whether new information will nullify the deal resulting in the practitioner not being candid when new information arises. Of course, it is not a simple matter for the regulator to cancel the agreement for lack of candour because that would amount to an admission that the witness was not honest and credible (which will jeopardize his or her credibility in the ensuing hearing).

Another challenge in offering immunity to practitioners by regulators is that the offer can only apply to regulatory proceedings like complaints and discipline. Regulators cannot offer immunity from civil, criminal or human rights liability.

A proposal to enact a provision in legislation allowing the granting of immunity raises the question of what prevents a regulator from offering immunity under current legislation. In fact, similar kinds of arrangements have existed in the past. The challenge at the present time is that immunity offers cannot be absolute. The regulator has to warn the practitioner that while the regulator might not initiate proceedings on its own, others might. For example, if someone were to make a formal complaint against the practitioner, the screening committee would have to consider the complaint on its own merits and likely could not dismiss the complaint solely because an immunity arrangement had previously been reached between the practitioner and regulator. In addition, any decision made by the screening committee is reviewable, sometimes by another tribunal and always by the courts.

It is for these reasons that regulators are reluctant to offer immunity to practitioners who come forward with concerns, even concerns relating to serious misconduct.