

*“Ethics is knowing the difference between
what you have a right to do and what is right to do.”*

– Justice Potter Stewart

“Grub first, then ethics.” – Bertold Brecht

VOCATIONAL REHABILITATION ETHICS

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Among the many challenges facing vocational rehabilitation professionals in Canada today is the need to preserve and foster ethical values and practice. This challenge is heightened by the fact that vocational rehabilitation is not a single, unified profession but, rather, a collection of many subprofessions

committed to the common goal of providing client-centred, outcome-based vocational rehabilitation interventions and services to persons with disabilities.

The adoption of comprehensive codes of ethics by the membership of the Vocational Rehabilitation Association of Canada (“VRA”) and the Commission on Rehabilitation Counselor Certification (“CRCC”) has gone a long way to meeting the challenge.

It is beyond the scope of this paper nor its intention to comprehensively review the wide ranging VRA and CRCC codes of ethics. These are no doubt already familiar to the reader. The purpose, rather, is threefold: to examine the distinction between professional ethics and professional regulation; to consider the enforceability of the codes of ethics; and, lastly, to provide select examples of common ethical problems for which the law provides some guidance.

I–PROFESSIONAL ETHICS VS. PROFESSIONAL REGULATION

Multiple professions and disciplines are represented among the ranks of those who provide vocational rehabilitation services. Some of those professions and disciplines may be subject to legal regulation separate and apart from the codes of ethics governing their work as vocational rehabilitation professionals. (Indeed, some of them may be subject to separate codes of ethics and professional conduct.) Professional regulation and professional ethics share certain common aims, yet distinctions can be drawn.

Government has at its disposal a number of mechanisms to influence or control transactions between people. Government is expected to ensure some measure of public protection in transactions with professionals: broadly speaking, to ensure that the public receives professional services from knowledgeable, competent and ethical professionals.

This is often achieved through professional regulation. Government does this by granting a particular profession self-regulatory status whereby the members of the profession formally undertake to monitor the conduct of its membership. Legislation provides the framework for the regulation of the profession and identifies the extent of legal authority that will be delegated to the particular profession's self-governing body. In Ontario, there are more than three dozen self-regulated professions, including law, medicine, nursing, occupational therapy, psychology, social work, and the like.

In exchange for the benefits of professional status (which, in essence, amounts to the granting of monopoly control over who can practice a particular profession) the profession, through its own regulatory college, society or other organization, is expected to develop, implement and enforce various rules of professional conduct. These rules are designed, first and foremost, to protect the public.

The legal authority of a profession to self-regulate often includes the right to set standards relating to who may enter the profession, including requirements for education, certification, licensure, etc.; the right to set standards of professional practice and conduct; and, the right to regulate when and how members may be removed from the profession.

Almost invariably, self-regulation requires that a profession's regulatory body put in place a public complaints and discipline system, which includes a process for the investigation and discipline of members who do not meet standards of professional practice.

Compliance with professional regulation is, of course, a matter of law. A distinction can and should be drawn, however, between the law and professional codes of ethics such as those governing the membership of the VRA or certificants of the CRCC.

In the most general sense, the law can be described as a standard of conduct that is legally enforceable (by punishment or otherwise) once officially stated by the government, whether it be the legislature or the courts. Laws relate to the social values of society prevalent at the given time. As social values change, so the law evolves.

While the conduct of certain professions can be and is the subject of legal regulation and enforcement, professional codes of ethics are formed by a

profession or professional organization to govern or guide the ethical conduct of its own membership. Professional ethics, at bottom, are concerned with moral duty and obligation. Legal conduct is not necessarily ethical conduct – American Supreme Court Justice Potter Stewart put it aptly when he said, “Ethics is knowing the difference between what you have a right to do and what is right to do.”

Conversely, one can be unethical without behaving illegally. Dr. Peter Strahlendorf, a professor of occupational and public health, neatly addressed the topic of professional ethics in recent article, writing, “it is perhaps the major point of professional ethics...to deal with scenarios that do not involve illegality.”

Codes of professional ethics help a professional choose what do when faced with a problem in her work that raises a moral issue. As the reader well knows, many such issues are imbedded in what Strahlendorf calls “messy and complex factual situations,” which can often be much more difficult to identify and resolve than purely legal issues.

Professional regulation cannot and does not address the myriad of factual situations that a professional may have to face in her daily work. Professional codes of ethics, such as those adopted by the VRA and CRCC, in great measure, fill this gap. They speak directly to the conduct expected of members in the professional-client relationship (i.e., informed consent, client autonomy, client privacy, professional boundaries, etc.), as well as matters such as client

confidentiality, advocacy, evaluation, assessment and interpretation, even business practices. Yet these codes of ethics remain, in large part, a guide rather than an exhaustive list of prescribed conduct. In many ways, the codes of ethics of the VRA and CRCC are aspirational – directed at best practices.

Both the VRA and CRCC codes of ethics, consistent with their aspirational rather than prescriptive goals, are premised on value-based principles of ethical behaviour.

The VRA code of ethics, for example, enumerates four general ethical principles that form the philosophical basis underlying the more specific provisions of the Code, their interpretation and application:

1. Respect for the dignity, rights and autonomy of persons. This principle with its emphasis on moral rights, is given the highest weight except in circumstance in which there is a clear and imminent danger to the physical safety of any person.
2. Responsible caring for the best interests of persons. This principle is given the second highest weight. Responsible caring requires competence, the obligation to do no harm, and should only be carried out in a manner that accords with the first ethical principle.
3. Integrity in professional relationships. This includes values such as “openness and straightforwardness.” This principle should be given the

third highest weight if it is in conflict with another principle but, in rare circumstances, may be subordinated to the first and second principles of Respect and Responsible Caring.

4. Responsibility to Society. When in conflict with one or more of the other ethical principles, this principle should be given the least weight. For example, when a client's welfare appears to be in conflict with the public good, and the member cannot serve both interests, the respect and well-being of the client must take priority over that of society.

The weighted ordering of ethical principles is interesting, particularly given that no such weighting is made explicit in the largely analogous six fundamental principles of ethical behaviour enumerated in the CRCC code of ethics:

1. Autonomy: to respect the rights of clients to be self-governing within their social and cultural framework.
2. Beneficence: to do good to others; to promote the well-being of clients.
3. Fidelity: to be faithful; to keep promises and honour the trust placed in rehabilitation counselors;
4. Justice: to be fair in the treatment of all clients; to provide appropriate services to all;
5. Nonmaleficence: to do no harm to others.

6. Veracity: to be honest.

The only indication of the relative importance of these fundamental principles of ethical behaviour is found in the preamble to the code of ethics, which states that “the primary obligation of rehabilitation counselors is to clients.”

The weighted ordering of the four ethical principles contained in the VRA code of ethics is not without its potential pitfalls and should not be applied too rigidly. For example, the guidelines to the predecessor CARP code of ethics acknowledge that the ordering of the ethical principles reflects a Euro-North American cultural emphasis on the importance of individual rights, responsibilities and achievement. It is not consistent with the beliefs of many other cultures, including aboriginal cultures that may focus on family, community and collective good rather than the individual.

Not being strictly prescriptive in nature, and in contrast to professional regulation regimes, the VRA and CRCC codes of ethics are not in and of themselves enforceable in the legal sense. Practicing in a regulated profession requires membership in the profession’s regulatory college, while membership in the VRA or certification by the CRCC is entirely voluntary. As voluntary associations, the VRA and CRCC do not have any legal authority to enforce compliance with their codes of ethics beyond suspension or termination of membership or certification.

II – BREACHES AND CONSEQUENCES

Some brief, additional comments are in order concerning the consequences for breaches of the codes of professional ethics adopted by the VRA and CRCC.

As already mentioned, because neither organization is regulated by Ontario statute, complaints of ethical misconduct are not subject to the same legal principles or procedures governing regulated professions.

In very general terms, professional bodies to which government has delegated authority for self-regulation are limited by the scope of that delegated authority. The professional body cannot regulate beyond what government has permitted it.

The body of law concerned with discipline of regulated professionals is called administrative law. It concern is primarily with issues of substantive review (the determination and application of a standard of review of a disciplinary decision of the regulated profession's governing body) and with issues of procedural fairness (the enforcement of participatory rights such as the right to a hearing and the right to be judged impartially).

The role of the courts is not to judge professional conduct and impose discipline but, rather, through a process called judicial review ensure that a regulated profession's governing body observes the limits on its delegated authority in meting out discipline.

Although, strictly speaking, the VRA and CRCC have no legal authority to enforce compliance with their codes of professional ethics in the manner that regulated professions might, as voluntary associations they nonetheless can suspend or revoke membership or certification in their respective organizations.

It is laudable that the VRA and CRCC have, in setting up their respective complaints processes, done so in a way that very much accords with principles of administrative law. For example, the VRA has established an ethical complaints process with an express commitment to “the principles of procedural fairness and natural justice.” This is an adoption of administrative law principles and affords the subject of an ethical complaint the attendant protections to a full and fair hearing.

The VRA and CRCC have each published formal Guidelines and procedures for processing complaints and appeals. In almost all material respects they are substantively and procedurally the same. The CRCC will be considered here.

Section B.1 of the CRCC Guidelines provides that ethical complaints will be heard and determined by a standing Committee comprising four to six Commissioners.

Section B.7 provides that the Committee only has jurisdiction to consider whether an individual has violated the code of ethics if the individual holds current

certification under the CRCC. However, where a complaint is made against a non-certificant, the complainant may be referred to an “appropriate authority,” which in the case of a rehabilitation professional who is also a member of a regulated profession should be taken to mean a referral to the appropriate professional governing body with proper jurisdiction or authority.

Ethical complaints are initiated by the filing of a complaint by a complainant, who can be “any person who has a verifiable reason to believe that a certified individual has violated the applicable Code.” The Committee reserves the right to act as the complainant. In keeping with the principles of natural justice, complaints generally cannot be anonymous, although the CRCC Guidelines do not make this explicit except insofar as they provide that complainants must release records relevant to the complaint to the CRCC.

By contrast, Section B of the VRA Guidelines provides that its complaints Committee will *only* consider complaints of a violation of the code of ethics by an individual who was a VRA member at the time of the alleged unethical conduct. Curiously, the Guidelines go on to provide that complaints by non-members, including the general public will also be considered. On its face, this apparent contradiction appears to be a function of some inadvertent drafting, as limiting complaints to members only would not accord with one of the four stated philosophical bases underlying the VRA code of ethics, which is responsibility to society, or the public good.

The CRCC Guidelines do not appear to impose a limitation on the time within which complaints may be initiated. This is in contrast to the VRA Guidelines, which expressly impose a two-year time limit, which is consistent with the general limitation period for commencement of civil action in Ontario under the *Limitations Act*. It is likely, however, that the CRCC Committee would refuse to deal with complaints brought after a considerable delay, relying on the the common law doctrine of *laches* (meaning an unreasonable delay in pursuing a right or claim). In essence, “one cannot sleep on one’s rights.”

The CRCC complaints process itself is, strictly speaking, not a legal proceeding. Therefore, many legal procedures are not necessarily observed, and the formal and strict rules of evidence may not necessarily apply (Section D.6.a.).

Section D.7 of the CRCC Guidelines provides that the burden of proving a violation of the code of ethics is on the complainant (which is consistent with the principles of natural justice and the common law) and that while charges need not be proved “beyond a reasonable doubt” (the criminal standard of proof), a finding of a violation must be supported by the weight of the materials and testimony presented at the hearing, discussed below. This burden is the equivalent of the civil standard of proof at common law – the balance of probabilities.

Certificants who are subject to a complaint are, of course, entitled to legal counsel, as is the Committee (Section D.4.d.).

The complaints hearing itself is by way of a full oral hearing, where the complainant and certificant and even the Committee are entitled to call witnesses and other evidence (section D.4.e. and D.4.f.). This is in contrast to the VRA procedure, where the hearing is by way of an “on the record” teleconference after the member has been provided with all information arising from the Committee’s investigation into the complaint and afforded an opportunity to make written submissions in his or her defence on the filing of all evidence and documents that he or she wishes to be considered by the Committee. The CRCC procedure, in my view, provides a more fulsome opportunity to defend against a complaint.

Section D of the VRA Guidelines provides that the role and responsibility of its ethics complaints Committee is to:

1. Uphold the ethical standards of the VRA;
2. Educate members and promote awareness of the code of ethics and professional standards;
3. Determine appropriate sanctions against a member in the event of a determination of a breach of the code of ethics.

The CRCC ethics complaints Committee serves the same purpose, although not made express in its Guidelines.

Section E of the CRCC Guidelines sets out the possible sanctions arising from a finding of a violation of the code of ethics, including:

1. Letter of instruction;
2. Provisional suspension;
3. Reprimand;
4. Probation;
5. Suspension;
6. Suspension of CRCC certification for a specified period of time subject to Committee review of compliance;
7. Revocation of CRCC certification;
8. Other remedial actions, which would likely include sanctions such as counselling, treatment, restitution, a letter of apology, or education or peer supervision for a specified time.

The VRA Guidelines provide for an almost identical range of sanctions.

Section F of the CRCC Guidelines concerns appeals. An appeal of a decision that a member has violated the code of ethics is restricted to one or more of the following grounds:

1. The Committee violated its policies and procedures for processing complaints of ethical violations; and/or
2. The decision of the Committee was not supported by the weight of the materials and testimony presented by the Complainant and the Certificant.

The grounds for appeal in the VRA context are similar:

1. The Committee's investigation was inadequate;
3. The Committee's decision was unreasonable;
4. Relevant information unavailable at the time the complaint was considered is now available.

The second of the two grounds for appeal under the CRCC complaints process is, in essence, an articulation of the administrative law principle of standard of review.

At law, there are two standards of review to decisions made by tribunals such as the Committee: reasonableness and correctness. Where the underlying decision is a matter of a mixed of fact and law (in the present context, the interpretation of the code of ethics), a discretionary decision will be held unreasonable only where it is "not supported by any reasons that can stand up to a somewhat probing examination."

In other words, the underlying decision will be unreasonable only where “there is no line of analysis within the given reasons [by the tribunal] that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.”

III – ETHICAL DILEMMAS AND DECISION MAKING

Nobody wants to breach their professional code of ethics. Often, the greatest challenge is recognizing that an ethical problem has arisen. The next challenge is solving the ethical problem – acting ethically.

Sometimes ethical problems have straightforward solutions that are laid out plainly in the code of ethics itself. The prohibition against a sexual relationship with a client to whom one might be attracted is an obvious example. Certain factual situations, however, present more than just ethical problems; they present ethical (moral) *dilemmas*. Strahlendorf put it this way:

How should we think about moral problems? We are aiming for a moral decision, one that is prescriptive, one that resolves the issue in terms of what we ought to do. We can legitimately arrive at a moral decision only if we have an explanation for the decision that is a moral explanation. An explanation is a moral explanation only if at least one of the reasons within the explanation is a moral reason as opposed to, for example, a strictly practical reason. If we only have one possible moral explanation leading to one decision, we do not have a dilemma (let alone a moral dilemma). We only have difficulty if we are faced with two or more moral explanations leading to two or more different decisions.

A professional ethical dilemma requires resolution that is consistent with and guided by the ethical principles set out in one's code of ethics. An ethical resolution cannot simply be a choice between two unacceptable (i.e., unethical) courses of action. Section L.2.a. of the CRCC code of ethics provides that rehabilitation counsellors must be prepared to recognize underlying ethical principles and conflicts among competing interest, as well as to apply appropriate decision-making models and skills to resolve dilemmas and act ethically. Unfortunately, the CRCC code of ethics does not stipulate any decision-making model. The VRA code of ethics, however, is more helpful in this regard. Its introductory section provides an explicit model or framework for discerning solutions to ethical dilemmas, suggesting the following steps:

1. Identify the individuals and groups potentially affected by the decision.
2. Identify the ethically troubling issues, including the interests of persons who will be affected by the decision, and the circumstances in which the dilemmas arose.
3. Consider how personal biases, stresses or self-interest may influence the development of choices of action.

4. Develop alternative courses of action in consultation with team members, clients and others who may be affected by the decision where necessary and feasible.
5. Analyze the likely risks and benefits of each course of action for the person likely to be affected.
6. Choose a course of action, individually or collectively as deemed appropriate to the situation after conscientious application of existing principles, values and standards.
7. Act with an individual or collective commitment to assume responsibility for the consequences of the action.
8. Establish a plan to evaluate the results of the course of action, including responsibility for correction of negative consequences, if any.
9. Evaluate the organizational systems in which the issue arose in order to identify and remedy the circumstances which may facilitate and reward unethical practices.

Needless to say, the ethical decision making model, while helpful, does not provide a ready answer in most cases. Professional integrity, however, demands a commitment to the system of values embodied in one's code of ethics, and a commitment to resolving ethical dilemmas thoughtfully and reasonably.

IV – SOME HELP FROM THE LAW

There are some relatively common ethical problems for which the law provides some guidance.

Autonomy

At the core of vocational rehabilitation is the professional-client relationship. The primary ethical obligation of VRA and CRCC members alike is to their clients. Members endeavour at all times to place the client's interests above their own and to avoid imposing values inconsistent with vocational rehabilitation. Ethically, VRA and CRCC members are called to respect the dignity, autonomy, self-determination and rights of all clients, recognizing that their worth as human beings is neither enhanced nor reduced by their ethnicity, religion, gender, marital status, sexual orientation, age socioeconomic status or any disability.

In fact, one of the philosophical bases for the VRA code of ethics – one that “should be given the highest weight” – is respect for the dignity, rights and autonomy of the client. Section 1.3 of the VRA code of ethics speaks to the importance of client autonomy:

1.3 Client Choice. Vocational Rehabilitation Professionals will recognize the *client's right to make choices* and will provide clients with options to make *informed choices*. When working with *minors or other persons who are unable to give voluntary, informed*

consent, the Vocational Rehabilitation Professional will protect the client's best interest. Vocational Rehabilitation Professionals must provide adequate information in order to make an *informed* decision regarding services. [emphasis mine]

Section A.1.d. of the CRCC code of ethics is substantively identical:

A.1.d. Autonomy. Rehabilitation counselors respect *the right of clients to make decisions on their own behalf*. On decisions that may limit or diminish the autonomy of clients, *decision-making on behalf of clients is taken only after careful deliberation*. Rehabilitation counselors advocate for the resumption of responsibility by clients as quickly as possible. [emphasis mine]

Where working with persons suffering from mental illness or infirmity, one must be alive to the question of the client's capacity to exercise autonomous decision-making.

At law, a professional is entitled to presume that a patient is capable of giving consent to receipt of a service such as vocational rehabilitation unless there are reasonable grounds to believe otherwise. If a client knows who they are, where they are, what is being proposed, and the consequences of the decision they are being asked to make, it is likely safe for a professional to rely on the presumption that the patient is capable.

A cautionary word, however – capacity is not static. Capacity can change over time and depending on the nature and complexity of the specific decision. What must be determined is whether the client has the ability to understand the nature and effect of the particular rehabilitation measure being proposed, not the “general” capacity of the person.

If the vocational rehabilitation professional determines that a client is incapable of consenting to a rehabilitation measure, the professional must identify and obtain consent from an appropriate substitute decision-maker. If the vocational rehabilitation professional happens to be a member of a profession that is governed by legislation such as the *Health Care Consent Act*, then that act provides that such “health practitioner” when dealing with an incapable person shall obtain consent to “treatment” (very broadly defined as “anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan”) from a hierarchically enumerated list of persons or entities.

These substitute decision makers are: the incapable person’s guardian, attorney for personal care, representative appointed by Consent and Capacity Board, spouse or partner, child or parent or individual/agency entitled to give or refuse consent instead of a parent (this does not include a parent who has only a right of access), parent with right of access only, brother or sister, any other

relative (related by blood, marriage or adoption and, finally, the Public Guardian and Trustee.

Confidentiality

Clients seeking vocational rehabilitation services are often required to disclose deeply personal matters in order to facilitate rehabilitation. Ethically, vocational rehabilitation professionals are bound by the VRA and CRCC codes of ethics to respect and safeguard the confidentiality of client information and take all reasonable precautions to protect confidential information obtained in the course of their work (see: Sections 2 and B, respectively).

However, there are, and must be, limits on this ethical duty, particularly where the client's own safety or the safety of others is at stake. Section B.2.a. of the CRCC code of ethics, for example, expressly recognizes this, providing the general requirement that rehabilitation counselors keep information confidential does not apply when disclosure is necessary to protect clients of identified others from serious and foreseeable harm, or when legal requirements demand that confidential information be revealed.

The Supreme Court of Canada has provided guidance on when disclosure of a client's confidential information can be made, making resolution of the ethical dilemma simpler. In the 1999 case of *Smith v. Jones*, the court considered a lawyer's duty of confidentiality and held that there is *discretion* (i.e., permission)

to disclose confidential information about a client in order to prevent, on the facts of that case, harm to another person where the following three conditions are satisfied:

1. There is a clear risk of harm to an identifiable person or group of persons;
2. There is a risk of serious bodily harm or death; and
3. The danger is imminent.

This so-called public safety exception to the duty of confidentiality applies to every service provider who works with or counsels people in a setting where the client has an expectation of privacy. Disclosing confidential client information in such circumstances, provided the discretion to do so is exercised reasonably, is therefore defensible from an ethical standpoint.

Evaluation, Assessment and Interpretation

Section 5 of the CRCC code of ethics deals with the ethical obligations of vocational rehabilitation professions who provide vocational evaluation and assessment services through the use of valid and reliable assessment tools and techniques. Section 5.3 prescribes that vocational rehabilitation professionals will not misuse assessment results and interpretations and will take reasonable steps to prevent others from misusing the information.

In my own experience, the potential for misuse of vocational assessment results frequently arises in the context of adjudication of client's entitlements, for example, in court proceedings. Parties in court proceedings are entitled to disclosure of all relevant information concerning the issue of entitlement, including information that might be contained in a vocational assessment. Often, the party opposite to the client will request, and be entitled to, raw test data from such vocational assessments, for the purposes of securing a so-called independent "second opinion" by an expert of his or her choosing. The vocational rehabilitation professional's code of ethics mandates reasonable steps be taken to prevent others from misusing assessment results. The CRCC code of ethics expressly addresses the issue of raw test data in Section 5.3.b., which provides:

5.3b. Release of Raw Test Data. Vocational Rehabilitation Professionals will ordinarily release data (e.g. protocols, interview notes or questionnaires) in which the client is identified only with the consent of the client or the client's legal representatives. Appropriate requests for release of assessment data will result in an interested version of the assessment data. *Raw test data will be released only to person recognized to possess the professional competencies to interpret the data and who have established procedures to protect the privacy and confidentiality of test materials.* In the absence of a signed written release of information, Vocational Rehabilitation Professionals will provide assessment data only as required by law or court order. [emphasis mine]

When asked to release raw test data in the context of an ongoing legal proceeding, it is incumbent upon the vocational rehabilitation professional to ascertain that the raw test data is sent only and directly to the opposite assessor and only after reasonably satisfied that the other assessor is competent to interpret the data and has procedures to maintain the client's privacy in connection with the test data.

A final word: ethical problems and dilemmas need not be resolved alone. Consultation with other vocational rehabilitation counsellors is always an option and should be utilized where necessary. The VRA and the CRCC themselves are invaluable resources. Each publishes extensive material on the subject of professional ethics. The CRCC, in fact, will entertain requests for advisory opinions from its Ethics Committee and publishes those opinions for use by its members.

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