An attitude of cooperation

How should lawyers respond to complaints against them?

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Whilst this article was written for Tasmanian practitioners generally, the principles certainly apply in the Northern Territory and to complaint investigations which may originate from the Law Society Northern Territory.

A lawyer's initial reaction to a "please explain" letter from the Legal Services Commissioner or the Law Institute arising out of a complaint made against the lawyer is unlikely to be favourable. After all, statistics reveal that only a relatively small percentage of complaints have merit; also, for a busy lawyer, responding in detail to a complaint takes time and effort, for which he or she cannot charge. There may also be a tendency to view the Law Institute as an inquisitor (curiously, though, the public not infrequently views law societies as likely to favour their own members).

Lawyers who evince negative attitudes to inquiries arising out of complaints, or who give a low priority to responding to those inquiries, litter disciplinary determinations at both tribunal and court level. These speak of the importance of expeditiously responding to complaint inquiries from, and in being entirely frank with communications with, the Law Institute or Commissioner, and that failing to respond or corresponding so as to mislead may be misconduct.[1]

The duty to respond to inquiries from the Law Institute or Commissioner, and to do so promptly and candidly, can be justified by reference to the lawyer's duty as an officer of the court; the Institute and the Commissioner are, in this sense, seen as persons statutorily appointed to perform an aspect of the court's disciplinary ("protective") function.[2]

Beyond what is statutorily required of a lawyer by statute for this purpose, the case law suggests that lawyers are obliged to assist an inquiry into their own professional conduct[3], being a duty "to cooperate reasonably in the process".[4] To this end, the Full New South Wales Supreme Court in Re Veron[5] emphasised that the inquiry should not be viewed as if the Law Institute or Commissioner "was a prosecutor in a criminal cause or as if we were engaged on a trial of civil issues", in which the lawyer "engage[s] in a battle of tactics".

The foregoing does not mean that the lawyer must actively disregard his or her own interests in responding to the inquiry. Natural justice must, in any case, be accorded. What it does reflect is that because the lawyer will often have a better knowledge and understanding of the matter the subject of the complaint than the complainant, an investigator relies heavily on the lawyer's cooperation and candour.[6] The lawyer the subject of inquiry should also recall that a perceived attitude of disdain and non-cooperation is unlikely to receive favour in any subsequent disciplinary finding, especially if the investigation reveals other misconduct.

On occasion, lawyers have attempted to "short circuit" the disciplinary investigation by pressuring the complainant into retracting the complaint. Although a lawyer may be justified in viewing the complaint as vexatious or unsubstantiated, any such attempt represents treading on dangerous ground. The policy behind the protective function accorded to the Law Institute and Commissioner in pursuing the disciplinary process is one of independence and transparency.

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However annoying the task of responding to a complaint, a lawyer who "takes the law into his own hands" by pressuring the complainant, aside from risking a finding of misconduct, undermines the role and value of the complaints and investigation process.

It follows from the foregoing that a lawyer (A) engaged to act on behalf of a lawyer (B) who is the subject of the complaint has a duty to advise B of the obligation to cooperate and assist reasonably with the investigation of the complaint.

It also follows that neither A or B should correspond with the complainant in a way that could be construed as pressuring for the withdrawal of the complaint.

Mullins J, sitting as the Queensland Legal Practice Tribunal in Legal Services Commissioner v O'Connor[7], took the opportunity of addressing this point. There the respondent, who was advising a solicitor the subject of a complaint, orchestrated the sending of a letter to the complainant alleging that complaint amounted to defamation of the solicitor who was the subject of the complaint, and requesting an apology and retraction of the allegations. Her Honour held that sending the letter not only undermined the statutorily prescribed process for the protection of the public and the profession, it also breached the respondent's professional duty to the solicitor-client to advise cooperation with the investigation and in so doing the respondent's duty to uphold the law. The respondent was found to have engaged in unsatisfactory professional conduct, being saved from a finding of professional misconduct (and a disciplinary sanction more severe than a reprimand) by the fact that he had formed his opinion about the nature of the complaint bona fide.

Of course, it is preferable to avoid complaints in the first instance. Prudent lawyers will therefore pay particular heed to client dissatisfaction and ensure open lines of communication with their clients.

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Footnotes

1. See, for example, Veghelyi v Council of the Law Society of New South Wales (unreported, SC(NSW), Smart J, September 1989); Kerin v Legal Practitioners Complaints Committee (1996) 67 SASR 149.

2. New South Wales Bar Association v Thomas (CA(NSW), Kirby P, Samuels and Clarke JJA, 9 May 1989, unreported), at 19; Legal Practitioners Conduct Board v Phillips (2002) 83 SASR 467 at [34] per Gray J.

3. Johns v Law Society of New South Wales [1982] 2 NSWLR 1 at 6 per Moffitt P.

4. Council of the Queensland Law Society Inc v Whitman [2003] QCA 438 at [36] per de Jersey CJ.

5. (1966) 84 WN (Pt 1) (NSW) 136 at 141–2.

6. Law Society of South Australia v Jordan (FC(SA), 21 August 1998, unreported) at 46 per Doyle CJ, with whom Millhouse and Nyland JJ concurred.

7. [2006] LPT 001.

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