

NOTEBOOK ON ETHICS, STANDARDS AND LEGAL ISSUES FOR COUNSELLORS AND PSYCHOTHERAPISTS

The Obligation of Regulated Practitioners to Cooperate When an Ethical Complaint is Made Against Them and What Judges Recently Said About It

by

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All regulated professionals are expected to cooperate with the appropriate investigative and adjudicative processes established to address ethical complaints against them as a member of their profession. This ethical obligation also applies to members of the Canadian Counselling and Psychotherapy Association (CCPA). It is stated in the CCPA **Standards of Practice** as follows:

An Extension of Ethical Responsibilities

Counsellors cooperate in ethics investigations of complaints made against them and with the appropriate related proceedings. Failure to cooperate may be considered in itself an ethical violation. However, mounting an appropriate defense against an ethical complaint and taking full advantage of the opportunities afforded in an adjudication process to do so, does not constitute non-cooperation. (p. 9)

Of course, a member has a right to full disclosure of the basis for a complaint lodged against them and to an unbiased consideration of it. They may make a timely request for a reasonable extension to the stated time limits for their response to investigative personnel and for their engagement with an ethic committee and/or adjudication tribunal. However, after any such extension the member will be expected to fully cooperate with the appropriate proceedings. Failure to do so may be judged as a lack of cooperation resulting in a finding and a sanction for failure to meet the ethical obligation to cooperate.

Because professional activities and ethical complaints and their associated circumstances very greatly it can be difficult at times to determine what constitutes failure to cooperate. Fortunately, a recent judgement issued by the Ontario Court of Appeal in which lack of cooperation was the core issue does provide professional regulators and others with some helpful guidance. In this case of the *Law Society of Ontario v. Diamond, 2021 ORCA 255*, a lawyer appealed a disciplinary finding and sanction for non-cooperation with his profession's regulator, the Law Society of Ontario.

The Law Society was investigating one of its members because of concerns about some structural features of his law firm and the firm's practices regarding referral fees. Following a request for the member to provide the Society's regulator with some documents and other information he engaged in a considerable period of back and forth communication with the

Society. However, he did not provide the requested material until eight and one half months from when it was first requested. The regulator characterized the period and type of communication between the lawyer and the regulator as a "cat and mouse" game.

The Society finally took action alleging ethical misconduct by this member for his failure to "reply promptly and completely" to its request. It stated in its Hearing decision that "the reputation of the ability of the profession to self-regulate would quickly be diminished if the allegation to cooperate could be subverted by a "cat and mouse" game that fell short of a clear refusal." The member was reprimanded for his conduct and ordered to pay \$25,000 for the costs of the Hearing. Following unsuccessful appeals to the Society's Tribunal Appeal Division and the Divisional Court he appealed to the Ontario Court of Appeal. In its decision to dismiss the appeal, the judges provided the following criterion for determining the degree of cooperation:

(a) All of the circumstances must be taken into account in determining whether a licensee has acted responsibly and in good faith to respond promptly and completely to the Law Society's inquiries; (b) good faith requires the licensee to be honest, open, and helpful to the Law Society; (c) good faith is more than an absence of bad faith; and (d) a licensee's uninformed ignorance of their record-keeping obligations cannot constitute a "good faith explanation" of the basis for the delay.

The lawyer's defense that he had a misunderstanding of his record keeping obligations and his responsibilities to fully cooperate with the Society was rejected by the Court. In this matter, it said the following:

If a licensee could simply say to the regulator, "I cannot produce the record promptly or completely because I did not know about my record-keeping obligations and made no reasonable effort to find them out", and this response could constitute a "good faith explanation": it would undermine the very purpose of the duty to cooperate. Quite simply, ignorance of one's professional obligations cannot subsist as a demonstration of good faith; they do not go hand in hand.

The Court accepted the Society's characterization of the lawyer's various communications as not in good faith and a "cat and mouse" game. In its judgement the Court also said the following:

*Returning to the duty to cooperate, r. 7.1-1 of the **Rules of Professional Conduct** is designed to ensure that there is a complete response and no inordinate delays in investigations by the self-regulated authority. It requires nothing more than prompt and complete responses when requested, which are essential to moving investigations forward. Delays in doing so can only serve to shake the public's confidence in the Law Society's self-regulatory authority.*

The importance, emphasized in this court case, of the responsibility and capacity of the regulator of the legal profession to address complaints against its members promptly aided by members cooperation also applies to all health professions including counselling and psychotherapy. The judicial opinions from this case

also underscores the need for leaders, regulators, and members of all the professions to act with vigilance, competence, and courage to ensure that they are good stewards of the societal privilege to be self governing. Professional self regulation requires an all-hands-on-deck commitment if professions are to be successful in maintaining the community trust and confidence in their capacity to do so.

Reference: <https://ca/t/jfhjh>