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

Honest, Open and Helpful

by Bernie LeBlanc
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A challenge for regulators occurs when practitioners do not blatantly refuse to cooperate with an investigation, but still do not provide the requested information or assistance. For example, the practitioner can ask questions to clarify the regulator's request. Or the practitioner can demand disclosure of the basis for the investigation. Or the practitioner can challenge the scope of the request as being overly broad (i.e., a fishing expedition). Or the practitioner can indicate that they will cooperate but explain that they are having difficulties gathering the information and request extensions. Or the practitioner might provide only part of the information requested.

At what point do these responses become a failure to cooperate that is enforceable at discipline? The Ontario Court of Appeal spoke to the issue in *Law Society of Ontario v. Diamond*, 2021 ONCA 255, https://canlii.ca/t/jfhjh. In that case, the regulator sought certain documents that practitioners were required by law to keep. Despite numerous communications, many of the documents were not provided. Seven months after the first request, disciplinary proceedings were commenced alleging non-cooperation. The documents were finally produced about 8 ½ months after the initial request. The hearing proceeded and a finding was made.

The practitioner argued that he had not acted in bad faith. His attempts to understand and clarify the requests did not amount to professional misconduct. He ultimately provided the requested information.

In terms of the standard of review, the Court said:

> … the reviewing court is to apply a standard of correctness to questions of law, while a standard of palpable and overriding error is to be applied to questions of fact and questions of mixed fact and law where the legal principle is not readily extricable ….

The Court held that while the test for assessing a failure to cooperate is a question of law, subject to correctness review, the tribunals and lower court understood the correct test. The issue as to whether the conduct of the practitioner met that test was one of mixed fact and law subject to palpable and overriding error scrutiny.

The Court found that the test for assessing cooperation could be summarized as follows:

> (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 Court held that a practitioner cannot rely upon an honest misunderstanding of their record keeping obligations or their duty to provide an honest, open and helpful response as demonstrating good faith. Practitioners were expected to know these things.

> If a licensee could simply say to the regulator, "I cannot produce the record promptly or

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> 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 also did not accept that the omission was insufficiently serious to constitute professional misconduct. The Court said the "conduct constitutes a significant departure from the acceptable standards of the profession".

The Court also rejected the suggestion that a "clear refusal" was required to establish a failure to cooperate. The practitioner argued:

> … that each request made by the Law Society was responded to promptly. While the Law Society may not have liked all of the responses, they were genuine responses that, at their highest, may show some confusion on the part of both of the Law Society and the appellant, but not a failure to cooperate. The appellant argues that this is best demonstrated through the fact that, once the confusion was cleared, all the requested documents were produced. This is said to underscore how everything the appellant did was in good faith.

The Court deferred to the panel's findings that the practitioner's responses were not made in good faith and constituted a "cat and mouse game".

> The reputation of the legal profession rests on the public's confidence that self-regulation is taken seriously by the legal profession. This can only occur where the legal profession has at hand effective and efficient tools by which to achieve accountability among its members. This is fundamental to the health and vibrancy of the legal profession.
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> 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 …. As the Law Society points out in their factum, the "reputation of the ability of the profession to self-regulate would quickly be diminished if the obligation to cooperate could be subverted by a 'cat and mouse game' (as described by the Hearing Panel), that fell short of a clear refusal."

In light of this decision, regulators can take seven simple steps to enhance the enforceability of honest, open and helpful responses by practitioners:

1. Issue specific requests for the cooperation desired in writing.
2. Do not overreach in one's requests. Seek information that is relevant to the scope of the investigation and which does not create unnecessary burdens on practitioners. It is acceptable to make follow up requests for additional information arising from the information that has already been provided. Follow-up requests are preferable to making overreaching requests at the beginning of the investigation.

3. Set clear deadlines.
4. Follow up missed or incomplete responses with a renewed request for specific cooperation.
5. In replying to any questions for clarification, challenges or counter-proposals by the practitioner, be sure to conclude the response by reiterating the pending request for specific cooperation.
6. Similarly, do not make a commitment to consider an issue without responding immediately after the consideration is completed. Otherwise, the regulator might leave the impression that the request for cooperation is "on hold".
7. In all of this, assert, explicitly and accurately, the practitioner's duty to cooperate.