

4. Complaints Against Lawyers - Enforcement of Ethics and Standards

(a) Investigation of Complaints

Complaints against lawyers generally fall into one of two broad categories:

- complaints about the lawyer's professional conduct or ethics;
- complaints about the lawyer's competence, or standard of practice.

Matters which fall into either of these categories may be the subject of complaints investigated by the Law Society in its disciplinary process. However, it should be noted that complaints which raise allegations of professional negligence on the part of a lawyer, but which do not suggest concerns that the lawyer is incompetent or maintains a general standard of practice falling below an acceptable minimum, are not generally treated as disciplinary matters.

Members of the public alleging negligence are generally advised to seek legal advice regarding civil remedies that may be available to them. If a negligence claim is successful, the client is afforded protection through the mandatory errors and omissions insurance coverage carried by the member (see below).

It should also be noted that the Society receives a number of complaints which are essentially disputes between a lawyer and the client as to appropriate fees. A fee dispute may occasionally raise issues of ethics or professional misconduct, depending upon the particular allegations. However, in the majority of cases where there is simply

a dispute as to the appropriate quantum of fees, those complaints are not dealt with as disciplinary matters (see section on Fee Disputes below).

A complaint concerning the conduct or competence of a member must be put in writing before the Society will commence an investigation (Rule 5-60). However, the Society also has an early intervention program. Under this program, where concerns about a lawyer are expressed in the absence of a complaint and where the Society determines that it would be appropriate to intervene, staff will contact the lawyer in an effort to have the concerns addressed expeditiously and on an informal basis.

Complaints are most often received from a lawyer's client or former clients; however, the Society also receives complaints against lawyers from other lawyers and from opposing clients. Occasionally members of the judiciary will file complaints relating to a member's conduct in court. Additionally, if a Law Society auditor finds in the course of an audit the mishandling of trust monies or serious breaches of the accounting rules, the Audit Department will refer the matter to the Complaints Resolution Department for investigation.

When a written complaint is received a staff lawyer reviews it to determine whether the concerns expressed are within the Law Society's jurisdiction and whether the concerns merit investigation. The Law Society cannot investigate complaints that do not meet either of these conditions (Rule 5-62(1)). A copy of a written complaint is sent to the lawyer in question even when the Law Society has decided not to investigate it. Where a staff lawyer has determined that a complaint lacks merit and will not be investigated, the complainant will be advised in writing of his or her right to request that the decision be reviewed by the Law Society's Complaints Review Commissioner (Rule 5-62). The Complaints Review Commissioner is a lay person who has the mandate to conduct an independent review of the material submitted to the staff lawyer. The complainant's request for a review must be made within 60 days of the mailing of the decision not to investigate. The Complaints Review Commissioner must either confirm the staff lawyer's decision not to investigate, or direct that a complaint be investigated (Rule 5-63(8)).

There is no right of appeal from a decision that the complaint is outside of the department's jurisdiction.

After staff lawyers have investigated a complaint, they can close the file on the basis that the lawyer has provided a satisfactory response or on the basis of issuing a reminder letter or making recommendations to the lawyer. A complainant can appeal such a decision to the Complaints Review Commissioner who can either confirm the decision of the staff lawyer or refer it back to the Complaints Resolution Department for consideration by the Complaints Investigation Committee (Rule 5-63(8)(c)).

When the Law Society investigates the complaint, a copy of the complaint is forwarded to the member against whom it is made. The member must then, within 14 days of receipt of that correspondence, provide a written response to the Society, outlining his

or her position (Rule 5-64(4)). The Society may require that the member respond within a shorter time period. Failure to provide a response within the required time limit may in itself constitute professional misconduct by the member, in the absence of a reasonable excuse (Rule 5-64(5)).

Generally speaking, a copy of the member's response is provided to the complainant and the complainant may then provide additional information or otherwise respond to the information in the member's response, if the complainant so wishes.

Notwithstanding the above, a number of less serious complaints may be resolved through informal means. When a staff member determines it appropriate to attempt to resolve the complaint through informal means, the lawyer and complainant will be contacted (Rule 5-65(1)). The staff member may suggest a resolution of the matter which may be acceptable to the lawyer and to the complainant.

Informal resolution may be attempted at any time during the investigation of a complaint. If an informal resolution is unsuccessful, or more serious problems are disclosed, the complaint will be investigated or continue to be investigated.

Sometimes, the Society receives information which raises concerns about a member's conduct or competence, yet no formal complaint has been submitted. If there is jurisdiction and the information merits investigation, the Society will investigate the complaint in the usual manner. As well, if it is determined that a matter merits investigation, the Complaints Investigation Committee (the CIC) may commence an investigation on its own motion (pursuant to Rule 5-71).

After investigating a complaint, a staff lawyer may resolve the matter by taking no further action if:

- he or she is satisfied that the complaint is without substance or its substance cannot be proven;
- the member has provided a satisfactory explanation; or,
- the complaint has been resolved satisfactorily through informal means.

The staff lawyer may otherwise send a letter to the member reminding him or her of professional obligations (under the Act, the Rules, or the *Code of Professional Conduct*) or recommending that a certain course of action be taken. The complaint may also be referred to the CIC for its consideration. The CIC meets approximately once every six weeks, year round.

It should be noted that the CIC is essentially an investigative body and it does not determine the guilt or innocence of a lawyer who is the subject of a complaint. Aside from the power of the CIC to issue a formal caution (see below), the role of the CIC is to determine whether there has been a breach of the Act, Code or Rules, and, if so, whether a formal charge of:

- professional misconduct;
- conduct unbecoming a barrister and solicitor; or,
- incompetence;

is warranted.

The CIC has investigative powers including the following:

- obtaining and reviewing client files;
- sending additional letters to members requesting further information;
- reviewing members' complaints history;
- meeting with members in order to further an investigation; and/or,
- sending auditors to review members' trust records.

In addition to conducting any further investigation it deems appropriate, the committee has a number of options open to it, including the following:

(i) Take No Action, Recommend a Course of Action, or Send a Reminder Letter

If the CIC is of the view that the complaint is without substance or the allegations are unfounded, it may resolve to take no further action and advise the complainant and the member accordingly. In other cases, a complaint may be satisfactorily resolved by way of the lawyer providing the complainant-client with information requested, or perhaps by way of the CIC reminding the lawyer to be more diligent in the processing of a legal matter.

(ii) Hold Complaint In Abeyance

The CIC has the ability to hold its investigation of a complaint in abeyance until any related proceedings are concluded. For example, when a complaint relates to fees, the committee may hold its investigation in abeyance until the complainant applies for an assessment of the member's bill or proceeds to fee arbitration under the Society's rules.

(iii) Order a Practice Review and Make Recommendations to Improve the Member's Practice of Law

Where the CIC decides there are reasonable grounds to believe that a member is practising law in an incompetent manner, it may ask the member to consent to a practice review or it may order a practice review. Usually, two qualified members appointed by the chief executive officer (the CEO) of the Society, or his or her designate, conduct the review which consists of a review of some or all of the files of the member, including, where appropriate, an examination of the procedures in place to reduce the risk of liability insurance claims. The practice reviewers deliver a written report of their findings and recommendations to the CIC and to the member. After considering the report, the CIC may take any of the steps it may normally take upon considering a complaint, including sending a reminder letter or accepting written undertakings from the member. For example, it may recommend that the member

undertake not to practise a certain area of law, to satisfactorily complete a remedial program, to implement measures to reduce the risk of liability insurance claims, to obtain a psychiatric or psychological assessment or counselling, to obtain medical assistance, or undertake to practise in a setting approved by the CIC. If the member accepts the recommendations, he or she must sign a written undertaking to the CIC.

If the member refuses to accept the recommendations or fails to satisfactorily complete the recommended action plan, the CIC will proceed to dispose of the complaint and may exercise any of its various options, including the authorization of charges against the member.

Where the CIC determines that a member's difficulties stem from poor office management by the member, it may direct the member to meet with the Society's Practice Management Advisor and to follow any recommendations made. The Practice Management Advisor will assess the problems and will not only make recommendations to the member but will assist in implementing effective office management systems and policies. The Practice Management Advisor will report back to CIC.

In considering a subsequent complaint against the member, the CIC may refer to all or part of a practice review report, a practice management report, a committee recommendation and a report on the manner in which the member carried out or followed any previous recommendations or failed or refused to do so. This information may also be received in evidence at an inquiry before the Discipline Committee.

(iv) Formal Caution

The CIC has the power to make a final determination of the member's rights by issuing a formal caution (Rule 5-77). If the CIC is of the view that the allegations in the complaint are well founded, it may offer the member the option of accepting a formal caution which is a formal censure or disapproval of the member's conduct. A caution is offered in lieu of a formal charge, and if the member declines the offer of the caution, a formal charge must be laid and the matter will proceed to a formal inquiry before the Society's Discipline Committee. The issuance of a formal caution is confidential and will not be published, except to the complainant, to a member designated to receive such information by the firm, and to other governing bodies of which the member is a member. However, a formal caution does form part of the member's formal disciplinary record, and can be referred to in the future at the time of sentencing on a subsequent charge of which the member is found guilty. A formal caution may also be considered by the CIC when considering a subsequent complaint about the same member.

(v) Formal Charge

If the CIC is satisfied that the allegations are well founded and that the matter should not be resolved by issuing a formal caution, it will direct that an inquiry be held before the Discipline Committee (see below) and that a charge be formulated outlining the particulars of the alleged misconduct. Charges are forwarded to the Discipline Committee.

It should also be noted that all proceedings before the CIC are confidential (see *The Legal Profession Act*, s.69(1)), subject to limited exceptions (s. 69(2)).

(vi) Interim Suspension

The CIC also has the power, under Rule 5-72(5), to deal with certain situations on an emergency basis and to require a member's appearance on an urgent basis. Although these urgent matters can arise from any type of complaint, they most frequently result from a spot audit of a member's trust account in which the mishandling of trust funds is discovered. On such occasions, the CIC might consider the exceptional option of interim suspending a member or imposing conditions of practice, pursuant to the provisions found in s.68 of *The Legal Profession Act*. In making the decision to suspend or to impose conditions of practice, the CIC will take the public interest into account. An example of such a situation would be where there has been a misappropriation of trust monies or where a lawyer has abandoned his or her practice. If the committee concludes that the public would be at risk if the lawyer were permitted to continue to practise, it will direct that charges be laid to be heard by the Discipline Committee. It will also direct that the member be suspended from practice pending that hearing.

(b) Disciplinary Inquiries

Where the CIC authorizes a formal charge of professional misconduct, conduct unbecoming, or incompetence against a member, the matter is referred to the Discipline Committee for a formal inquiry under s.68(b) of *The Legal Profession Act*. A hearing into the charge is held before a panel of the Discipline Committee consisting of three members.

The Discipline Committee has the power to subpoena witnesses or documentary evidence. Testimony of witnesses is taken under oath, and the member who is the subject of the inquiry is entitled to be represented by counsel. Counsel for the Society acts as prosecutor (*The Legal Profession Act*, s.71 and Rules 5-93 to 5-96, generally).

Where, after a hearing, the member is found guilty of professional misconduct, conduct unbecoming a barrister or solicitor, or is found to be incompetent, the Discipline Committee may exercise the disciplinary powers given to the governing body under s.72 of *The Legal Profession Act*. The Discipline Committee may:

- disbar the member and order that his or her name be struck off the rolls of the Society;
- permit the member to resign his or her membership from the Society;
- suspend the member from the practice of law for a specified period;
- in the case of a student member, expel the student from the Society;

- reprimand the member;
- order the member to pay a fine;
- place restrictions on the member's right to practise;
- order costs pursuant to Rule 5-96(8) and ss. 72(1)(e) and 72(2)(e) of *The Legal Profession Act*;
- make any other order the panel thinks is appropriate in the circumstances.

A member who has been found guilty and sanctioned under s.72 of *The Legal Profession Act* has a right of appeal directly to the Manitoba Court of Appeal within 30 days after service of the decision or order (see s.76 of *The Legal Profession Act*).

The rules of the Society require publication to the profession, the complainant and to any other governing body of which the lawyer is a member when a lawyer has been found guilty of professional misconduct, conduct unbecoming or incompetence. The notice includes the member's name, the nature of the charges of which he or she has been found guilty, the penalty imposed, and any costs awarded. Publication to the profession is effected by way of a Discipline Case Digest. The Discipline Committee also has the discretion to order broader publication to the general public, if circumstances warrant. Where a member is disbarred, suspended from practice or permitted to resign, a notice to that effect is also inserted in one issue of a newspaper that circulates in the area where the member has an office and practises.

If the member is found not guilty after a hearing, a Discipline Case Digest will be published, but the member is not identified. In a case such as this, the complainant is advised of the outcome of the proceedings.

Discipline Committee hearings are open to the public, subject to narrow exceptions provided for in s.78(1) of the Act. This applies only to formal inquiries before the Discipline Committee. The investigative process of the Complaints Investigation Committee is not open to the public.

Any lawyer who has been disbarred and struck off the rolls of the Society or permitted to resign his or her membership in the Society, or expelled as a student, has the right to apply for reinstatement. A formal hearing into such an application is heard by the Discipline Committee pursuant to the procedures under Rules 5-102 through 5-109. Since the number of lawyers who have been disbarred by the Society is very small, such applications are rare.

A lawyer who was cautioned by the Complaints Investigation Committee or was found guilty of professional misconduct or conduct unbecoming or incompetence and received a reprimand or a fine may apply to the Discipline Committee for a pardon. The Discipline Committee may grant the pardon if it determines that the lawyer has met the

criteria under Rule 5-101.1(3) and that under the circumstances a pardon is appropriate.

5. Errors and Omissions Insurance - Professional Liability Claims Fund

One aspect of fulfilling the Law Society's mandate of protecting the public is the requirement that all practising lawyers in Manitoba carry professional liability insurance for errors and omissions arising from the rendering of professional services for others. The Society is empowered, under s.45 of *The Legal Profession Act*, to establish a professional liability claims fund. The Law Society of Manitoba is a member of the Canadian Lawyers Insurance Association (CLIA), a reciprocal insurance exchange. Through CLIA the Society enters into a group policy providing professional liability insurance for all practising members. It is a condition of practice that all members pay the annual insurance assessment. Certain classes of lawyers are exempt from insurance, including lawyers in the exclusive employment of the government of Manitoba (other than Legal Aid Manitoba), a municipality in Manitoba, certain departments of the federal government, and members of our Society who are licensed and resident in another province and who have insurance in that jurisdiction.

The mandatory professional liability insurance policy provides coverage of up to \$1 million per occurrence with a \$2 million annual aggregate per insured. The deductible payable by the member is \$5,000 - \$20,000, depending on the member's past claims experience. It is both a condition of the policy and an ethical obligation (see Rules 5-34 through to 5-36) that the member advise the Society's Director of Insurance as soon as the member becomes aware of an act or omission which may give rise to a professional liability claim. Failure to report a potential claim promptly and to cooperate with the insurer may result in denial of coverage and is also potentially a breach of the Society's rules.

Many lawyers prefer to increase their liability insurance coverage beyond the mandatory \$1 million limit. Those lawyers' firms have the option of voluntarily purchasing coverage in excess of \$1,000,000.00 from CLIA through the Law Society of Manitoba.

6. Reimbursement Fund

While this fund is often confused with the professional liability claims fund described above, the two funds in fact have very different purposes.

The reimbursement fund, established under s.37 of the former *The Law Society Act* and continued under s.46 of *The Legal Profession Act*, is a fund maintained by the Society to compensate members of the public who have suffered financial loss as a result of the misappropriation or conversion of client funds or property by a lawyer. Thus, the reimbursement fund compensates and reimburses the public for dishonesty on the part of lawyers, whereas the professional liability claims fund provides compensation for lawyers' negligence.

In order to claim successfully under the reimbursement fund and in accordance with s.47 of *The Legal Profession Act*, a claimant must provide satisfactory evidence that the

following conditions have been met:

- (a) money or other property was entrusted to or received by:
 - (i) a law corporation, or
 - (ii) a member in his or her capacity as a lawyer;
- (b) the corporation or member misappropriated or wrongfully converted the money or other property; and
- (c) the claimant sustained a pecuniary loss as a result of that misappropriation or wrongful conversion.

An application form and payment guidelines have been developed to assist claimants in submitting claims and to provide guidance in the administration of claims.

An assessment for the reimbursement fund is set annually as part of the practising fees, taking into account claims paid during the past year and anticipated claims during the coming year and the cost of insuring the reimbursement claims fund.

7. Prevention of Unauthorized Practice

As indicated earlier, the Law Society of Manitoba has the power to determine who will be admitted to the practice of law in this province and to license and regulate those individuals. As a corollary to that power, the Society is also empowered to prevent the unauthorized practice of law in this jurisdiction by any person who is not properly qualified and licensed.

In order to determine whether a person is engaged in the unauthorized practice of law, one must first consider the definition of "carrying on the practice of law" under ss.20(2) and 20(3) of *The Legal Profession Act*. The latter subsection outlines a number of actions which are deemed to be carrying on the practice of law. It should be noted that the definition is rather broad in that the giving of legal advice for, or in the expectation of, a fee or reward, directly or indirectly, is in itself deemed to be the carrying on of the practice of law.

When a complaint is received by the Law Society about unauthorized practice, typically, an investigation is undertaken. Where it appears there is sufficient evidence that a non-lawyer is carrying on the practice of law and that person refuses to cease his or her activities upon the request of the Society, the Society may initiate court proceedings to seek an injunction under s. 29(1) of the Act restraining an unauthorized person from practising law. Alternatively, the Society may seek to prosecute the person summarily under s.28 of the Act.

It should be noted that s.21 of the Act and Rules 5-7.1 and 5-7.2 provide that an articling student may practise law in accordance with the terms of the Education Plan and Articling Agreement entered into between the articling student and his or her principal. Sections 40-42 of the Act set out a further exception and provide that non-

lawyer agents may, subject to certain insurance, bonding, and licensing requirements, act on behalf of other persons and give legal advice in very limited circumstances with respect to certain offences under *The Highway Traffic Act*. *The Crown Attorneys Act* [s.3(3)] and *The Legal Aid Services Society of Manitoba Act* [s.15.1(1)] also permit the practice of law by non-lawyers in certain circumstances, provided that the non-lawyer is acting under the general direction and supervision of a lawyer.

8. Fee Disputes

Many of the complaints the Society receives can be characterized as purely fee disputes between clients and lawyers, and do not otherwise raise any concerns as to lawyers' professional practice or ethical conduct. These complaints are generally not dealt with as disciplinary matters. Rather, the client is advised of the fee arbitration service offered free of charge by the Law Society (pursuant to Rule 5-58) and, as an alternative, of the right to have the lawyer's account assessed in the Court of Queen's Bench. Inquiries are made as to whether the lawyer and client will both consent to submitting the lawyer's account to arbitration. Note that legal fees that are subject to a tariff (e.g., in estate matters or mortgage foreclosure matters), or are imposed under a contingency agreement, may not be reviewed through arbitration or assessment.

In accordance with its fee arbitration process, the Society has a list of practising lawyers who have volunteered to act as arbitrators. Where both the lawyer and the client consent, a three-person arbitration board is selected from the list of arbitrators. Each party is presented with a list of names of lawyers (from the list of arbitrators) who are experienced in the area of practice with respect to which the fee dispute has arisen. The client selects one person as his or her nominee on the arbitration panel and the lawyer whose fee is in dispute also selects a nominee. The Law Society subsequently appoints a third person to act as chairperson of the board of arbitration. Both the client and the lawyer must sign a written consent agreeing to be bound by the decision of the arbitration board, and acknowledging that the board's decision is legally enforceable in the same manner as an arbitration under *The Arbitration Act*.

The three-member panel then convenes an informal hearing and hears representations from both parties. The board subsequently issues a written decision either upholding the lawyer's account or ordering the lawyer to reduce his or her account and reimburse the client accordingly (assuming the account has been paid). It should be noted that the failure of the lawyer to comply with the decision of an arbitration panel, without reasonable excuse may be reviewed by the Society.

This fee arbitration service is provided free of charge by the Law Society, and the members of the profession who have volunteered to place their names on the list of potential arbitrators do so as a service to the profession and the public.

In the Society's discretion, sole arbitrators are sometimes used to resolve certain fee disputes. This sometimes expedites the process of convening the arbitration hearing, and is considered particularly appropriate where the amount in dispute is relatively small.