The Law Society of Upper Canada

Le Barreau du Haut-Canada

The Adviser

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Paying attention to client complaints

In this issue:

The Law Society opened more than 110 complaint files per week in 1992 and the volume of complaints received from the public has increased at an average of 15 per cent annually in recent years.

There has been a commensurate increase in the cost of meeting this demand, with more than $1.5 million of members' fees spent to administer the complaints process last year.

Maintaining public confidence in the ability of the profession to regulate itself requires that complaints be dealt with fairly and promptly. But fulfilling this requirement under current conditions strains Law Society resources and also consumes the time and energy of the lawyers who must respond to a complaint.

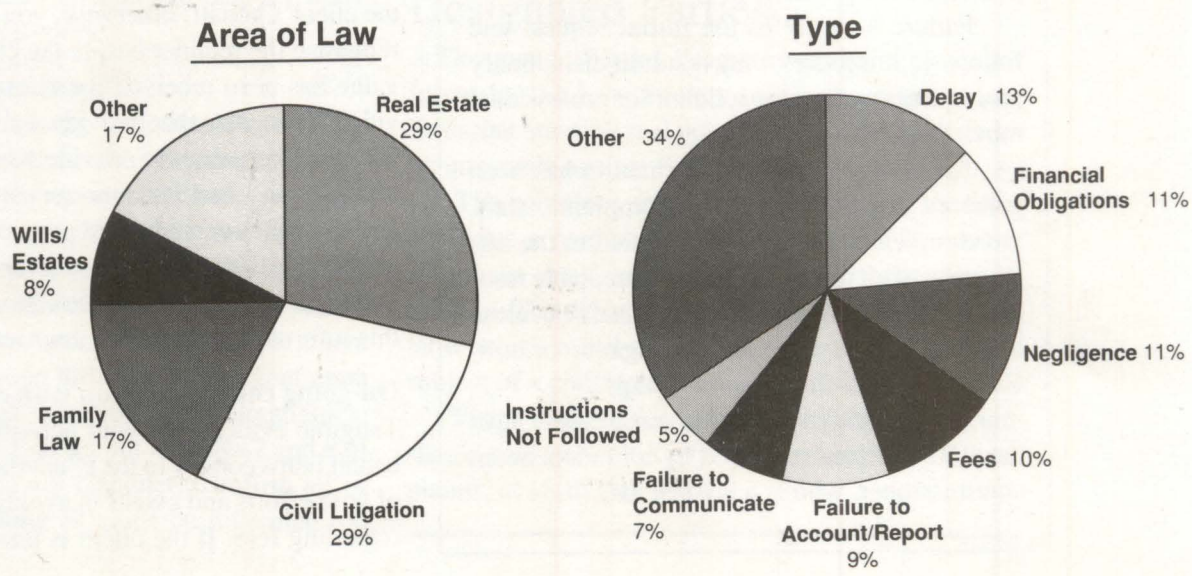
Improving the profession's awareness of the complaints situation is a first step towards reversing the growth trend and ensuring that complaints are handled efficiently when they do occur.

As the graphs below indicate, real estate, litigation and family law matters generated three-quarters of complaints during the past six years. The nature or type of complaints during the same period was wide ranging, but delay, financial obligations, negligence and fees made up nearly half of the files that were opened.

The vast majority of concerns that re-

Complaint Files Opened 1986-1992

(total=22,333)



sult in a complaint do not warrant disciplinary action and are usually based on communication problems between the lawyer and the client. This would seem to be confirmed by a recent Law Society survey that indicated clients are generally dissatisfied with the frequency and quality of communications received from lawyers.

When the Complaints Department calls...

The principal objectives of the Complaints Department are to effect a speedy resolution to a problem and to help rebuild the solicitor-client relationship.

Depending on the nature of a complaint—and subject to the permission of the complainant and the lawyer—staff often attempt to resolve problems by telephone. If it becomes apparent that the matter cannot be resolved in this fashion, then the matter will be investigated by an exchange of correspondence.

In these cases, the lawyer is sent the details of the complaint and asked to respond. Responses should be as detailed as possible and returned promptly. Because a copy of the response is usually forwarded to the complainant (except in the case of third-party complaints), the process is not enhanced if it contains inflammatory language or accusations about the complainant's behaviour.

Failure to reply to the initial request and follow-up reminders may result in disciplinary proceedings against the solicitor for professional misconduct.

After the necessary information has been gathered and considered by Complaints staff, the complaint can usually be settled to the satisfaction of all parties. When an acceptable resolution is not possible at this stage, staff can close the file, conduct a further investigation or initiate formal disciplinary proceedings.

The complainant can, in most cases, have the staff decision reviewed by an independent commissioner, who is a lay bencher.

Improve client relations when talking money

While the Law Society does not normally mediate fee disputes, the number of fee-based complaints received from the public is significant. Complainants are advised of the assessment process available to them, but the lawyer involved still has to deal with a client who believes his or her bill is unfair.

The problem is usually not one of lack of work by the lawyer. Most fee disputes are based on the client not understanding what is involved in his or her bill. The four steps outlined below are a method of educating the client about legal fees and an effective way of avoiding a fee dispute.

Initial retainer

In the initial interview, clients generally require two pieces of information: what the lawyer can do for them and what it will cost. Both of these issues must be addressed to inform clients adequately. Clients do not seek legal services without expecting to be billed for it.

Explain to the client what you charge, how you calculate your fees, the frequency on which the client will be billed, and the expected terms of payment. Then include this information in your letter of retainer.

Go on to explain what a cash retainer is, why you require one, where the money is held, and the amount to be required from time to time. Ensure that the initial retainer you receive is adequate to allow you to undertake a reasonable amount of effort on the client's behalf; otherwise, you will be seeking to replenish the retainer before the client feels that any value has been received for the initial retainer provided. Recognize that individual clients may not have the funds necessary to provide you with an adequate retainer, and facilitate matters by accepting post-dated cheques or credit card payments. Barring emergency situations, explain to the client that work will not begin until the retainer has been paid and include this information as part of your letter of retainer.

On-going communication with clients

Tangible evidence of your activities on the client's behalf helps convey to the client the nature and scope of your efforts and assists in avoiding future disputes regarding fees. If the client is provided with copies

of all correspondence and documentation sent or received by you, the client will have knowledge of what you are doing, and how promptly. The client will also recognize the cause of any delays.

Again, in the initial interview, explain to the client your office procedures, so that the client will understand why these materials are arriving on his/her doorstep. Although it is easy enough to send a standard form covering letter, it may be adequate simply to stamp the materials sent with your firm name and the word "copy" in red, as long as the client understands that this procedure is being followed.

This approach requires little of your support staff's time and entails little cost to the client. It facilitates good relations with clients, since their need to know is met, and in the event that an account is assessed,clients will be unable to argue about the work undertaken, since they will have received evidence of that work as it progressed.

Interim accounts

Very few clients today are willing, even if able, to pay only one, final, often substantial account. An interim account assists the client in managing cash flow, and offers you the same benefit; it allows the client to assess on an on-going basis the financial viability of continuing to pursue the matter on which you are retained. It also provides the client with information as to the steps taken to date. Accounts can be rendered on a time specific basis (e.g. monthly), a next-step basis (e.g. after discoveries; after an initial draft), or a combination of both. Explain your approach and its benefits to the client. Show that you recognize your client's financial realities, and assist the client to recognize yours.

Replenishing the retainer

In order to avoid financing the client's file and to reduce your accounts receivable, replenish your retainer after the interim account has been rendered. This measure will help you to protect your cash flow and meet your GST (and other) obligations. It will also assist your client to determine and meet his/her financial obligations. Again, ensure that the client realizes that progress on the file is contingent upon the retainer, but do not overlook your obligations in representing the client, as set out in Rules 2 and 8 of the Rules of Professional Conduct. Confirm all of the foregoing in writing (it can't be reiterated too often), so that you and your client have a record of what has been agreed upon.

Medical report payments

Lawyers arranging for medical-legal reports should leave no doubt as to who will pay for the doctor's services. A significant portion of the complaints the Law Society receives from doctors concern unpaid accounts and most can be attributed to inadequate communication at the time the report is requested.

When a lawyer approaches a doctor to request a report, responsibility for payment of the account can easily be addressed when discussing the report's content and cost. If the client is going to pay the doctor's account directly, this should be made clear in writing.

Rule 13 of the Rules of Professional Conduct, which speaks of "obligations incurred, assumed or undertaken on behalf of clients," can serve as a guide in these situations. Assurances that the lawyer will get the client to pay are not really helpful.

If the lawyer agrees to assume responsibility for payment, interim billing the client or the Legal Aid Plan would be a courtesy to the doctor because it would result in payment sooner rather than later and eliminate the possibility of a complaint being made.

A non-binding mediation scheme agreed upon by the Law Society and the Ontario Medical Association is available if a dispute arises between a doctor and a lawyer regarding medical-legal reports.

Designated Parties

A Designated Parties Program was recently established by the Law Society to assist the many law firms that have internal policies for dealing with complaints made against firm members.

The voluntary program involves having the firm designate a member to be a contact in the event a complaint or claim is made against any member of the firm. The designated member will receive a brief letter which merely identifies the lawyer who is the subject of a claim/complaint.

Firms interested in participating in the program should contact Scott Kerr, Assistant Secretary–Complaints, at (416) 947-3310.

Q & A

Applicability of Forms 4 and 5

The recent publication of Forms 4 and 5, which require more detailed reporting of private mortgage investments, has resulted in numerous enquiries from the profession regarding the applicabilty of the forms. The following are answers to common queries about the forms.

I act for a vendor who is investing in a "vendor take back" mortgage. Does section 15b of the Regulation apply to this situation?
Section 15b (1) provides that where a member receives money from a person for investment, the forms are applicable. In the described situation, the lawyer is not receiving money from an investor, therefore, there is no requirement to complete the forms.

A client has agreed to the terms of a private mortgage loan either through a mortgage broker or directly with the borrower. I am the solicitor and the money has been paid into my trust account. What are the implications of section 15b?
Since the money has been received in relation to a private mortgage investment, you are required to ensure the client completes Form 4 prior to the advance to the borrower. This ensures that the terms of the mortgage are fully communicated to you and that the client has the benefit of considering all the terms of the intended loan before the advance takes place.

A private mortgage transaction has been arranged through a mortgage broker and the client has provided a copy of Form 1 pursuant to the Mortgage Brokers Act. *This form is similar to Form 4. Does Form 4 still need to be prepared?*
The Society can only enforce the use of forms authorized by Convocation. The Regulation does not permit the Society to accept Form 1 prepared under the *Mortgage Brokers Act* as a replacement to Form 4. As a practical solution to the duplication in the forms' content, the client may endorse Form 4 to direct the lawyer to rely on a copy of Form 1 where it contains clauses that are identical on Form 4. The balance of Form 4 would be completed and both documents retained in the client's file.

I act for a sophisticated corporate lender that makes mortgage loans. The client is not a public company or a regulated financial institution. Is section 15b applicable?
The client does not meet the exclusions provided for by section 15b (3). The forms are applicable.

I act for a client lender in a mortgage loan of a relatively small amount of money. The forms seem unnecessary in consideration of the amount involved. Do Forms 4 and 5 need to be prepared in this case?
Yes. The forms are applicable pursuant to the Regulation.

I am not pleased with some of the "wording" of Forms 4 and 5. Also, I would like to see a greater scope for exclusion of sophisticated lenders. Is the Society reviewing the forms?
The Society has received many valuable suggestions with regard to possible revisions to the forms and the regulations. A Committee of Convocation is currently reviewing all suggestions.

NOTE: To facilitate completion of the forms, lawyers are advised that they may enter Form 4 and Form 5 into a computer word processing program.

BRIEFLY...

Guidelines available for suspended lawyers

The Practice Advisory Service has material available for suspended lawyers and those lawyers dealing with suspended lawyers. Telephone (416) 947-3369 or fax (416) 947-3990.

Search and seizure information

What procedures should a lawyer follow when dealing with police or government authorities that want information or property? A new package of material on search and seizure is available by contacting Practice Advisory at the numbers listed above.

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