WHAT HAPPENS BEHIND CLOSED DOORS: THE WORKINGS OF THE STANDARDS COMMITTEE – ADDITIONAL QUESTIONS

Question One

Does the LCRO decision Mr IV v Ms DD etc only mean we have to provide a copy of fees invoices to a residuary beneficiary, and not statements of account detailing the estate administration?

Regulation 9(4) of the Trust Account Regulations only relates to the fee invoice. However, you might want to practically reflect on why it would ever be a good idea to be anything less than transparent with any beneficiary. There is no reason why statements cannot also be provided – they will see them at the end anyway.

Many beneficiaries complain about being in the dark, and SC's have dealt with complaints where the complainant is essentially paying the lawyer to have an argument with them. Being transparent with the people who will be paying the bills is invariably going to be the best way to avoid, or solve these sorts of issues.

Question Two, Three, and Four

How does a lawyer deal with privilege when a complaint is made by a third party (ie not a client)?

When the Committee considers a review of the file is necessary, does the complainant provide a letter waiving legal privilege?

Could we please hear how confidentiality and privilege issues are dealt with when responding to a complaint?

Section 271 of the Lawyers and Conveyancers Act 2006 (LCA) provides that nothing in the Act affects legal professional privilege. The privilege belongs to the client.

If the client is the complainant, privilege is taken as being waived by the tabling of the complaint.

In a complaint made by a third party (or an own motion investigation), the lawyer will need to ask the client to waive privilege if the reply requires that.

If confidentiality remains a concern in this situation then it should be squarely raised with the Committee, who will look to help find a solution to the issues raised (that may involve, for instance, telling the complainant that they may not see some of the information provided).

If the client refuses to waive its privilege a Committee will not usually require production of privileged documents. Note that the entire file is not privileged. The lawyer can be asked to provide non-privileged documents.

RCCC 8.2(d) allows a lawyer to disclose confidential information where that disclosure is required by law. This permits disclosure where a committee issues a direction under s 147 of the LCA for production of documents considered reasonably necessary for the purposes of the investigation.

RCCC 8.4(g) records that a lawyer may disclose confidential information relating to the business or affairs of a client to a third party where disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the lawyer by the client.

Question Five

How common is it for lawyers to be legally represented when responding to complaints?

Most lawyers are not legally represented. We don't have an exact figure but probably much less than 25%.

Question Six and Seven

In the instance of a litigious litigant/someone who makes numerous complaints against lawyers (ie, say they appear regularly before the Criminal courts and they have a tendency to make complaints). Do the complaints committee take that into consideration at first instance?

If anyone can bring a complaint when does a complainant not have standing?

All complaints must go before a Standards Committee – the Law Society/Lawyers Complaints Service itself cannot unilaterally dismiss a complaint.

If a complainant has a track record of complaining, then that would probably be taken into consideration if the Committee was made aware of it.

The Act allows a standards committee to take no action on a complaint if, in the Committee's opinion, it is vexatious or not made in good faith. The Committee may also decide to take no further action on a complaint if the complainant does not have sufficient personal interest in the subject matter of the complaint – s 138(1)(e) of the LCA.

Complainants that might fall into this category that Committees have had experiences with include general busy body members of the public, or bloggers/blog sites. Invariably these sorts of complaints will be about something that there will have been publicity about, and more "connected" complaints may have raised these things. Duplication of complaints about the same thing is something the Committees attempt to avoid happening.

Note: only a person chargeable can complain about the quantum of a fee – see s 132(2) of the LCA. Under s 160(1) of the LCA, if an executor, trustee or administrator has become chargeable with a bill of costs, any person interested in the property out of which the bill will be paid may complain about the amount of the bill. This allows beneficiary complaints.

Question Eight

Would the standards committee like the power to award costs against a vexatious complainant?

The power does not exist. It would seem unlikely in the present regulatory climate that the self regulatory part of our system would ever encompass an ability to make cost awards against people that chose to complain. The focus of the Act, remember, is the consumer, not the lawyer.

If the power did exist it would likely only be rarely used, and would certainly be difficult to enforce.

Remember, it is rare *even for the LCRO* to award costs against complainants, and the LCRO stands independent of everyone.

Vexatious people are problematic in lots of areas of life, including for the courts, and many complaints bodies. It is one of the trade-offs that needs to be made when designing a disputes system that you want to be accessible to all.

Perhaps this is an area that needs to be thought through in a more holistic sense by the people that design all complaint type rules.

Question Nine

If you are notified that there was a complaint (clearly unfounded) but has already been withdrawn (probably after you explained to the complainant that it was unfounded), does it remain on record?

A no further action decision does not form part of the disciplinary record. A record is kept of the fact that the complaint has been made and the outcome.

Question Ten

Our client uplifted the file. Later after 4 weeks we have received a complaint from him however not drafted by him. Drafted by his legal rep however lodged by client. How we can deal with legal rep?

This question is all about what the client wants. If you receive a complaint from the client, you will not be criticised for dealing with the client as you have been asked. It may be you want to deal with the lawyer? But that is the client's call. They may not want to pay for the other lawyer to deal with the complaint.

This question is perhaps something for all lawyers to reflect on as well.

There can be occasions when a lawyer assisting a client to make a complaint about another lawyer assists the client and the Committee by clarifying exactly what is being complained about (rather than including unnecessary or extraneous material or allegations).

But are you actually helping the complaining client by writing this letter for them? Do you really need to sit down with them and reflect (maybe in some quite forceful terms) about whether the complaint they want to make has any prospect of success.

If *you* are not prepared to complain on the record on behalf of your client (because you think the other lawyer's conduct is not actually that bad at all) then maybe the best advice you might be able to give the client is to decline to waste their money on something that will likely get them no-where. They may still wish to proceed and complaint, but with our system, should they want to do that, might it be best to suggest that they do this aspect themselves?

Lawyers do not need to be the enablers of vexatious or pointless complaints. Ask the client, what are you trying to achieve from this? If the answer does not make sense to you then perhaps the best role you can play as their advisor is to suggest other ways that might exist to get the client what they want?

Question Eleven

Would the committee really read through each case one by one? Surely they would want to take the papers as read?

Full reading is done prior to the meeting and it is taken that people have read the material to enable an informed discussion to take place.

At a meeting it is not usual to read through the entire agenda note. Much depends on the way the presenting member choses to handle it. Sometimes things are so complicated the presenter will prepare other papers to hand out to make life easier for all (eg summary chronologies, or tables). Sometimes a sub-committee may be required to meet separately to review materials and then more than one person may take a presenting role.

The way we simulated Wormwood was an accurate, but slightly abridged version of what will generally occur in an actual meeting.

Question Twelve

If an "own motion" hearing is brought on in respect of 2.8 & 2.9 confidential reports made by a solicitor in respect of say a colleague, is the anonymity of the author of the report really assured?

Confidentiality cannot be guaranteed. Even if we redact the names, the lawyer may still know who it was. The reporting lawyer will be told this.

Question Thirteen

How do RCCC 2.8 functions relate to complaints functions? I am aware of r 2.8 reports being treated as complaints, and of the SC saying they didn't know why the lawyer had thought they had to make a complaint.

RCCC 2.8 and 2.9 deal with reporting conduct you may see other lawyers engaging in.

RCCC 2.10 is also worth reading in this context as well:

> **Reporting misconduct**
>
> 2.8 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of *misconduct must make a confidential report* to the Law Society at the earliest opportunity.
>
> 2.8.1 This rule applies despite the lawyer's duty to protect confidential non-privileged information.
>
> 2.8.2 Where a report by a lawyer to the Law Society under rule 2.8 may breach the lawyer's duty to protect confidential non-privileged information, the lawyer should also advise his or her client of the report.
>
> 2.9 Subject to the obligation on a lawyer to protect privileged communications, a lawyer who has reasonable grounds to suspect that another lawyer has been guilty of *unsatisfactory conduct may make a confidential report* to the Law Society, in which case rule 2.8.1 will likewise apply.
>
> 2.10 A lawyer must not use, or threaten to use, the complaints or disciplinary process for an improper purpose.
>
> (Emphasis added)

In summary, reasonable ground to suspect misconduct (bad bad stuff that the SC will have to "send upstairs" to the LCDT) then you must report. Reasonable ground to suspect unsatisfactory conduct, then you *may* report.

Confidential reports can be treated as a complaint if the reporting lawyer wants to or perhaps has framed it that way.

They are usually dealt with as an own motion if a decision is made that the matter needs to be taken further. It is usual for Complaints Service staff to check with the reporting lawyer and discuss what their intentions are.

Question Fourteen

How does the committee assess quantum when it did not form part of the complaint? Does the committee have a right to bring into account other issues that are not subject to the actual complaint?

The Committee can own motion on quantum of a fee if it appears to be excessive. The LCRO has held that a standards committee is not restricted in the matters which it can inquire into in an own motion investigation, noting that the purpose of an inquiry is to uncover concerns. See LCRO 77/2013 at [32].

Question Fifteen

Can you confirm whether, in the circumstances, Mr Wormwood's act of delegation was wrong, ill-advised or acceptable please? (Also – can we have the invoices?)

No actual invoices were prepared for the exercise. We did not want to burden you with too much paper. The intent of the discussion there was to show you how an issue that may exist may be noticed by the Committee and then taken further through and own motion investigation.

The delegation to the other executor may not have been best practice, though perhaps it made sense in the circumstances Wormwood was confronting.

It really depends on the circumstances. Lawyers are asked to make difficult decisions in fractious situations all the time. These decisions can become especially acute in family or estate situations: being able to handle this sort of stuff is part of the skill set you must have to do this work.

Question Sixteen

If the Committee comes up with fresh issues during its meeting, is there a process to ensure practitioners are given the opportunity to comment before adverse findings are made?

Yes. Any new issues must be referred to the lawyer for comment before any finding is made. All committees are acutely aware of the need to ensure natural justice is given to both complainant and the lawyer. This is often the reason complaints can take as long as they do to resolve, because each interaction can take at least one month, perhaps two, before the issues will come back to the Committee (on a monthly meeting cycle).

Question Seventeen

Is the Law Society content that they cannot deal with laypersons' complaints about [certain] government lawyers because they are not providing regulated legal services?

A complaint can be laid against *any lawyer*, including in-house counsel and government lawyers. A lawyer is defined as person who holds a current practising certificate.

An in-house lawyer may be providing regulated services to his or her employer and it is possible for there to be a third party complaint. Whether or not the complaint would be upheld is a separate issue.

If there is potential misconduct, that is, conduct which reflects upon whether the lawyer is a fit and proper person or is otherwise suited to engage in practice, a Committee can investigate irrespective of whether the conduct is related to the provision of regulated services.

Question Eighteen

What about something that's within the ambit of the original complaint, but outside the issues enumerated by the Legal Standards Officer in the initial covering letter?

If this is identified by the Committee at the initial meeting it will be included as an issue in the notice of hearing. If identified at the hearing on the papers, it would have to be adjourned and a new notice of hearing issued before any determination could be made. The issues that may be identified by the LSO can help to guide the response but the lawyer should still read the complaint and answer the complaint.

Question Nineteen

How does the SC officially deal with lawyers who appear to provide their complete file but later turn out to have removed the evidence of their own and others' serious wrongdoing?

This would be a separate conduct issue which may be the subject of an own motion investigation. This would be a foolish thing to do, and if discovered could be expected to result in some quite serious consequences. Committees have in the past referred conduct of lawyers telling untruths to the committee to the LCDT.

There is a duty of candour on the part of lawyers to co-operate with the process: see *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103.

Question Twenty

When an "own motion" hearing is brought on by the SC - what does the complainant get told? does the original complaint get dismissed?

The own motion is entirely separate to the original complaint, and new documentation would be sent to the lawyer outlining the new matter.

The complainant will not be a party to this, but the Committee may resolve to keep them informed if appropriate. This has no effect on whether the original complaint is dismissed or upheld: that will continue in the usual way. In our Wormwood example (Pathway One) the original complaint was NFA'd at the initial meeting, but the OMI was commenced.

Question Twenty-One

What happens if a Judge brings an own motion case and the layperson also brings a complaint?

If the complaint and the Judge's report contain the same issues, it would be dealt with as a complaint. An own motion would not be opened in relation to the same matter. The Complaints Service is alive to complaints that appear to repeat or are duplicates of other complaints and tries to bring them together into one complaint file to progress things more efficiently.

Question Twenty-Two

The non-print/save restrictions on complaint documents make it difficult to store and present documents within a firm (as lawyers are trained to do). Any flexibility on this?

The LSO does not apply any restrictions on the PDF material we send around other than a password. We are not aware of non-print/save restrictions on documents. Perhaps this is something within your own system? Feel free to call the NZLS to discuss this if you would like to understand more.

Question Twenty-Three

What are the usual disciplinary measures the SC will use?

Censure, fine, reduction of fee, education orders, supervision.

Question Twenty-Four

Do you see any trends coming through the complaints process, and can that information be used in a proactive way (eg by NZLS offering training on the particular area)?

Great question. Definitely more work to be done in this area. The three big complaint practise areas (Trusts, Family, and Property), and some of the most common complaint areas themselves are regular topics in lawyer CLE.

The top nine sorts of complaints most years are: negligence, inadequate reporting/lack of communication, overcharging, discourtesy, delay, failure to follow instructions, conflicts, other conduct issues, misleading conduct.

Extract from that if you will a common and overarching issue, perhaps, of just plain old "get communications clear from the start and keep it fulsome, open, and polite and respectful at all times"? (Easy to say, maybe hard to do?)

Question Twenty-Five

If you act on your Principal's instructions against your better judgement and a complaint is then made against you, can your Principal be called to account for it?

As a lawyer you still have your own professional conduct obligations. If you were acting under instructions of a Principal, he or she would usually be joined into the complaint and may be viewed as the primary offender. Sometimes when staff solicitors or employed lawyers are complained about the real issue is a supervision one, and an OMI against the supervisor can arise from that.

"To thine ownself be true" – rings out large here.

We would hope that there was a lot of internal debate about the proposed course of conduct here *before* it was embarked upon, and if it is decided to proceed against that internal debate then the lawyer (we suggest the actual Director/Partner or Principal themselves) actively making the decision puts their *own name* on things.

It is OK to refuse to sign somethings you know. It may cause you issues with your employer, but ethical obligation are important enough sometimes to require an employee to take a stand.

Question Twenty-Six

How do you test the evidence you are relying on?

The process invariably followed by the Committees will mean there is no cross examination. Where evidence is truly contested it may be appropriate to refer it to the Tribunal (if serious allegations) otherwise the Committee may simply be unable to make a finding to the balance of probabilities, in which case it may decide it can do little further with the complaint as it will not have been established.

Question Twenty-Seven

What is the criteria for public interest (ie when the matter is resolved but still comes back to the Committee for withdrawal)?

If the Committee considers there are wider practice issues involved such that further action is required to protect other clients or potential clients, or there is something about what the Committee is seeing that might reflect badly on the profession as a whole (as opposed to a one off issue with a client).

Question Twenty-Eight

This may be out of remit, but at disciplinary committee is mitigation considered when assessing whether misconduct, serious misconduct or no issue?

Yes, it is a factor that may be taken into consideration.

The way lawyers go about trying to deal with a complaint is an important part of being a professional and complying with your obligations under the Rules. It is not uncommon for lawyers to deal with complaints with an immediate apology and other actions that can fix things instantly, and actually mean there will be no issue.

Just because there is a complaint does not mean things cannot still be solved. The challenge that seems to arise once a complaint is made is that many lawyers complained about stop being able to see clearly enough to discover the way through (sometimes called the fog of war). This is why a third set of eyes can help you.

Do not be shy to use the resources available to you here (see materials that are sent to lawyers that has a list of experienced people you can call).

Question Twenty-Nine

Does the panel think that the LCRO process is a fair one given the time delays and resourcing?

This is not a process issue but a bad design and under-resourcing matter for which lawyers have been and are blamed. NZLS has been constantly lobbying for these processes to be improved. It has taken the better part of ten years for this to happen.

The LCRO has been aware of this itself, and through its own efforts has made good progress in clearing the backlog and getting greater flexibility into its processes.

Question Thirty

Can you confirm as mentioned that the LCRO is by way of rehearing de novo like the ERA / Emp Ct? Not review of the way the SC dealt with the complaint originally?

It is a de novo hearing. All issues will be reviewed by the LCRO.

Question Thirty-One

For the purposes of your process, how do you define "conciliation"?

A conciliator is appointed to ring around the parties to attempt to assist them to reach an agreed resolution. The parties are not in the room together like in a mediation. This is useful if the parties are not in the same city or region and cannot come together to mediate.

Question Thirty-Two

Can the Committee's notes/agendas be disclosed to the parties under the Privacy Act?

People have tried to request these things, but the Committee's own notes and deliberative materials are not provided. Agenda notes would be provided after the decision has been released but not before. The minutes extract would also be provided if sought. These documents are all provided to the LCRO if a review application is made.

Question Thirty-Three

What about complaints relating to harassment? There must be a place for confidential complaints, surely?

The current legislation was set up to deal primarily with complaints from consumers of legal services. It has been a struggle to fit these types of complaints within the current legislative framework. A new specialist committee has been set up as a result of the Cartwright Report and working group.