

KEEPING CURRENT

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Duty of professionals to respond promptly and cooperatively with regulators

By James R.G. Cook

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The Ontario Court of Appeal has confirmed that professionals have a duty to cooperate promptly and fully with their regulator during the course of an investigation.

In 2016, the Law Society of Ontario commenced an investigation into a lawyer's firm, focussing on the firm's structure and referral fee practices. For several months, the Law Society asked the lawyer to produce various documents and information required for the ongoing investigation. While there was a great deal of communication between the lawyer's counsel and the Law Society, the requested documents and information were not fully produced until approximately eight and a half months after the initial request was made.

As a result, the Law Society brought an application before the Law Society Tribunal Hearing Division, alleging that the lawyer engaged in professional misconduct by failing to comply with Rule 7.1-1 of the *Rules of Professional Conduct*, which provides: "A lawyer shall reply promptly and completely to any communication from the Law Society in which a response is requested."

The Hearing Division concluded that the lawyer had breached the rule, and reprimanded him, in addition to ordering that he pay \$25,000 in costs to the Law Society: *Law Society of Upper Canada v. Diamond*, [2017 ONLSTH 191 \(CanLII\)](#).

The lawyer appealed the Hearing Division's decision to the Law Society Tribunal Appeal Division, which affirmed the decision: *Law Society of Ontario v. Diamond*, [2018 ONLSTA 11 \(CanLII\)](#).

The lawyer appealed the Appeal Division's decision to the Divisional Court, which affirmed the decision once again: *The Law Society of Ontario v. Diamond*, [2019 ONSC 3228 \(CanLII\)](#).

A further appeal, representing the third appellate review of the original decision of the Tribunal Hearing Division, was heard by the Ontario Court of Appeal in November 2020.

The Court of Appeal's decision, affirming once again the decision of the Tribunal Hearing Division, was released in April 2021: *Law Society of Ontario v. Diamond*, [2021 ONCA 255 \(CanLII\)](#).

It is important to note that this decision was only about the lawyer's breach of a duty to cooperate required by Rule 7.1-1 of the *Rules of Professional Conduct*. The case did not involve any issues with the state or contents of the specific financial records themselves which had been requested during the investigation. In fact, the Law Society withdrew any allegations that the lawyer's firm had not maintained books and records as required by the Law Society's by-laws.

The two overriding concerns of the Court of Appeal were the lawyer's professional obligations to know and comply with his record-keeping obligations, and the reputation of the profession as a whole, which depends on public confidence that self-regulation is taken seriously.

The Court of Appeal accepted the extensive factual findings of the Law Society Tribunal Hearing Division that the lawyer had engaged in a "cat and mouse game" in responding to the Law Society. In the Court's view, this type of gamesmanship is the antithesis of good faith dealings or of "honest, open, and helpful dealings."

There was nothing genuinely complicated about the Law Society's request for financial records, consisting of general receipts and disbursements journals, bank statements, cancelled cheques, and deposit slips. It simply should not have taken the lawyer more than eight months to produce the records requested.

The Court of Appeal did not accept the lawyer's argument that his delay in responding to the Law Society had stemmed from a "failure to communicate" rather than a "failure to cooperate." The lawyer analogized his situation to Joseph Groia's dispute with the Law Society which culminated in a Supreme Court of Canada

decision setting aside a finding of professional misconduct against him: *Groia v. Law Society of Upper Canada*, [2018 SCC 27 \(CanLII\)](#), [2018] 1 SCR 772. However, that case involved a legal interpretation of the ethical limits of a lawyer's civility obligations during the course of a heated trial. There was no similar justification for lawyers failing to understand their fundamental financial record-keeping obligations and promptly responding to the Law Society as required. As stated at paragraph 58 of the Court of Appeal's decision: "With the privilege of being admitted to a self-regulated profession comes the responsibility to know one's obligations."

The obligations at hand, namely responding promptly to an investigative request for specific accounting information, should not have been a difficult matter for the lawyer to comply with, and the failure to do so over the 8.5-month period led to the findings, upheld through three levels of appellate review, that the lawyer had failed to comply with his professional obligation to cooperate with a Law Society investigation.

Lastly, the Court of Appeal was concerned with the public confidence in the self-regulated nature of the profession, which requires public confidence that *Rules of Professional Conduct* will be complied with. The rule in question requires a prompt response and no inordinate delays in investigations by the Law Society. In the Court of Appeal's view, delays in complying with the duty to cooperate can only serve to shake the public's confidence in the Law Society's self-regulatory authority.

The main takeaway from the decision is that a similar situation could hopefully be avoided by maintaining the financial records required by the Law Society's by-laws and making them available



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promptly upon request during an investigation. Lawyers should not engage in what could be construed as gamesmanship in response to a Law Society investigation rather than cooperating in an open and helpful manner. Other professionals would likely be held to a similar standard in their dealings with their regulators.

Contact us

If you have a litigation matter and are in need of legal advice, please contact James Cook, at 416.865.6628 or jcook@grllp.com.

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