

SMALL PRACTITIONERS ASSOCIATION

SUBMISSION TO

THE HON. M BELOFF QC

**IN RESPECT OF A REVIEW OF DISCIPLINARY MATTERS OF THE
INSTITUTE OF CHARTERED ACCOUNTANTS IN ENGLAND & WALES**

JUNE 1998

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1. BACKGROUND

SPA is a wholly independent association of small practitioners within the ICAEW, and was formed in early 1996 because of concerns with the perceived effectiveness, or not, of our Institute's support for such members, further because the design of regulations and their implementation was perceived to be based largely on Public Companies rather than small private business needs.

In May 1996 SPA sent a survey to some 11,000 ICAEW small practitioners receiving 850 responses. Within the ensuing report dated September 1996 SPA identified as a key objective the need to review our Institute's disciplinary process.

SPA's stated policy is to promote and improve the relationship between members and our Institute by providing constructive criticism together with practical proposals for improvements. Further to provide commentary and proposals to other authorities influencing our practising environment.

Membership has grown steadily to around 850 small practices or sole practitioners (some 1100 partners in total) throughout England and Wales. In November 1997 the present chairman, using as his platform SPA's objectives, gained election to the ICAEW Council for Beds, Bucks and Herts constituency.

Following its request to Council in February 1998 for such a review, SPA followed up its 1996 survey on the Disciplinary Process to share the experience of members who had had complaints heard against them in the last few years.

SPA seeks a wide ranging review not only of the administrative procedures and By-laws but also of the operating methods and grading applied to perceived offences plus ensuing penalties. Our request is that the review should include evidence from those on both the defendant and prosecution sides.

No comment is offered on the processing of complaints holding no element of professional misconduct and which are resolved by conciliation or other means. Our observation and recommendation in the main relate to how the Disciplinary Process impacts on smaller practices of between one and three partners.

2. EXECUTIVE SUMMARY

- 2.1 The gravity of complaints should be graded within given categories
 - Whether a first offence
 - Whether a technical breach, issue of public trust, other financial impropriety or dishonesty
 - Whether causing actual loss or inconvenience, intentional or not
 - Whether in the public or private domain
- 2.2 A system should be evolved which enables lesser complaints to be heard locally to the defendant member and in a manner not as adversarial as the present process at Moorgate Place.
- 2.3 The defendant members should be provided with free guidance and counsel of a local Support Member from the initiation of the complaint process
- 2.4 Penalties attached to proven cases should reflect their grading in (2.1) above
- 2.5 The process of recovering or awarding costs in proven or unproven cases should be related to the grading in (2.1) above, and free initial legal support for defendant members should be provided
- 2.6 The publicising of proven complaints should reflect their grading in (2.1) above, and should only be given to those cases found proven by the Disciplinary Committee.
- 2.7 The imposed sanctions taken against members for JMU
- 2.8 The personal impact of complaints on defendant members should be reviewed to ensure that unintended personal damage is not caused by an unbalanced system.

2.1 GRADING OF COMPLAINTS

- 2.1.1 Both surveys undertaken by SPA confirmed a principal concern that the disciplinary system does not distinguish sufficiently between the nature of proven complaints. The example is given of a technical breach arising of a one-off tax repayment being passed through a practice as against a non-existent client account, where the cleared cheque was immediately paid to the client. Such action may be said to be unwise, but there was not intent by the practitioner to obtain personal gain and no loss incurred by the client.
- 2.1.2 Does such a first and only breach merit a fine of perhaps £500 plus costs? Does such a penalty compare reasonably with similar penalties attached to cases of breach of duty or public trust?
- 2.1.3 The point made is that complaints do not appear to be graded from a sufficiently low starting point, in terms of significance or severity as, on reading the Disciplinary Committee handbook, any proven case appears to attract a minimum level of fine plus costs, without adequately assessing all the characteristics of the complaint itself, namely:
- Was this the practitioner's first and only breach?
 - Was the breach, through an erroneous lack of application of a rule or standard, technical where no monetary loss or significant inconvenience was suffered by the client?
 - Disrespectful, but with no financial impropriety, in that a deliberate or careless attitude was displayed towards a client's affairs that caused demonstrated inconvenience?
 - Wilful or negligent where both demonstrated inconvenience and real financial loss to the client has occurred?
 - Dishonest, where wilfully incorrect statements or personal gain were made in a breach of trust?
 - Was the breach in the private or public domain?
 - How widely was the breach felt?
- 2.1.4 Clearly there is a world of difference between the affairs and potential damage to a Plc or other public interest concern compared with a small private owner-managed business or limited company.
- 2.1.5 It is suggested that by reference to the criteria listed above a clear distinction between minor and major complaints can evolve.
- 2.1.6 Assessing the complaint in this way before rather than during the Investigation Committee process should enable all ensuing aspects of a hearing to relate to such a grading.

2.2 HEARING OF COMPLAINTS

- 2.2.1 Our Institute only has one court - Moorgate Place - thus effectively any hearing for whatever grade of complaint is heard in an adversarial atmosphere with no parallel to our legal system of local magistrate, county and then high court.
- 2.2.2 Membership is spread throughout England and Wales, hence any attendance at a hearing to defend a minor breach may incur an excessive amount of time travelling, together with related costs.
- 2.2.3 SPA s survey found that only a quarter of its members attended their hearing to defend the complaint against them, and even less engaged a solicitor, stating that extra time and expense were key factors in this decision. For 85% it was their first offence of a minor technical nature. Most accepted a consent order although these were frequently stated to be excessive in terms of the fine and costs imposed.
- 2.2.4 It is not seen as appropriate for all complaints, whatever their nature or severity, to be heard in one possibly remote court, as a member may opt to accept rather than defend a complaint in order to minimise personal time and excessive costs. Such a process is not conducive to the carriage of natural justice and, with the granting of an increasing number of consent orders, is in danger of becoming an expedient.
- 2.2.5 SPA s view is that wherever practical and by reference to the grading discussed in (2.1), the hearing should be devolved to a new and lower local court - a District Hearing which might make use of the office of the defendant member or the local District Society. Those attending might include:
- The defendant member
 - The complainant if local, especially if another ICAEW member
 - The Support Member (see 2.3)
 - A representative of the Investigation Committee who would chair the hearing
 - A District Society member who should be of similar standing as the defendant member.
- 2.2.6 Any appeal against the finding of a District Hearing would be to the Disciplinary Committee.
- 2.2.7 It is seen as very important that a member is tried by his peers. Members

who have the understanding and experience of the defendant member's area of work should be on the hearing panel.

- 2.2.8 a time scale of two months would be proposed from date of notice of the complaint to such a District Hearing.
- 2.2.9 Such a devolution of hearings would improve the perception of natural justice being seen to be done - the defendant member has the opportunity of being present and participating in the hearing whose objectives would be constructive rather than adversarial.
- 2.2.10 The District Hearing would review the complaint with the member, discuss how this could be put right and subsequently monitor, perhaps within the following year, that this had been done.
- 2.2.11 A first, minor offence, would not attract a fine or costs, but would be noted on the member's disciplinary record.
- 2.2.12 For repeat offences of minor breaches the District Hearing would be able to impose modest fines plus costs.
- 2.2.13 In this way it is hoped that far fewer consent orders would be made by the Investigation Committee, whose central role would be to examine cases for perceived gravity in order to agree where they might be heard, either at a District Hearing or a Disciplinary Committee Hearing.

2.3 COMMUNICATION WITH AND SUPPORT OF DEFENDANT MEMBER

- 2.3.1 The remoteness of both Moorgate Place and the administrative personnel running the Disciplinary Process can inhibit a member's response, with growing resentment or disbelief in the process; failure to respond becomes a further breach for which the ultimate sanction can be exclusion.
- 2.3.2 A minor complaint may thus escalate as a member loses the will to become involved in resolving the complaint, and there are many published cases demonstrating the folly of adopting such an attitude.
- 2.3.3 SPA believes that whether or not the concept of a District Hearing is adopted, all complaints should be discussed with the member at the earliest possible stage, both in terms of the nature and the processing of the complaint itself, possible sanctions, if proven, and whether legal representation is recommended given the gravity of the complaint. It is felt that such a support service might be provided through a designated member of the local District Society - the Support Member - to whom it is felt the defendant member will be able to relate and with whom he will be able to meet during or after office hours.
- 2.3.4 SPA sees such a Support Member as having a good knowledge of the disciplinary process. He or she is there to help, guide the member through the complaint process, and such support would be provided free of charge to the member.
- 2.3.5 The concept of a Support Member already exists, albeit passively, whose role it would be intended to strengthen by suggesting that each District Society created a pool of up to three members to provide free support in an active manner.
- 2.3.6 The change in emphasis would be that positive personal contact would be established between defendant member and Support Member from the outset of a complaint and until the case was settled. Also monitoring any undertakings to the future.
- 2.3.7 SPA feels it would be to this Support Member that complaint papers would be copied in the first instance, together with a letter to the defendant member from the Professional Standards Office stating that a complaint has been recorded and the designated Support Member would be contacting the defendant member to discuss this with him.

- 2.3.8 The defendant member should be sent the existing and helpful leaflet entitled 'What happens when a complaint is made against you?' which should include a summary of the range of fines and costs that may be applied where a complaint is upheld - including importantly the further breach plus associated penalties incurred through not answering correspondence from the Professional Standards Office. Also the circumstances in which a member may be excluded.
- 2.3.9 SPA feels that all members against whom serious complaints are laid and subject to disciplinary committee hearings, should have access to suitably qualified legal support. It is felt the Institute has a responsibility for identifying such defence solicitors or other experts. A defendant member attending a disciplinary hearing without legal support must be at a disadvantage and possibly overwhelmed by the legal attitudes arrayed against him.

2.4 SENTENCING - PENALTIES AND CONSENT ORDERS

- 2.4.1 Penalties in the form of reprimands, fines and application for costs, do not appear to follow the perceived grading of the offence and should reflect the suggested grading in (2.1) however, SPA believes the starting point for minor or first time technical breaches are too high: the Disciplinary Hearing Committee Handbook suggested minimum fines be applied in every case.
- 2.4.2 As outlined in (2.2) SPA believes that such first offences merit no more than a discussion of the complaint, plus a note on the member s disciplinary record with a warning that further occurrences within a period of six years would be treated more seriously with a possible fine of up to £500.
- 2.4.3 Consent orders with fines plus costs as has been mentioned in (2.2) are not perceived as being fair in that they carry an implied threat of both fines and costs being increased if the order is appealed. Neither does the Investigation Committee process allow the defendant member a hearing .
- 2.4.4 It is hoped that the occurrence of Consent Orders will reduce by devolving many minor complaints to a District Hearing as outlined in (2.3).
- 2.4.5 Council should be aware of and reaffirm from time to time the scale of fines proposed by the Professional Standards Office.

2.5 COSTS AGAINST AND FOR THE DEFENDANT MEMBER

- 2.5.1 If our disciplinary system is to follow the course of natural justice then in cases where a serious complaint has been made, i.e. served on a member by the Disciplinary Committee and where that complaint is subsequently dismissed, then the defendant member should have leave to appeal for costs incurred in maintaining his defence.
- 2.5.2 The disciplinary system seeks to provide a parallel with our legal system - except where stated to the contrary as in the case of evidence - and, as such, employs legally trained personnel within its administration and also to serve on Disciplinary Committee Hearing panels, including solicitors and ex-judges.
- 2.5.3 Where a member is found in breach of Bye-laws then besides a fine, costs are sought which it is understood are an accumulation of the deemed hourly rates of the people involved.
- 2.5.4 SPA feels that it is wrong if the disciplinary system was regarded as a self-financing cost centre, and suggests costs should never exceed half the fine, as it is the fine which measures the gravity of the offence.
- 2.5.5 In its recent survey SPA sought to understand the extent of such fines and costs imposed on its members, the majority of whose complaints were a first offence and fell into the technical category - additionally member's own costs in dealing with the complaint were identified. The results are tabled below:
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|--|---------------|------------------|
| • Range of fines | £250 - £2,000 | Average £800 |
| • Range of costs added | £100 - £2,000 | Average £600 |
| • Range of solicitors charges | £300 - £1,500 | Average £900 |
| • Range of personal time spent | 2 - 250 hours | Average 40 hours |
| • Indicated average cost to practitioner per complaint, assuming time @ £50 per hour | | |
| Without solicitor | £3,400 | |
| With solicitor | £4,300 | |
- 2.5.6 It can be seen that a member's involvement in even a minor technical complaint costs him or her very dear - a substantial amount when compared to annual fee income. And in 85% of the complaints made this was a first offence.

2.5.7 It is of note that although this is a quasi-legal process few members sought assistance or possible attendance of a solicitor. Two principal reasons may be given why:

- Few solicitors specialise in dealing with such complaints, for which it is held they must have considerable experience - if not our qualification - besides their legal qualifications.
- Solicitors are expensive and members commented that, given their lack of formal accountancy qualification, their presence was ineffective as they did not understand the technical issues involved.

2.5.8 Should a complaint against a member be listed for hearing by the Disciplinary Committee, he or she should be granted 2 hours free access to such a solicitor or expert, which free support would parallel that already given to a member in business.

2.5.9 Administrative cost should be much reduced by hearing minor complaints at District Hearings and the defendant member's associated costs similarly minimised.

2.5.10 The process of adding costs at all is debatable: in any event Council should be aware of the basis used for calculating costs by the Professional Standards Office, which should be reaffirmed from time to time.

2.6 PUBLICISING OF FINDINGS

- 2.6.1 Historically all findings have been published, and examples can be shown of minor complaints of a technical nature where no loss was occasioned, but where the member's dignity and personal affairs including private health matters are extensively exposed in tabloid glory.
- 2.6.2 Surely the only findings that should be published are those where the gravity of the offence merit such treatment, which criteria might include:
- This was not the first offence proven against the member
 - The offence was of substance and not a technicality
 - Dishonesty or substantial disrepute has occurred
 - The offence was in the public domain or disrespect was widespread
 - A real financial loss or breach of public trust has occurred.
- 2.6.3 SPA suggests that by allowing minor complaints to be resolved at a District Hearing no publicity should be accorded to such findings. Only a reduced number of Consent Orders and cases found proven by the Disciplinary Committee should be published.

2.7 JMU COMPLAINTS

- 2.7.1 It is understood that the Professional Standards Office is responsible for dealing with breaches reported by the Joint Monitoring Unit following its inspectors visits to members practices.
- 2.7.2 The range of penalties applied in respect of JMU breaches - restrictions on areas of work, external reviews, or further training courses - can be every bit as costly and damaging as those resulting from a minor technical breach. It appears the imposition of such penalties is at the behest of the Professional Standards Office alone without a hearing or appeal available to the member.
- 2.7.3 It is not understood how the application of such penalties for JMU breaches fits within the Bye-laws, or whether Council has approved the penalties that may be applied. Although not directly part of this review such processes are having the effect of weakening small practitioners resolve to maintain certain specialisms, notably auditing and investment business.
- 2.7.4 SPA suggests that such breaches and penalties be formalised within the processes outlined earlier. They should be subject to the same grading, hearing and appeal process as other minor or major breaches.
- 2.7.5 Council should be aware of the range of penalties other than fines and costs that are imposed by the Professional Standards Office for JMU breaches, and these should be reaffirmed by Council from time to time.

2.8 THE EFFECT OF COMPLAINTS ON THE DEFENDANT MEMBER

- 2.8.1 Before a complaint lands on a member's doormat, he or she may previously have had little direct contact with Institute personnel. Their professional record over many years may be spotless, and they may have a prominent position in their local community.
- 2.8.2 The present abruptness of a complaint's arrival engenders many very strong reactions amongst which may be incredulity, anger at the Institute, worry for their practices, concerns about their standing, anxiety about a possible public trial of their perceived offence.
- 2.8.3 SPA's survey found all these emotions are reflected to a lesser or greater degree - and in extreme cases have resulted in the equivalent of paranoia or depression. At stake is your pride and dignity, what you have worked for all your life and the belief that the Institute was supportive.
- 2.8.4 Clearly if the gravity of the complaint is sufficiently high it will not be a surprise to the member that they have been found out. However, where the issue is an inconsequential technical breach the personal damage can be deep and long lasting with members turning off from their Institute.
- 2.8.5 SPA feels that much of this anxiety and damage can be avoided through the process of District Hearings and Support Members in contact at the earliest stage.
- 2.8.6 The importance of the initial contact in such matters cannot be overemphasised - get it right and the member maintains his pride and belief, get it wrong and the member turns away from the Institute possibly for ever.