Softly, softly, catchee monkey

Patience, concern and good intentions should underpin dealings with regulators, says **John Gould**

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When a regulatory problem arises, the right approach to dialogue with the SRA can make all the difference.

As some recent high-profile cases show, it can be a mistake to treat a regulator as an opponent to be defeated by legal jousting. Aggressive correspondence taking marginal technical points may do more harm than good.

It may be attractive to attempt to rely on self-belief, bluster and effortless intellectual superiority, but such an approach may actually evidence a regulatory problem that is deeper than the immediate issue.

A regulator will always be thinking about the prospects for compliance in the future: denial of a problem suggests a higher risk that the same failure will happen again.

A conventional statement of the duty to cooperate with the SRA was made by Moses LJ in *Law Society (Solicitors Regulation Authority) v Emeana & Ors* [2013] EWHC 2130 (Admin): "Self-regulation of a profession requires those who hold themselves out as professionals to cooperate with regulators and give completely frank and honest answers when questioned." The word 'frank' in this passage is not a euphemism for hostile or aggressive.

'Obvious duty'

Sometimes a solicitor may feel a sense of grievance, which results in dealings with the regulator intended to make the regulator's life more difficult. On being directed to compensate clients for poor service, it may amount to misconduct to deliberately pay the wrong amount or require gratuitous and repeated confirmation of payment details.

The responsibility of a solicitor to comply promptly and efficiently with the proper requirements of the regulator has been described by the lord chief justice as an "obvious duty" (see *Re a Solicitor* (CO/0930/99)).

If misconduct is established, the disciplinary tribunal will need to consider the appropriate penalty. Published guidelines on factors to be taken into account on sentencing include a failure to cooperate with the regulatory process and the demonstration of remorse and insight.

Ill-advised aggressive correspondence may make a later Damascene conversion to contrition seem unconvincing.

The other side of the coin is that an open dialogue with the SRA may significantly reduce the penalty. For example, in *Re a Solicitor* (CO/2184/99)), a practitioner who carelessly but unknowingly employed a struck-off solicitor without permission was found guilty of misconduct.

However, the court on appeal substantially reduced the mandatory period of suspension: it had been clear from his communications with the SRA that the delay in remedying the position arose from an agreed approach to protect clients.

Derogatory correspondence

In *Edward Ellis v The Law Society* [2008] EWHC 61 (Admin), Leveson LJ considered the extent to which correspondence with the Law Society might amount to misconduct in itself:

"The remaining allegations relate to inappropriate, offensive and derogatory correspondence directed to and about the Law Society, FM, members of the judiciary and others.

"I find these more difficult because, at least in relation to the Law Society and the judiciary, it is necessary to approach the matter on the basis that a solicitor is entitled to hold strong views, however unpalatable others might find them to be, and, furthermore, the officials of the former and members of the latter must be and are equally robust in being able to ignore observations of an intemperate or even abusive nature. Disciplinary action of the type taken in this case should not normally follow for this reason alone.

"I recognise, however, that there must be a line beyond which such proceedings are justifiable and, perhaps, inevitable. It is trite to say that each case must depend on its own facts but the test might well be whether the level of abuse and obsession permeates the solicitor's approach to the real detriment of his client.

"After all, the reputation and integrity of the profession is essential to maintain public confidence in its ability to act in the very best interests of each client to the highest professional standard without being affected by extraneous issues."

This suggests an extreme in which exasperation with the regulator becomes almost a self-evident obsession and an end in itself.

Dealing with the regulator is not to be approached in the same way as the tough representation of a client. However hard, the best communications show patience, concern and good intentions. **SJ**