

INVESTIGATION AND DISCIPLINARY 101

INTRODUCTION TO THE DISCIPLINARY PROCESS OF THE SAIT

NOTE TO LEGAL REPRESENTATIVES:

The purpose of this document is to assist lay-persons who do not have any formal legal training to understand and deal with the investigative and disciplinary process of the Institute. A number of the basic legal principles that apply to the disciplinary process have been simplified in order to assist in explanation. Legal representatives should prepare their client's complaint/affidavit on the same basis as they would deal with an application in the High Court.

A. INTRODUCTION:

The South African Institute of Tax Professionals (hereafter referred to as the 'SAIT' or the 'Institute') is an Institute for persons engaged in professional tax services at various levels in the public and private sectors. We strive to afford our members a professional identity and to take such action as may be necessary to improve and sustain the status, professional image and conduct of our members.

The Institute is charged with a regulatory function of its members in terms of the provisions of the Tax Administration Act and its members also subscribe to a Code of Professional Conduct with regard to their conduct as tax professionals and/or tax practitioners. As such, the disciplinary process of the Institute is intended to regulate the conduct of members within their professional capacity as tax professionals and/or tax practitioners.

B. THE REGULATORY FUNCTION OF THE INSTITUTE:

The Institute does not act as an arbitrator of social conduct, morals and values and will in general not concern itself with the conduct of members outside of any professional engagements, except in exceptional circumstances where the conduct of the member, if left unchecked, may ultimately result in damage to the Institute's and/or its members' professional image and/or reputation.

The Institute exercises the function of a disciplinary body and not that of a civil court of law. Sanctions that are imposed are generally aimed at regulating the conduct of a member and, although the Institute is not prohibited from doing so, it will in general not entertain claims for damages suffered by a complainant as a result of the professional negligence of a member. The Institute will also not issue interdicts or protection orders with regard to the conduct of a member outside the scope of his professional engagements.

Complainants are advised to rather pursue claims for damages against a member via the Magistrate or High Court having jurisdiction in the matter.

C. HOW IS THE DISCIPLINARY PROCESS STRUCTURED:

The disciplinary process of the Institute is based on a three tiered structure comprising of an 'Investigation and Prosecution Committee', a 'Taxation Disciplinary Board' and a 'Taxation Disciplinary Board Appeals Tribunal'.

1. THE INVESTIGATION AND PROSECUTION COMMITTEE:

The Investigation and Prosecution Committee ('IPC') is mandated to take note of and investigate all alleged offences, acts of misconduct and breaches by members and affiliates falling under the jurisdiction of the Institute and has the authority to gather and order the production of all relevant information, records, books, documents (regardless of its form or format) and statements under oath, as well as to conduct professional evaluations and practice visits.

The Investigation and Prosecution Committee requires that all complainants must be submitted in the form of an affidavit in much the same manner as an applicant would approach one of the civil courts for relief. We will deal more fully with the requirements for such an affidavit later in this document.

Once the IPC has received a complaint the IPC will do a cursory evaluation of the relevant merits of the complaint. This is not a determination of the merits, it is merely a cursory evaluation to determine if, on the facts disclosed in the affidavit, it is possible to make a determination of any misconduct on the part of the member. If the IPC is of the view that the complaint does not disclose a basis for a finding of misconduct the complaint will be referred back to the complainant.

Once satisfied that there appears to be reasonable grounds for the complaint the IPC will advise the member concerned of the complaint and afford the member the opportunity of responding to the allegation(s) levelled against him by filing an answering affidavit. The answering affidavit is usually due within twenty-one (21) business days but further extensions may be provided for by the IPC.

Once received, the answering affidavit will then be made available to the complainant to allow the complainant to file its response in the form of a replying affidavit. What is important to note is that:

- a. This is not an opportunity for the complainant to rectify any defects or mistakes in its initial affidavit nor to raise new facts that it should have anticipated and disclosed in its initial affidavit. The complainant has first 'bite of the cherry' and the complainant's affidavit should set out the full basis of the complainant's case against the member.
- b. The purpose of the replying affidavit is to allow the complainant the opportunity to respond to any new facts or allegations made by the member in stating his version of events.

If the complainant does not file a replying affidavit, the complaint will then be considered on the basis of the facts not in dispute taken together with the probability of the version put forward by the member versus the probability of the version put forward by the complainant. It is strongly advised that the complainant should always consider filing a replying affidavit.

The complainant's (founding) affidavit, the member's replying affidavit and the complainant's replying affidavit together will constitute the basic record in front of the IPC together with such additional documents as the IPC may allow or deem relevant or necessary to the consideration of the matter. The filing of any further affidavits will not automatically be allowed unless leave to do so is granted by the committee.

The IPC will then consider the merits of the complaint based on the affidavits and documents on record and/or may call any person to appear in front of the IPC to give oral evidence or to produce any book and/or document in amplification or clarification of any issue to be determined by the IPC. The IPC may dismiss the complaint or issue an admonishment, reprimand, severe reprimand, fine, monetary penalty and/or suspend the member's membership, together with such further terms as the committee may deem necessary having regard to the nature of the offence. As of November 2015

the IPC has been vested with authority to also terminate member's membership of the Institute when the IPC deems it necessary to do so.

The IPC may also refer the complaint to the Taxation Disciplinary Board for further consideration and/or hearing of oral evidence.

2. THE TAXATION DISCIPLINARY BOARD:

The Taxation Disciplinary Board (TDB) is a more formal structure for dealing with complaints referred to it by the IPC, either for hearing of oral evidence or for consideration of more serious complaints that warrant the termination of a member's membership together with such referrals to SARS and/or the Prosecuting Authorities as may be dictated by the facts of each individual case.

The TDB is not obliged to hear oral evidence on any matter and the complainant's (founding) affidavit, the member's answering affidavit and the complainant's replying affidavit, together with such additional documents as the IPC referred to the TDB will constitute the initial record in front of the TDB.

The TDB shall further determine its own process as deemed relevant or necessary to the consideration of the matter.

3. THE TAXATION DISCIPLINARY BOARD APPEALS TRIBUNAL:

The Taxation Disciplinary Board Appeals Tribunal (TDBAT) is mandated to act as the independent disciplinary Appeals Tribunal for members found guilty of an offence and/or misconduct by the independent Taxation Disciplinary Board.

The Taxation Disciplinary Appeals Tribunal shall consider an appeal based on the record (or the relevant parts thereof) of the proceedings of the Taxation Disciplinary Board. New evidence shall only be entertained in the discretion of the tribunal and then only in exceptional circumstances.

The Tribunal may refer any matter back to the Taxation Disciplinary Board together with such instructions as it may deem fit or it may vary and/or substitute the order of the Taxation Disciplinary Board with such order as it may deem fit in the circumstances.

D. HOW TO PROCEED TO LODGE A COMPLAINT:

The Institute recognises the fact that that a balance needs to be maintained between the interest of the complainant and the interest of members of the Institute. The complainant needs to be provided with a method of addressing unprofessional conduct on the part of a member. At the same time the Institute has to be mindful of the fact that in many instances, membership of a professional controlling body is a requirement for practice as a tax practitioner and/or tax professional and that suspension or termination of membership can impact on a member's ability to earn an income. This may in turn have a negative effect on a members dependants, staff and their dependants.

In order to address this concern and to ensure a balance of interest and that complaints are dealt with as effectively as possible, the Institute subscribes to a formal disciplinary process that is modelled on the procedural requirements set forth in the rules of the High Court of South Africa, with the necessary modification to facilitate the disciplinary process.

Before starting to draft the complaint, we suggest that you first refer to the guidelines set out below as to process and the content of the complaint.

1. DETERMINE JURISDICTION:

The first step in the process is to ascertain whether the tax professional / tax practitioner against whom the complaint is to be lodged is in fact a member of the Institute since the Institute will only be able to consider complaints against members. This can easily be ascertained by directing a query to the membership department of the Institute. Queries may be directed to Me Sindy du Pont by telephone at 0861 777 274 (select option 1) or by email to info@thesait.org.za. Please note that the membership department will only confirm membership and that no further particulars with regard to a member will be provided.

2. DETERMINE THE NATURE OF THE MISCONDUCT AND WHETHER IT IS ATTRIBUTABLE TO THE MEMBER:

Once the tax professional / tax practitioner has been properly identified and it has been confirmed that the tax professional / tax practitioner is in fact a member of the Institute, it is then necessary to

determine the exact nature of the misconduct with reference to the Code of Conduct, Taxation Standards (if applicable) and the Disciplinary Rules of the Institute.

The complainant will be required to provide the IPC with a listing of the provisions of the Code of Conduct and/or Disciplinary Rules and/or Taxation Standards that the complainant alleges the member breached and/or contravened together with a brief summary as to the complainant's reasons for such submission.

Once the exact nature of the alleged misconduct has been determined it is then necessary to determine whether the conduct can in fact be attributed to the member. For example: the member may be employed by a company with whom the complainant contracted for the provision of professional services. Should a dispute arise between the complainant and the company with regard to the processing of debit orders from the complainant's bank account and which fall outside the control or influence of the member, then it will be a dispute between the complainant and the company that is not directly attributable to any misconduct by the member. In such an event the Institute will be limited in its ability to act against the member (if at all).

Once you have confirm that the practitioner is a member of the Institute and that the misconduct can be attributed to the member, the next step would be to proceed to prepare and submit your complaint.

3. DRAFT THE FOUNDING AFFIDAVIT SETTING OUT THE MERITS OF THE COMPLAINT:

The merits of the complaint has to be set out in an affidavit. For guidelines, hints and tips on how to approach the drafting of such an affidavit and what to include therein, please refer to Annexure A below.

4. FORMAT OF THE COMPLAINT AND PROCEDURAL COMPLIANCE:

In order to facilitate that complaints are dealt with in a structured manner the committees rely to a large extent on the format and principles that have crystallised out of the civil practice and procedure in the High Courts of South Africa.

The Institute requires that all complaints must be made a) under oath, b) in writing and c) in accordance with the guidelines set down by the disciplinary structures of the Institute from time to time:

1. As far as possible, a complaint shall be printed (or legibly typewritten) in black ink on white A4 paper with a font of 12pt and line spacing of 1.5 or 2. Provision should be made for a left margin of at least 3 cm, and bottom, right and top margins of 2.5 cm.
2. The complaint must be in the form of an affidavit. An affidavit has to be signed in front of a Commissioner of Oaths and conclude with a paragraph along the following lines:

"I hereby certify that the deponent states that he/she understands the content of this affidavit, confirms the content as true and correct and has no objection to taking the oath, the provisions as set out in Government Notice Number R1648 of August 1977, as amended, have been complied with."

3. As far as it is possible, divide the content of the affidavit into paragraphs (including subparagraphs) which shall be consecutively numbered and shall, as nearly as possible, each contain a distinct averment. Please provide sufficient particularity to enable the opposite party to reply thereto.
4. Where reference is made to external documents, copies of the documents should as far as possible be attached to the affidavit and consecutively identified eg: Annexure "A", Annexure "B", etc. Keep in mind that you may be requested to produce the original documents for inspection at a later date.
5. If a document that you refer to is voluminous, please try to assist the Institute as far as possible by indicating in your affidavit to what area of the document you are specifically referring to or relying on eg: ".....Annexure A, paragraph 5, on page 6 thereof."
6. Once your affidavit and its annexures are complete, please number all the pages on the top right hand corner from the first page to the last page. This will assist us in working with the document and to monitor that essential pages are not inadvertently lost or misfiled during the process.

7. Lastly, and as far as formalities are concerned, please remember to provide us with sufficient contact particulars to enable us to correspond with you. At the very least we require a telephone number, fax number and e-mail address and our preferred method of communication is by way of e-mail.

Complaints that fail to comply with the above criteria will automatically be rejected.

5. SUBMIT THE COMPLAINT:

The following documents are to be submitted to the Institute:

- a. The Referral of Complaint and Undertaking by Complainant (IPC01A).
- b. The signed checklist (IPC01B).
- c. The affidavit setting out the merits of the complaint, duly deposed to.

The complaint may be scanned and submitted to the Institute as a 200dpi, black and white PDF document to: cvandyk@thesait.org.za. If your complaint is too large for email, you are welcome to split the document into three or four parts by separate email provided that the parts are clearly identified, e.g. answering affidavit, part 1, etc. Please do not send us your affidavit with each annexure as a separate annexure.

Copies of the complaint can also be delivered to the Pretoria office of the Institute.

E. FURTHER PROCESS AND CONSIDERATION OF THE COMPLAINT:

Against receipt of a complaint the complaint will first be evaluated for compliance in terms of the procedural guidelines set out in the previous section above. Any complaint that does not comply with the required guidelines will be referred back to the complainant for rectification unless there are grounds for urgency and or justification for deviating from the normal process.

Should the complaint substantially comply with the procedural guidelines as set out above, the complaint will then be evaluated to determine whether the complaint is to be dealt with by the

disciplinary committees in the normal course of events or whether it is necessary to deviate from the normal process and proceed with the complaint on an urgent and/or expedited basis. The further process for dealing with matters on an expedited or urgent basis falls outside the scope of this document.

The complaint will then be placed on the agenda for the first meeting of the IPC. The IPC will conduct a cursory evaluation of the complaint to determine whether sufficient information is provided so as to support a finding of misconduct. This is not a consideration of the merits of the complaint but serves to determine whether a proper case is made out in the complaint itself.

The complaint will then be forwarded to the member to afford the member the opportunity of answering to the allegations put forth by the complainant in the complaint. The same procedural requirements as set out in the previous section apply to any Answering Affidavit prepared by or on behalf of a member. In general, a member will be afforded a period of 21 working days in which to submit his or her Answering Affidavit but further extension may be provided by the committees at the latter's discretion.

Should the member fail and/or refuse to file an Answering Affidavit, the complaint will then automatically be considered by the relevant committee at its next sitting based on the documents then filed on record being the complaint and any ancillary documents in front of the committee such as the member's Membership Profile and CPD record.

Following receipt of the member's Answering Affidavit the answering affidavit will then be forwarded to the complainant to allow the complainant to comment thereon and to respond to any new facts or disputes raised by the member in the Answering Affidavit. This is not an opportunity for the complainant to bring new issues to the table but for the complainant to be able to respond to new facts and/or allegations that was not dealt with by the complainant in the initial complaint (Founding Affidavit). Complaints are generally requested to respond by way of Replying Affidavit within 15 working days but again, further extension may be provided by the committees at the latter's discretion.

Should the complainant fail and/or refuse to file a Replying Affidavit, the complaint will then automatically be considered by the relevant committee at its next sitting based on the documents

then filed on record being the complaint, answering affidavit and ancillary documentation such as the member's Membership Profile and CPD record.

Following receipt of the complainant's Replying Affidavit the complaint will then be placed in front of the relevant committee for consideration. The committee may then consider the complaint based on the record or may request any party to provide further particulars and/or additional documentation or to provide oral evidence as determined by the committee in order to consider the matter.

Following consideration of the matter by the committee the parties shall then be advised in writing of the outcome thereof.

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ANNEXURE A

SUGGESTIONS, TIPS AND HINTS FOR DRAFTING AFFIDAVITS

We understand that it is not always easy for a lay-person to formulate his or her complaint and that people are not always certain on how to go about the process. With this in mind we provide the following guidelines and suggestions that may assist to clarify the process.

A. THE FOUNDING AFFIDAVIT:

1. INTRODUCTION:

The complaint (Founding Affidavit) is where the complainant sets the stage for the basis of his/her complaint. This also serves as the main source of information on which the disciplinary structure of the Institute relies when having to evaluate and determine whether a member is guilty of any misconduct or not.

The complaint represents the first and only opportunity for the complainant to place his version of events on record and it is of critical importance that the complainant ensures that he deals with all the relevant facts and background relating to the matter. Although the complainant will have the opportunity to respond to later allegations by the member the complainant will not be allowed to then bring new facts or allegations to the table and he/she will be limited to the case that he/she made out in the initial complaint (Founding Affidavit).

In essence then, the formulation of the complaint provides the complainant with his/her first and only 'bite of the cherry' and the content and the formulation of the complaint will predominantly determine the ultimate success of the complaint, obviously having regards to the full record of the matter at the time.

In the following paragraphs we will set out some of basic principles that a complainant can follow when drafting his/her complaint.

2. PROVIDE A PROPER AND COMPREHENSIVE FACTUAL BASIS FOR THE COMPLAINT:

All too often the Institute is presented with a bare chronology of events together with a seemingly random concoction of email correspondence and extracts from sms's and whatsapp messages. This is usually accompanied by a covering letter where the complainant states his own conclusions such as:

- a. He wants the member to be found guilty of unprofessional conduct;
- b. He wants the member to be suspended or membership terminated;
- c. He wants to be reimbursed for his "damages"; and
- d. He demands all manner of formal statements from the Institute deploring the conduct of the member.

No background or context is provided to substantiate the complainant's conclusions. Similarly, the multitude of annexures is simply there and the complainant expects the Institute to do his work for him by sifting through numerous documents in a search for any nuggets of 'evidence' supporting his conclusions.

It is highly unlikely that an applicant will attempt to approach the High Court in such a manner and expect any measure of success and the same applies to the investigative and disciplinary process of the Institute. The Institute cannot do a complainant's work for him and a complaint as referred to above will either be rejected out of hand as being without merit or referred back to the complainant.

Remember, it is the duty of the complainant to provide the Institute with the full factual basis of the complaint and all supporting evidence on which the complainant relies so that the Institute can consider the complaint and make an initial evaluation as to the merits based on the complaint itself. This will also assist the Institute at a later stage to determine whether the complaint should be referred to a disciplinary hearing or not.

We cannot place enough emphasis on the importance of preparing a proper and comprehensive founding affidavit setting out all the facts relevant to the matter. Remember, as we have stated above, the complainant will generally not be allowed to rectify any defects in his initial affidavit or to place facts on record by way of further affidavits that he should have placed on record in his initial affidavit.

In general, a complaint will stand or fall based on the strength of the initial (founding) affidavit.

Another common mistake by complainants is to assume that their audience has the same knowledge of the matter as they do. They assume knowledge of facts when in reality, their audience has absolutely no knowledge of the matter whatsoever.

Consider the investigative and disciplinary committees to be your audience. It's very similar to writing a book. You want to peak the readers interest in the story and get them to read further. You want them to sympathise with the victim and rage against the villain. You don't want them to get frustrated or bored and put the book down. To do this you need to tell your story in a structured and logical manner. To take a page from 'Alice in Wonderland', you tell a story by starting at the beginning, then the middle and finally progressing to the end.

Still dealing with the analogy of a story or a book. If you were to start and conclude with "and they lived happily ever after" it will be highly unsatisfactory to your audience. By the same token, if you were to start in the middle of the murder scene, your audience will be left totally confused since they will have no idea as to who the main characters are, what the major plot line is and how the events came to pass.

The same principles apply when drafting your complaint. Start from the basic assumption that your audience has absolutely no knowledge whatsoever of the facts of your particular complaint – because in reality, they don't.

We are going to illustrate the point in the following paragraphs by continuing the analogy of a story book or novel:

- a) The first thing that you want to do is to sketch out the main characters. Tell the audience who you are and what it is that you do. Remember, they don't know you from Adam and you will probably not meet them in the initial phases of the process so you want them to be able to form an idea in their minds as to who you are.
- b) The same applies to framing the other characters in the story. You need to provide the necessary detail as to the other characters. For the complainant it will be the member against who he is complaining. We need to know who he or she is and his/her practice

details. This will save time, especially where we have members with similar names or practices. Help us by eliminating cases of confused or mistaken identity.

- c) Now that you have the main characters on record, briefly tell us what the story is about. Is it about unprofessional conduct? Is it about misappropriation of funds? Is it about retention of documents? A general summary will do, we just want to know what the story is about – you will set out the detail of the story later.
- d) However, a word of caution. It is not going to be sufficient to say that you feel the member is guilty of unprofessional conduct. You will have to specify what unprofessional conduct he is guilty of and give a brief summary of the reasons why you say that the member is guilty of unprofessional conduct and then expand on these reasons in the main body of your complaint.
- e) The next step is to give us the background to the story. You need to set the scene. So many complainants jump to the statement that "...he failed to submit my tax return." To which the appropriate response should be "so what?" They completely forget to tell the committee why the member was supposed to submit the tax return in the first place. It comes back to the mistake of assuming that the audience has the same knowledge as the complainant of the matter.
- f) A much better approach would be to tell the committee how and when you and the member became professionally engaged. You obviously had to come to some agreement as to the professional services that the member was to provide and when and how and how much he was to be paid for his services. You probably agreed on areas of responsibility and other items such as retention of documents, provision of information, guarantee as to the accuracy of the information that you provide etc. If this was verbal then you need to give us the details of this verbal agreement. If it was in writing, so much the better – attach a copy of the agreement to the complaint.
- g) The next step would then be to deal with the detail of the conduct that you are complaining about. By way of illustration: Let's say that one of the terms that you agreed on was that the member would submit your tax returns to SARS. The member failed to do so and you now wish to lodge a complaint.

- i) You need to lay the basis as to why you say that the member acted wrongly or negligently.
- ii) Let's assume you only make the barest of submissions. If the member responds by saying that yes, he did not file your return but that he couldn't do so because you failed to provide him with any of the documents and/or information that he required to do so, despite numerous requests to you – then the probabilities mitigate in favour of the member. It also creates a factual dispute that, if left unresolved, may lead to the complaint being dismissed.
- iii) You will then be left to attempt to salvage matters by adding new information in a further affidavit which may not necessarily be allowed. This places you at a disadvantage since the duty is on you to make out a proper case in your initial complaint.
- iv) However, let's assume that you provided proper context as we suggested above. You sketched the basis of the engagement with the member and that he assumed responsibility to prepare and submit your return. You then provided the details of your correspondence with the member with regard to the preparation and submission of the return. You confirm that you timeously provided him with all necessary documentation and information that he required and that basically, you have complied with all your obligations and duties viz the engagement.
- v) Unless the member can provide a plausible / probable contradictory version for his failure – the facts now mitigate in your favour.
- vi) Remember. As complainant your initial affidavit is your first and best 'bite at the cherry'. Make certain that you make it count.
- h) Just to recap. The committee now knows who you are and who you are complaining against. You have provided the background of your engagement and the respective duties and obligations of the parties. You have specifically dealt with the duty of the member that he failed to exercise and that you are complaining about and you have provided the committee with the detail as to your compliance and all the steps that you have taken

from your side in 'support' of this duty of the member. Lastly, you have dealt with the member's failure to do his duty or to exercise reasonable care.

- i) The next step would be to deal with the consequences of the failure or conduct of the member. Again, don't fall into the trap of assuming knowledge of the matter on the part of your audience. Give detail as to the consequences and try to separate the damages into categories eg. penalties incurred, wasted costs to have work redrafted, fees paid for no service etc.
- j) Please provide supporting documentation and also provide a detailed breakdown of how any amounts are calculated. Remember to separate penalties or amounts that you would in any event had to pay (if any) from the penalties and amounts that are attributable to the conduct of the member. The Institute will only concern itself with the latter and it is very frustrating to be faced with a jumble of irrelevant information.
- k) We suggest that you follow a structure similar to the following (although any logical breakdown will be acceptable):

...Penalties in the amount of R###, made up and calculated as follows:

- ### (See Annexure #) R###;
- ### (See Annexure #) R###

- l) The same breakdown as set out above can be used for fees paid for services (not rendered, fees paid to have the work redrafted etc. It helps the investigative and disciplinary committees to evaluate the complaint in a structured and logical manner.
- m) You then conclude with the relief that you prefer. It is not to say that it will be granted since the relief provided will depend on the merits of the specific matter. You may request that the member's membership be terminated while the committee may only impose a reprimand or a fine. You may request damages whereas (as stated above) the committee may refer you to pursue damages via a civil court of law. However, where possible, it assists the committees in evaluating the complaint and an appropriate sanction.

At this point in time it is perhaps necessary to say something about annexures and supporting documentation.

3. ANNEXURE'S AND SUPPORTING DOCUMENTATION:

Keep in mind that the complaint (Founding Affidavit) essentially constitutes evidence in front of the disciplinary committees as if you are providing oral evidence. In order to lend credibility to your version of events it is important that you support your version with documentary evidence where available. A version supported by external written documents generated by the parties during the course of events is much more credible than a version without any supporting documents whatsoever.

When you refer to a document, clearly identify the documents for example, "... email dated 28 March 2015." Reference the documents in sequence for example as Annexure A or Annexure B and remember to also mark the specific document according to the reference. This assists the committee to identify the documents that you refer to.

If you are dealing with lengthy Annexure's such as a long letter or a contract then it is always helpful to indicate the specific paragraphs or page that contain the information that you are relying on for example, "... Annexure A, paragraphs 5 and 7 on page 2 thereof." It assist the committees in identifying the relevant portions of the Annexure's without having to read through lengthy and irrelevant documents.

It is always a beneficial if there are third parties who can confirm your version of events. Where certain discussions or conduct took place in front of such third parties and you refer to them, it is ideal to attach a confirmatory affidavit from such 3rd party where in the third party confirms that he has read the content of your complaint and that he confirms the content thereof as far as it relates to him or her.

4. FURTHER PROCESS AND CONSIDERATION OF THE COMPLAINT:

Following completion of the internal process for considering the relative merits of a complaint, as have been set out above, the Founding Affidavit (complaint) will be forwarded to the member to afford the member the opportunity of answering to the allegations put forth by the complainant in the Founding Affidavit.

B. THE ANSWERING AFFIDAVIT:

1. INTRODUCTION:

The same principles, procedure and formalities that apply to the drafting of the Founding Affidavit also apply to the preparation and drafting of the Answering Affidavit.

The Answering Affidavit represents the first and only opportunity for the member to place his version of events on record. It is therefore critical that the Answering Affidavit deals with all the relevant facts and background relating to the matter as well as the specific content of the Founding Affidavit.

In essence then, the formulation of the Answering Affidavit provides the member with his/her first and only 'bite of the cherry' and the content and the formulation of the Answering Affidavit will predominantly determine the ultimate success of the member in resisting the complaint against him or her, obviously having regards to the full record of the matter at the time.

In the following paragraphs we will set out some basic principles that a member can follow when drafting his/her Answering Affidavit.

2. PROVIDE A PROPER AND COMPREHENSIVE FACTUAL BASIS:

Please refer to what has been set out above with regard to the formulation and content of the complainant's Founding Affidavit. The same principles will apply to the drafting of the Answering Affidavit.

All too often the Institute is presented with a bare denial of events together with a mix of seemingly random email correspondence and extracts from sms's and whatsapp messages. No background or context is provided to substantiate the member's denials and the member expects the Institute to do his work for him by sifting through numerous documents in a search for any nuggets of 'evidence' supporting his denials.

As we mentioned earlier in this document, it is highly unlikely that a person will attempt to approach the High Court in such a manner and expect any measure of success and the same applies to the investigative and disciplinary process of the Institute. The Institute cannot do a member's work for

him and an Answering Affidavit as referred to above will either be rejected out of hand as being without merit or referred back to the member.

When considering a complaint regard is had to the probability of the complainant's and the member's versions. In considering this regard is had to, inter alia:

- a) The facts that are common cause between the parties and/or not in dispute.
- b) Taken together with the facts contained in the Answering Affidavit that are admitted and/or undisputed.

Having regard to the above we cannot place enough emphasis on the importance of preparing a proper and comprehensive Answering Affidavit setting out all the facts relevant to the matter. As per the analogy of the storybook as set out above:

- a) Don't make the mistake of immediately dealing with the content of the Founding Affidavit. The first thing that you want to do is to tell the reader who you are and what it is that you do. Remember, they don't know you from Adam and you will probably not meet them in the initial phases of the process so you want them to be able to form an idea in their minds as to who you are.
- b) Now that we know who you are, provide the background by setting out your version of events. The complainant has set out his or her version of events which may or may not correspond with your own version of events. Commit your version of events to record.
- c) Remember, don't fall into the trap of trying to be too cryptic. This is your one opportunity to take the committee into your confidence and to provide a detailed explanation as to your version of events and why you say that you are not guilty of unprofessional conduct and/or professional negligence as alleged by the complainant.
- d) Please refer to the example that we used in Section A2 paragraph g, i – vi.
- e) Having set out your properly motivated and supported version of events, you then deal with the content of the complainant's Founding Affidavit. Remember that any allegation

made by the complainant that is not denied by you in your Answering Affidavit will be deemed to have been admitted. The best way to prevent your accidentally omitting to deal with something is to deal with the allegations on a paragraph per paragraph basis. Remember to provide a heading so that the reader can ascertain which paragraphs you are dealing with. For example: “Regarding paragraph 1 thereof:” If convenient you can also deal with paragraphs as a group eg “Regarding paragraphs 1 to 6 thereof:”

- f) If you agree with the content of a paragraph or group of paragraphs, then you can simply state that it is admitted or that you agree with the content thereof. If you only partially agree with the content of a paragraph or group of paragraphs then state what you agree with and then deal with the portion that you do not agree with. If you do not agree at all then state that you do not agree and why.
- g) Be careful of a bare denials unless you have clearly dealt with the facts in dispute when setting out your own version of events. Even then it is better to say that you do not agree and then briefly refer to the relevant paragraphs of your version if possible. You don't have to retype your whole version at every juncture – that is the reason you deal with it up front. It makes traversing the paragraphs of the Founding Affidavit much easier.

3. ANNEXURE'S AND SUPPORTING DOCUMENTATION:

As with the Founding Affidavit, the Answering Affidavit essentially constitutes evidence in front of the disciplinary committees as if you are providing oral evidence. In order to lend credibility to your version of events it is important that you support your version with documentary evidence where available. A version supported by external written documents generated by the parties during the course of events is much more credible than a version without any supporting documents whatsoever.

When you refer to a document, clearly identify the documents for example, “... email dated 28 March 2015.” Reference the documents in sequence for example as Annexure A or Annexure B and remember to also mark the specific document according to the reference. This assists the committee to identify the documents that you refer to.

If you are dealing with lengthy Annexure's such as a long letter or a contract then it is always helpful to indicate the specific paragraphs or page that contain the information that you are relying on for

example, "... Annexure A, paragraphs 5 and 7 on page 2 thereof." It assist the committees in identifying the relevant portions of the Annexure's without having to read through lengthy and irrelevant documents.

It is always a beneficial if there are third parties who can confirm your version of events. Where certain discussions or conduct took place in front of such third parties and you refer to them, it is ideal to attach a confirmatory affidavit from such 3rd party where in the third party confirms that he has read the content of your affidavit and that he confirms the content thereof as far as it relates to him or her.

4. FURTHER PROCESS AND CONSIDERATION OF THE COMPLAINT:

The Answering Affidavit will be forwarded to the complainant to afford the complainant the opportunity of answering to the allegations put forth by the member in the Answering Affidavit.

The same procedural requirements as set out in the previous section apply to any Replying Affidavit prepared by or on behalf of a complainant.

C. THE REPLYING AFFIDAVIT

Following receipt of the member's Answering Affidavit the Answering Affidavit will then be forwarded to the complainant to allow the complainant to comment thereon and to respond to any new facts or disputes raised by the member in the Answering Affidavit.

This is not an opportunity for the complainant to bring new issues to the table but for the complainant to be able to respond to new facts and/or allegations that was not dealt with by the complainant in the initial complaint (Founding Affidavit).

The same principles as set out above when dealing with the content of the Answering Affidavit also apply to the content of the Replying Affidavit.

It is not necessary for a complainant to repeat the allegations that it set forth his or her Founding Affidavit to the extent that the member denies the content thereof. However, where the member brings new facts or allegations to the table that have not been addressed in the Founding Affidavit, it

is necessary for the complainant to respond thereto, even if it is just to note that the new fact or allegation is denied to the extent that it is in conflict with the complainant's initial version.

Should a complainant fail to deal in Reply with any new fact or allegation raised in the Answering Affidavit then such fact or allegation shall be deemed to have been admitted in the same manner as if the member should fail to deal with any allegation made in the Founding Affidavit.

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