



Effective Caucusing



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Introduction

- Holding an effective caucus is an art.
- Effective caucusing is a key part of adjudication but historically has received little attention in training.

Effective Caucuses

- Three benefits of an effective caucus:
 1. Creates high-quality decisions.
 2. Leaves all Hearing Committee members engaged.
 3. Serves as a springboard for developing strong written reasons.

Ineffective Caucuses

- By contrast, an ineffective caucus:
 1. May lead to wrong decisions.
 2. Does not take advantage of multi-person tribunals and multiple perspectives on the tribunal.

Ineffective Caucuses continued

3. May create dissatisfaction among Hearing Committee members who may feel like they weren't heard.

4. Is of little value in developing the written reasons.

The Role of the Chair

- The Chair of the Hearing Committee runs the hearing but the Chair's work in facilitating an effective caucus is equally important.

Methodology

- There is no absolute right or wrong way of holding a caucus.
- Different chairs and Hearing Committees will have different styles.
- However, the proposed structured methodology is rigorous and a valuable tool in having an effective caucus.

Methodology continued

- Some experienced Hearing Committees will adopt a less structured approach.
- But a structured methodology ensures nothing is missed.
- Try the structured methodology and then you can adjust the process to whatever approach works best for you.

Suggested Steps

- The steps are based on experience as adjudicator and role as independent legal counsel to tribunals.
- Also based on experiences and tips from other experienced adjudicators.

Pre-Caucus Tip

- Do not engage in in-depth discussions until case is finished
- Be cautious about discussing the case with the Hearing Committee members prior to the end of the case.

Pre-Caucus Tip continued

- If you engage in in-depth discussion at breaks or lunch prior to the conclusion of the case, you may begin to form conclusions before you have heard the whole case.

Step 1: Getting Started

- The Panel Chair needs to lead caucus discussions while ensuring that all members of the Hearing Committee have an opportunity to contribute.
- The Panel Chair should propose at the outset of the caucus a method of proceeding and reach agreement on the process.

Step 1 continued: Getting Started

- Don't be rushed. Take as much time as you need to make an effective decision.
- If the parties are waiting for a decision and it will take some time, send the parties home and tell them to come back at some later time.

Step 1 continued: Getting Started

- Do not immediately vote at the start of the caucus session.
 - If you do so, then you are casting your vote before the benefit of discussion with your colleagues on the Hearing Committee.
 - If you declare yourself at the start, you may be reluctant to later change your mind.

Step 2: Issue Identification

- Identify with precision the specific issues that must be addressed under each Citation.
- A flip chart or white-board may be useful for this purpose.

Step 2 continued: Issue Identification

- Start the session by reviewing again the specific Citations.
 - This helps orient the Hearing Committee to its work and helps identify issues.
 - Sometimes during hearings the evidence is wide-ranging and Hearing Committee members can sometimes lose sight of the particular issues that must be adjudicated.

Step 2 continued: Issue Identification

- Review the opening statements and closing argument .
- Review the defences raised by the investigated lawyer.

Step 3: Identify Key Evidence

- Review and discuss the evidence of each witness one by one.
- Hearing Committee members should review their notes from the evidence, focusing on the testimony that they had identified as being particularly important.

Step 3 continued: Identify Key Evidence

- The Hearing committee members should then discuss their impressions of the witnesses.
- You should then summarize under each issue the key evidence from each of the witnesses.

Step 3 continued: Identify Key Evidence

- Finally, review the documents marked as Exhibits and identify under each issue any documents that are particularly important.

Step 4: Resolve Necessary Credibility Issues

- Identify where there are credibility issues that need to be resolved.
- In other words, where witnesses testify to different versions of events, what version of events the Hearing Committee will accept.

Step 4 continued: Resolve Necessary Credibility Issues

- However, appreciate that not every dispute about what happened needs to be resolved. Hearing Committees only need to rule on different versions of events in cases where it is necessary to do so in order to determine whether the allegations are proven.

Step 4 continued: Resolve Necessary Credibility Issues

- In assessing the credibility of witnesses, Hearing Committees should consider the traditional credibility factors addressed in the “Fundamentals of Law Society Discipline Hearings” video. Not all factors will be relevant in all cases.

Step 4 continued: Resolve Necessary Credibility Issues

- The Chair should be taking notes of the factors the Hearing Committee members consider important in determining which evidence to accept. These notes will later be invaluable as the Chair begins to draft the Hearing Committee's written decision.

Step 5: Ask the Most Important Question

- The single most important questions Hearing Committee members can ask each other in caucus is “Why?”

Step 5 continued: Ask the Most Important Question

- Examples of “Why” questions:
 - “Why do you believe the member is guilty of allegation number one?”
 - “Why do you believe Joe’s testimony?”
 - “Why don’t you think that what the lawyer did constitutes conduct deserving of sanction?”

Step 5 continued:

Ask the Most Important Question

- This type of dialogue will assist in good decision-making and will help identify the rationale of the written decision.

Step 5 continued:

Ask the Most Important Question

- It is also important to understand the difference between a “conclusion” and “reasons.”
 - Your written decision must include both “reasons” and your “conclusions.”
 - The conclusion is whether the investigated lawyer is found guilty or not guilty of the allegation. The conclusion is your destination.

Step 5 continued:

Ask the Most Important Question

- The “reasons” are the journey; how you got from “A” to “B.” The “reasons” are the rationale for your “conclusions.”
- The written decision needs to explain the Hearing Committee’s reasoning process

Step 6: Final Review of Arguments

- Review the arguments presented by LSA counsel and the lawyer's counsel one more time to ensure that all major arguments have been considered and addressed by the Hearing Committee.

Step 7: Arrive at Conclusion

- Once all the above steps are complete, go through the Citations one by one.
- Strive for consensus in your decision making but if a consensus is not possible, then the majority governs.

Step 7 continued: Arrive at Conclusion

- Determine if there is a consensus on factually what took place with respect to the Citation.
- Determine if the LSA counsel has proved the factual elements of the allegation.

Step 7 continued: Arrive at Conclusion

- Determine if the Hearing Committee is satisfied that the factual conduct in the allegation constitutes “conduct deserving of sanction.”
- Be aware of the definition of “conduct deserving of sanction” in section 49 of the Legal Profession Act.

Preparing the Report of the Hearing Committee

- Typically, the Chair will prepare the draft decision for the consideration of the Hearing Committee.

Preparing the Report of the Hearing Committee continued

- If the methodology outlined above has been followed, then the Chair will already have a summary with the following information for each Citation:
 1. Identification of key issues.
 2. Summary of key documents.
 3. Summary of key documents.

Preparing the Report of the Hearing Committee continued

4. Credibility findings and relevant factors considered.

5. Findings of fact and whether Hearing Committee accepts that factual allegation in the Citation is proven and why.

6. Conclusions on whether factual findings constitute conduct deserving of sanction and why.

Preparing the Report of the Hearing Committee continued

- With this summary, the Chair can easily begin to craft draft reasons for each Citation for the review of the other Hearing Committee Members.

Conclusion

- That is how an effective caucus leads to high-quality decisions through a rigorous review of evidence and argument and by engaging the talent and perspectives of all the Hearing Committee members.
- An effective caucus serves as a “springboard” to well-written reasons.