Law Society of Alberta

Hearing Guide

February 2013

Format updated April 2016

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Hearing Guide

I. The Nature of this Guide

1. This guide addresses matters which commonly arise during the course of conduct hearings. It is intended to guide and assist all of those involved in the hearing process to identify, understand and apply the relevant principles.

2. The guide begins with procedural guidelines which set out the basic procedure to be followed in every hearing, as prescribed by the *Legal Profession Act* and the Rules of the Law Society.

3. The guide then addresses issues which can arise in certain hearings (adjournments, proceeding in the absence of the member, amending the citation and so on). The relevant rules and/or practices are identified and summarized.

4. The guide then addresses the issues of burden and standard of proof, what is conduct deserving of sanction and the sanctioning (sentencing) process. In general, the material set out in these sections consists of principles set out in case law, the Code of Conduct, the *Act*, legal publications and related material.

II. Procedural Guidelines

A. Preliminary Matters

References: *Legal Profession Act*, R.S.A. 2000, c. L-8 (Part 3).
Rules of the Law Society (Part 3).

5. **Quorum.** A Hearing Committee may consist of one current or former Bencher (s. 60(3)) or three or more persons, one of whom must be a Bencher or former Bencher (s. 59(1)(b)). If, after the commencement of a hearing, one or more of the members are unable to continue, the remaining members of the Hearing Committee may continue to act if at least two members, including a Bencher or former Bencher, remain (s. 66(3)).

6. **Representation.** The member and the Law Society may be represented by counsel (s. 64). The Chair should determine if the member has counsel, does not want counsel or wants an adjournment to obtain counsel. If the member does not have counsel, the Chair should confirm that the member has received a copy of the list of counsel willing to act for members before Hearing Committees on a pro bono basis.

7. **Jurisdiction.** For the purposes of establishing jurisdiction, counsel for the Law Society submits the following exhibits:

   a) Letter(s) of Appointment.

   b) Notice(s) to Solicitor.

   c) Notice to Attend (to Solicitor).

   d) Certificate of Standing of Member.

e) Certificate of Exercise of Discretion pursuant to rule 96(2)(b) which says that the Executive Director may give a private hearing application notice prior to the commencement of the hearing to any person "who in the Executive Director's opinion is or may be an interested party."

f) Affidavit(s) of Service on Interested Parties plus any other exhibits that have been agreed upon by counsel for the Law Society and counsel for the member, including, where applicable, an agreed statement of facts or a statement of admission of guilt.

8. **Bias.** At the hearing, member's counsel should be asked if there is any objection to the membership of the Committee based on an apprehension of bias or for any other reason. If there is an objection, the Hearing Committee member should not disqualify herself or himself unless reasonable grounds exist.

a) An allegation of bias which is raised before the commencement of the hearing is to be dealt with by the chair of the Conduct Committee (s. 59(5)(a)).

b) An allegation of bias which is raised at or after commencement of the hearing, is to be dealt with by the Hearing Committee unless the Hearing Committee refers the matter to the chair of the Conduct Committee (s. 59(5)(b)).

c) Where the chair of the Conduct Committee is of the opinion that there are reasonable grounds for so doing, he/she may revoke the appointment of a member of a Hearing Committee before or during a hearing, and may appoint a replacement for a member of a Hearing Committee who ceases to be a member or whose appointment is revoked (s. 59(4)).

9. **Open Hearing.** When the hearing commences, the Chair shall invite applications to have the whole or part of the hearing in private (r. 98(1) and s. 78(2)).

a) In the interests of transparency, hearings should be open to the public – except to the extent required to protect compelling privacy interests.

b) To the extent possible, an application for a private hearing should be made in public, with the applicant providing a general outline as to why the hearing should be held in private.

c) Protection of legal privilege and solicitor-client confidentiality are compelling privacy interests which must be protected unless they are expressly waived by the appropriate person(s). Neither the making of a complaint to the Law Society, nor failure to respond to a Private Hearing Application Notice constitutes an express waiver.

d) Where a Hearing Committee decides that privacy should be protected, that may be accomplished by closing the necessary portions of the hearing or taking other appropriate measures. If the hearing is closed, rule 98(2) then governs who shall be present. The Hearing Report must also be prepared in a manner that protects the identity of the client, which requires use of generic references (e.g. Client A) and may require additional steps in some cases. Release of that report is governed by s. 74(3.1) of the LPA.

10. **Adjournments.** Rule 97(2) says that the Hearing Committee may, on or after the date of a hearing, adjourn the hearing to any other time or place on any conditions it may impose. In deciding whether or not to grant an adjournment, the Hearing Committee, in order to comply with its duty of fairness, may consider any or all of the following:

    a) prejudice to any person affected by the delay;

    b) the timing of the request, prior requests, and adjournments previously granted;

    c) the public interest;

    d) the costs to the Law Society and the other parties of an adjournment;

    e) the availability of the parties, counsel, and witnesses;

    f) the efforts made to avoid the adjournment;

    g) the requirement for a fair hearing; and

    h) any other relevant factor.

    The considerations apply to all requests for adjournment, including those made after a finding of guilt and before the commencement of the sanction phase of a hearing.

B. Opening Statements, Evidence and Submissions

11. **Opening Statement - Law Society.** Opening statement by counsel for the Law Society. If it is apparent at this stage that incompetence is in issue, that counsel for the Law Society perceives the case to be one which may warrant disbarment or a lengthy suspension or one in which a referral to the Attorney General may result, that should be stated.

12. **Exclusion of Witnesses.** Generally, witnesses other than the complainants should be excluded until they have given their evidence. Witnesses who are complainants generally should be allowed to remain in the hearing room unless there is a reason to exclude them, such as where evidence is to be given in a private portion of the hearing and the complainant is not entitled to hear it.

13. **Evidence** is then called, if applicable, by counsel for the Law Society.

14. **Oaths.** A member of the Hearing Committee may administer an oath to a witness (s. 68(2)). Pursuant to Section 15 of the *Alberta Evidence Act*, the person taking the oath holds the Bible or New Testament or Old Testament in the case of an adherent of the Jewish religion in his or her uplifted hand and the officer administering the oath shall say: "You swear that the evidence you give touching the matters in question shall be the truth, the whole truth and nothing but the truth so help you God?"

15. **Affirmation** in lieu of oath is governed by Section 17 of the *Alberta Evidence Act*. If the person objects to taking an oath, and the Hearing Committee is satisfied the person objects to being sworn:

    a) from conscientious scruples,

b) on the ground of his or her religious belief, or

c) on the ground that the taking of an oath would have no binding effect on his or her conscience

the witness may make an affirmation which is of the same effect as an oath. The officer administering the affirmation shall say, "You affirm that the evidence you give touching the matters in question shall be the truth, the whole truth and nothing but the truth?"

16. **Opening Statement** by counsel for the member.

17. **Admission of Guilt.** If a Statement of Admission of Guilt has been tendered, the Hearing Committee decides if it is in a form acceptable to it (s. 60) and, if so, then it is deemed for all purposes to be a finding of the Hearing Committee that the conduct of the member is deserving of sanction.

18. Before accepting an admission of guilt, the Hearing Committee may consider whether or not: (1) the member is making the admission voluntarily and free of undue coercion; (2) the member unequivocally admits guilt to the essential elements of the citations describing conduct deserving of sanction; (3) the member understands the nature and consequences of the admission; and (4) the member understands that the Hearing Committee is not bound by any submission advanced jointly by the member and the Law Society counsel. The Hearing Committee may require the member, in person or in writing, to confirm their positive response to each of the foregoing conditions.

> The requirement that the accused understand the nature and consequences of a guilty plea is not a requirement to canvass every conceivable consequence which may result or may be foregone. Such a requirement would be a practical impossibility…[T]he accused should be aware of the probable direct consequences of the plea.

R v Hoang, 2003 ABCA 251 at para 36.

19. A Hearing Committee, having completed the above enquiry, should then give serious consideration to a jointly tendered admission of guilt, should not lightly disregard it, and should accept it unless it is unfit or unreasonable, contrary to the public interest, or there are good and cogent reasons for rejecting it.

Rault v. Law Society of Saskatchewan, 2009 SKCA 81, *R. v. Tkachuk*, 2001 ABCA 243, and *Law Society of Alberta v. Pearson*, 2011 ABLS 17.

20. **Defence Evidence.** Evidence is then called, if applicable, by counsel for the member. The member is a compellable witness (s. 69(1)). If the member has not voluntarily offered to be a witness, the Hearing Committee may consider whether or not it wishes to call the member.

21. **Submissions Regarding Guilt.** Counsel shall make their closing arguments. Counsel for the Law Society is first, followed by counsel for the member (or the member personally if unrepresented), which may be followed with a rebuttal from counsel for the Law Society.

C. Decision Regarding Guilt, and Matters Ensuing

22. **Decision Regarding Guilt.** In cases not involving a Statement of Admission of Guilt, the Hearing Committee shall make a finding under s. 71(1) on whether or not the conduct is deserving of sanction. If not, the Hearing Committee must still make an Exhibits Order (see paragraph 30). If the conduct is deserving of sanction, the Hearing Committee proceeds to the next step.

23. **Record.** The Hearing Committee then hears the record of the member, if any (s. 71(3)(a)), if counsel for the Law Society applies to have it admitted.

24. **Incompetence.** If requested to do so by a member of the Hearing Committee or either counsel, the Committee then hears representations from counsel as to whether or not the member's conduct arose from incompetence (s. 71(3)(b)) and makes a finding on this issue.

25. **Argument Regarding Sanction/Costs.** The Hearing Committee then hears representations from both counsel about costs and proposed dispositions.

26. **Decision Regarding Sanction/Costs.** The Hearing Committee then orders a reprimand, suspension or disbarment (s. 72(1)). In addition, the Committee can order the member to pay fines of up to $10,000.00 per citation and/or all or part of the costs (s. 72(2) and r. 99(1)). Time to pay shall be specified. The membership of the member is automatically suspended until payment is made in full on time, unless otherwise directed (s. 76). In addition to the previously recoverable costs for counsel fees, court reporter charges, witness expenses and the like assessed when a member's conduct has been found to be deserving of sanction, the Benchers have resolved that the following costs should be assessed for all adjournments which take place and all hearings which are held after February 6, 1998:

Hearings:	$500.00 for each day in excess of 4 hours of hearing; $250.00 for each day up to and including 4 hours of hearing.	
Adjournments:	Seven (7) days prior to hearing	$200.00
	Under seven (7) days to hearing	$350.00
	At the hearing	$500.00

27. **Time to Pay.** The time for payment specified in a Hearing Committee's order for costs should be dependent upon the date that the statement of costs is forwarded by the Executive Director and the amount of costs should be set at the actual costs rather than the estimated costs unless the Hearing Committee has ordered a lesser maximum amount.

28. **Practice Review Referral.** Where the Hearing Committee refers a member to the Practice Review Committee, the Hearing Committee should consider the wording of that referral. While it is always helpful for the Hearing Committee to identify any areas of special concern, it is important that the referral be broad enough to permit Practice Review to pursue areas which are revealed through the gathering of further information and through the expertise of the Committee. Further, the Hearing Committee should specify whether the member is simply required to cooperate with Practice Review on an ongoing basis, or whether the member is required to meet certain conditions before being reinstated to practice. It is generally helpful if the referral is worded as follows, and then amended according to the circumstances:

To cooperate with the Practice Review Committee and to satisfy any conditions which may be imposed upon the member by the Practice Review Committee, which conditions will [might] include, but not be limited to, the following: [specify any conditions; specify whether these must be met prior to reinstatement.]

29. **Custodian.** If the member is suspended or disbarred, a Benchers' Guideline (Convocation, February 1992) states that the Hearing Committee shall take steps to see that the practice of the member is looked after.

30. **Exhibits.** The Committee invites submissions on whether exhibits should be made available for inspection and whether the public should be able to obtain a copy (r. 98(3)). Where the Hearing Committee determines that an exhibit will be available for inspection, it will also be made available for copying unless the Hearing Committee specifically directs otherwise (r. 98(3)) and, therefore, copying should be specifically dealt with at the time of the hearing.

31. **Publication.** The Committee decides if an order should go directing the Executive Director to publish a notice pursuant to rule 107.

32. **Referral to Attorney General.** If, following the hearing, the Hearing Committee is of the opinion that there are reasonable and probable grounds to believe that the member has committed a criminal offence, it shall direct the Executive Director to send a copy of the hearing record to the Attorney General (s. 78(5)).

33. **Report.** On completing its hearing and deliberations, a Hearing Committee shall

    a) prepare a written report that is complete, but concise, written in plain language, that sets out

        (i) each of its decisions and the reasons for its decisions,

        (ii) the findings of fact and the conclusions of law, if any, and

        (iii) any order made by the Hearing Committee,

    b) prepare the report in a manner that, to the extent possible, protects privilege, solicitor-client confidentiality and closed portions of the hearing (see paragraph 9 of this guide), and

    c) give a copy of the report to the chair of the Conduct Committee and to the Executive Director.

34. **Dissenting Report.** If a Hearing Committee has found the member guilty of conduct deserving of sanction but any of its decisions in respect of its finding, determination or order is not unanimous, the dissenting member or members of the Committee shall

    a) prepare a written report respecting the dissent that is complete, but concise, written in plain language, that sets out the reasons for the dissent,

    b) prepare the report in a manner that, to the extent possible, protects privilege, solicitor-client confidentiality and closed portions of the hearing (see paragraph 9 of this guide), and

c) give a copy of the report to the chair of the Conduct Committee and to the Executive Director.

35. The reports prepared by the Hearing Committee (including those in dissent) are public, and should be prepared with a view to their being read not only by the member, but also the complainant, the profession, and the public. The reports must include reasons which confirm the decision and the process of arriving at it. The reasons should be comprehensive, articulate, and logical.

Bencher Minutes, November 25 & 26, 2004.

36. The Hearing Committee's reasons must explain why the Committee decided as it did, must account to the public, and must permit effective appellate review. These purposes are met if the reasons, read in the context of the evidence and relevant issues in the hearing, set out why the Committee made the decision it did.

> The reasons must be sufficient to fulfill their functions of explaining why the [Hearing Committee convicted or acquitted], providing public accountability and permitting effective appellate review…. These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. The object is not to show how the judge arrived at his or her conclusion…it is rather to show why the judge made that decision.

R v REM, 2008 SCC 51.

37. If credibility is an issue, the Hearing Committee must clearly set out its findings on the credibility of a witness or authenticity of a document. Those findings must be supported by an analysis which serves the purposes set out above of explanation, accountability, and effective appellate review.

III. Other Procedural Issues

38. **Adjournments.** Rule 97(2) allows the Chair of the Conduct Committee or the Hearing Committee to adjourn the hearing date prior to the date set for a hearing, "on any conditions they may impose".

39. **Amendment of Citation.** The Hearing Committee may amend the citation at any time during a hearing and shall allow the member sufficient time to prepare an answer to the amended citation (s. 65 and r. 94(2)).

40. **New Matters Arising.** The Hearing Committee can deal with other conduct of the member that arises in the course of the hearing after announcing its intention to do so and providing ample time to the member to prepare his answer for it (s. 65 and r. 94(1)).

41. **Suspension of the Member.** The Hearing Committee may suspend or impose conditions on the member, pending its decision on guilt or sanction, pursuant to sections 63(3) and 63(6) (refer to the Interim Suspension/Conditions Guideline).

42. **Absence of Member.** On proof of service of a Notice to Attend on the member, the hearing may proceed in the absence of the member. (s. 70(2)).

43. **Practice Advisor and Practice Management Advisor.** At their Convocation in April, 1994 the Benchers approved a motion that a general principle be incorporated in the

Hearing Guidelines that the Practice Advisor and Practice Management Advisor will not be called by the Law Society to give evidence in a conduct proceeding against a member. The only exception to the general principle will be when a member has put in issue communications between the member and the Practice Advisor or Practice Management Advisor thereby waiving confidentiality.

44. **"Off the Record" Discussions.** Off the record discussions are to be discouraged.

IV. Evidentiary Principles

A. Burden and Standard of Proof

45. At Law Society hearings, Law Society counsel bears the burden of proving, on evidence that is clear, convincing, and cogent, the Member's guilt on a balance of probabilities. There is no sliding or shifting scale of probability within that standard, and although the Member is not entitled to a presumption of innocence, the Law Society must still prove its case.

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

FH v McDougall, 2008 SCC 53, [2008] 3 SCR 41.

46. The standard of proof on a balance of probabilities has been confirmed as the correct standard for professional regulatory discipline hearings by the Alberta Court of Appeal.

> But the law is now clear that there is only one civil standard of proof at common law. That is proof on a balance of probabilities. There is no "clear, convincing and cogent" standard, whatever that floating standard might have meant.

Moll v College of Alberta Psychologists, 2011 ABCA 110.

B. Assessing Credibility

47. The Hearing Committee should consider and may take into account the seriousness of the allegations and potential consequences of the matter at hand and the probability or improbability that the alleged misconduct may have occurred. However, such considerations must not alter the standard of proof.

FH v McDougall, 2008 SCC 53, [2008] 3 SCR 41.

48. The Hearing Committee should assess the credibility of each witness with regard to all relevant evidence before them, and believe the evidence which is consistent with the preponderance of the probabilities which a practical and informed person would recognize as reasonable given the factual circumstances and the issues in the hearing.

> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Faryna v Chorny, [1951] BCJ No 152 at para 11.

49. The Hearing Committee should be cautious about assessing credibility on the basis of the demeanor of a witness alone, or the interests of a witness in the outcome, but these remain relevant factors to consider within the totality of the evidence before the Committee.

> I judge a witness to be unreliable if his evidence is, in any serious respect, inconsistent with the undisputed or indisputable facts, or of course if he contradicts himself on important points. I rely as little as possible on such deceptive matters as his demeanour.

Sir Brian MacKenna, "Discretion" (Paper delivered at University College, Dublin, 21 February 1973), (1974) 9 Ir Jur 1, adopted in *R v Pelletier*, 1995 ABCA 128 at para 18.

C. Reverse Onus – Trust Funds

50. Where it is established that a member has received any money or other property in trust, the burden of proof that the money or other property has been properly dealt with lies on the member (s. 67).

V. What Is Conduct Deserving Of Sanction?

51. The *Legal Profession Act* sets out the general definition of conduct deserving of sanction (section 49(1)):

> 49(1) For the purposes of this *Act*, any conduct of a member, arising from incompetence or otherwise, that
>
> (a) is incompatible with the best interests of the public or of the members of the Society, or
>
> (b) tends to harm the standing of the legal profession generally,
>
> is conduct deserving of sanction, whether or not that conduct relates to the member's practice as a barrister and solicitor and whether or not that conduct occurs in Alberta.

52. In *Pearlman v. The Manitoba Law Society Judicial Committee*, (1991) 84 D.L.R. (4th) 105, Iacobucci J., speaking for the Supreme Court of Canada said:

> As for the jurisdiction of the Benchers to hear the disciplinary proceedings, I note that courts have recognized that Benchers are in the best position to determine issues of misconduct and incompetence. For example, in *Re Law Society of Manitoba and Savino* (1983), 1 D.L.R. (4th) 285 (Man. C.A.) the Court of Appeal said (at pp. 292-93): 'No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body'.

53. In *Stevens v. Law Society (Upper Canada)* (1979), 55 O.R. (2d) 405 at 410 (Div. Ct.), Justice Cory, as he then was, stated:

> What constitutes professional misconduct by a lawyer can and should be determined by the discipline committee. Its function in determining what may in each particular circumstance constitute professional misconduct ought not be unduly restricted. No one but a fellow member of the profession can be more keenly aware of the problems and frustrations that confront a practitioner. The discipline committee is certainly in the best position to determine when a solicitor's conduct has crossed the permissible bounds and deteriorated into professional misconduct. Probably no one could approach a complaint against a lawyer with more understanding than a group composed primarily of members of his profession.

54. In *Wilson v. Law Society of British Columbia* (1986), 33 D.L.R.(4th) 572, 9 B.C.L.R. (2d) 260 the British Columbia Court of Appeal upheld a finding of misconduct for violating a Rule of the Law Society:

> What is and what is not professional misconduct is a matter for the benchers to determine, and the court must be very careful not to interfere with the decision of the benchers for their decision is, in theory, based on a professional standard which only they, being members of the profession, can properly apply....

VI. The Sanctioning Process

55. Pursuant to *Philion v. The Law Society of Alberta* (January 1999) unreported (Alta. C.A.), this section of the Hearing Guide is to be applied only to cases where the conduct in question occurred after the Benchers adopted this section of the Hearing Guide (February 5, 1998).

56. If a submission on sanction is made jointly by the member and Law Society counsel, the Hearing Committee should give serious consideration to the joint submission, and accept it unless they consider it unfit or unreasonable or contrary to the public interest.. This Hearing Committee, however, is not bound by the submission, and may determine the more appropriate sanction, but only do so after the member and Law Society counsel are given an opportunity to speak to the matter.

R. v. Tkachuk, 2001 ABCA 243 and Law Society of Alberta v. Pearson, 2011 ABLS 17.

A. The Purposeful Approach

57. The primary purpose of disciplinary proceedings is found in section 49(1) of the *Legal Profession Act* (set out above): (1) the protection of the best interests of the public (including the members of the Society) and (2) protecting the standing of the legal profession generally. The fundamental purpose of the sanctioning process is to ensure that the public is protected and that the public maintains a high degree of confidence in the legal profession.

> It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. . . . In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standards. The purpose is achieved for a longer period, and quite possibly indefinitely, by an

> order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled, but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceedings to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.

Bolton v. Law Society, [1994] 2 All ER 486 at 492 (C.A.), per Sir Thomas Bingham MR for the court.

58. *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie (at page26-1):

> The purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve public confidence in the legal profession.
>
> In cases in which professional misconduct is either admitted or proven, the penalty should be determined by reference to these purposes. . . .
>
> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of a recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

59. *Regulation of Professions in Canada*, by James T. Casey at page 14-4.

> Given that the primary purpose of the legislation governing professionals is the protection of the public, it follows that the fundamental purpose of sentencing for professional misconduct is also to ensure that the public is protected from acts of professional misconduct.

60. *McKee v. College of Psychologists, etc.*, [1994] 9 W.W.R. 374 at 376 (B.C.C.A.).

> In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree of risk, if any, in permitting a practitioner to hold himself out as legally authorized to practise his profession.

61. The American Bar Association, Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions, 1991 Edition, states:

> The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. (At p.5).
>
> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession. (At p.7).

62. The sanctioning process should involve a purposeful approach. In doing so, those factors which relate most closely to the fundamental purposes outlined above will be weighed more heavily than other factors. Further, the final sanction must be one which is consistent with the fundamental purpose of the sanction process.

63. The *Legal Profession Act*, s. 72(1) requires a Hearing Committee, on finding a member guilty of conduct deserving of sanction, to disbar, suspend, or reprimand the member.

64. Unlike a disbarment or suspension, a reprimand does not limit a member's right to practice. It is, however, a public expression of the profession's denunciation of the lawyer's conduct. In addition, a reprimand should deter future misconduct by the member or otherwise within the profession, in accordance with the Law Society's duty to protect the public.

Law Society of Alberta v. Westra, 2011 CanLII 90716.

65. The reprimand should be worded, keeping in mind both its individual and general purpose. The individual purpose is to address the specific misconduct being sanctioned, but there is also a general purpose in educating and informing the profession and the public that such misconduct is unacceptable in view of s. 49(1).

B. Relevant Factors

66. In each case, the Hearing Committee will consider various factors in determining what sanction to impose. Some of these factors are identified below. In deciding what weight to give to the various factors, the following must be kept in mind:

> Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity

> and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make the suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.

Bolton v. Law Society, [1994] 1 W.L.R. 512 at 519 (C.A.); applied in Law Society of Upper Canada v. Jacobs, [1995] L.S.D.D. No.151 at p.18.

67. The privilege of self-governance is accompanied by certain responsibilities and obligations. The impact of any misconduct on the individual and generally on the profession must be taken into account.

> This public dimension is of critical significance to the mandate of professional disciplinary bodies." "The question of what effect a lawyer's misconduct will have on the reputation of the legal profession generally is at the very heart of a disciplinary hearing . . . .

Adams v. The Law Society of Alberta, [2000] A.J. No.1031 (Alta. C.A.)

68. See also all of the material referred to under the "Integrity" heading below.

69. A number of general factors are to be taken into account. The weight given to each factor will depend on the nature of the case, always keeping in mind the purpose of the process as outlined above.

a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.

b) Specific deterrence of the member in further misconduct.

c) Incapacitation of the member (through disbarment or suspension).

d) General deterrence of other members.

e) Denunciation of the conduct.

f) Rehabilitation of the member.

g) Avoiding undue disparity with the sanctions imposed in other cases.

In one way or another each of these factors is connected to the two primary purposes of the sanctioning process: (1) protection of the public and (2) maintaining confidence in the legal profession.

70. More specific factors may include the following.

a) The nature of the conduct:

(i) Does the conduct raise concerns about the protection of the public?

(ii) Does the conduct raise concerns about maintaining public confidence in the legal profession?

(iii) Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties to the court, other lawyers or the Law Society)

(iv) Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?

b) Level of intent: the appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain the public confidence in the legal profession may require a particular sanction regardless of the state of mind of the member at the time.

c) Impact or injury caused by the conduct.

d) Potential injury, being the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

e) The number of incidents involved.

f) The length of time involved.

g) Whether and to what extent there was a breach of trust.

h) Any special circumstances (aggravating/mitigating) including the following:

- prior discipline record
- risk of recurrence
- member's reaction to the discipline process (acknowledgement of wrongdoing, guilty plea, self-reporting, refusal to acknowledge wrongdoing, etc.)
- restitution made, if any
- length of time lawyer has been in practice
- general character
- whether the conduct involved taking advantage of a vulnerable party.
- a dishonest or selfish motive
- personal or emotional problems
- full and free disclosure to those involved in the complaint and hearing process or cooperative attitude toward proceedings

- physical or mental disability or impairment
- delay in disciplinary proceedings
- interim rehabilitation
- remorse
- remoteness of prior offences

71. Reference may be made to various authorities on these issues: *Regulation of Professions in Canada*, by James T. Casey; *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie; *Camgoz v. College of Physicians and Surgeons of Saskatchewan* (1993), 114 Sask. R. 161 (Q.B.); *Jaswal v. Newfoundland Medical Board* (1996), 138 Nfld. & P.E.I.R. 181 (Nfld. S.C.); *Standards for Imposing Lawyer Sanctions*, 1991 Edition, American Bar Association Center for Professional Responsibility.

72. *Law Society of Alberta v. Estrin* (1992) 4 Alta. L.R. (3d) 373 (C.A.) at p. 374:

> ...the penalties imposed for conduct deserving of sanction are cumulative and future offences will attract progressively more severe penalties.

73. *Law Society of Upper Canada v. Jacobs*, [1995] L.S.D.D. No.151 at p.16 [From the report of the Discipline Committee which recommended disbarment; Convocation then permitted the solicitor to resign.]:

> Simply put, bad lawyers endanger the public, destroy public confidence in the legal profession and through doing so, endanger the independence of the profession. Benchers will not tolerate this; such are our standards.

C. Precedential Value

74. When a member has been found guilty of conduct deserving of sanction, and the Hearing Committee is addressing the question of what sanction to impose, previous decisions may be referred to. Where previous decisions are considered on the issue of sanction, the following principles apply:

a) The decisions of one Hearing Committee are not binding on other Hearing Committees: *R. v. Bonneteau* (1994), 93 C.C.C. (3d) 385 (Alta. C.A.).

b) The decisions of one Hearing Committee may be considered persuasive by another Hearing Committee: *R. v. Bonneteau* (1994), 93 C.C.C. (3d) 385 (Alta. C.A.).

c) A previous decision of the Benchers (as a whole) does not bind the Hearing Committee to impose the same sanction.

d) There is no single correct sanction: *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 at paragraph 48 (S.C.C.).

e) Where a Hearing Committee is faced with a previous decision of the Benchers, the Hearing Committee should review that decision to see whether the factors

referred to in this guide were addressed by the Benchers in that decision. If they were not, that may limit the value of the decision as a precedent. If they were, then the Hearing Committee must acknowledge that the sanction imposed in that case was a reasonable one in those circumstances. However, the Hearing Committee is not bound to find that the sanction imposed in that case is the only reasonable one in those circumstances.

D. Where Integrity is an Issue

75. Preface of the Code of Conduct:

> Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach.

76. *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie, at pages 23-2 to 23-3 [These comments made in the context of good character hearings as opposed to the sanctioning portion of disciplinary proceedings]:

> The requirement that lawyers must be of good character finds expression also in what is in most jurisdictions not coincidentally the first rule of professional conduct: lawyers must discharge with integrity all duties owed to clients, the court, the public, and other members of the profession. 'Integrity", the first commentary to this rule says, 'is the fundamental quality of any person who seeks to practise as a member of the legal profession.'
>
> Lawyers who by their conduct have proven to be lacking in integrity are likely to lose their right to practise. . . .
>
> The requirement that applicants be of good character is preventative, not punitive. It recognizes that character is the well-spring of professional conduct in lawyers. By requiring lawyers to be of good character, law societies protect the public and the reputation of the profession from potential lawyers who lack the fundamental quality of any person who seeks to practise as a member of the legal profession, namely, integrity.

77. Marvin J. Huberman in his article "Integrity Testing for Lawyers: Is it Time?" (1997), 76 Canadian Bar Review 47 at pp. 53-54:

> The costs of lack of integrity, and the perception of absent [sic] of integrity, are significant. When lawyers act without integrity, people are injured, whether financially or emotionally. The individual lawyer suffers a loss of reputation, the profession's reputation suffers damage, and the justice system is diminished. Mr. Justice La Forest has explicitly stated that lawyers must possess the qualities of honesty and integrity for the justice system to function properly. Lawyers are individuals' representatives within the legal system. People rely on them to serve their interests, to carry out the tasks required of them, and to do so in a principled fashion. Lawyers 'may be entrusted with the liberty, confidences, property, well-being and livelihood of a client'. Likewise, judges rely upon the integrity of the lawyers who appear before them. Judges expect to be able to rely upon lawyers' statements, research and undertakings. If judges cannot assume that the

> representations made by lawyers are true and accurate, the system cannot function.
>
> Integrity on the part of lawyers is therefore essential to the effective operation of our legal system. . . .
>
> . . . Even further, the integrity of the legal profession is necessary in order to maintain a free and democratic society. In essence, then, a lawyer's integrity is important for reasons going far beyond the interests of his or her clients; it has implications for our overall legal and social order. Lawyers thus have an obligation to their clients, to the judiciary, to other lawyers and to the public to act, at all times, with integrity.

78. The American Bar Association Guidelines:

> The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct. (At p.36).
>
> A lawyer who engages in any of the illegal acts listed above [intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, theft, anything involving dishonesty, fraud, deceit and so on] has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer. In fact, this type of misconduct is so closely related to practice and poses such an immediate threat to the public that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed.
>
> In imposing final discipline in such cases, most courts impose disbarment on lawyers who are convicted of serious felonies. (At p.36).

79. *Bolton v. Law Society*, [1994] 2 All ER 486 at 492 (C.A.), per Sir Thomas Bingham MR for the court.

> The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled, but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceedings to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.

80. *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie, at page 26-45, referring to the unreported decision of *Re Milrod*, report of discipline hearing panel adopted by Convocation, January 30, 1986 (Ontario):

> In cases involving fraud or theft, in spite of evidence of prior good character and financial or other pressures, lawyers are almost certain to be disbarred. . . . Thus the profession sends an unequivocal message in the interest of maintaining public trust and the reputation of the profession.

81. *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie, at page 26-46, noting various unreported Ontario cases in support of this point:

> Discipline hearing panels have frequently held that acts of misappropriation should result in disbarment unless exceptional extenuating circumstances exist. An order of disbarment in such cases is made to preserve public confidence, to protect the public, and to deter other lawyers from breaching the trust of their clients.

82. *Bolton v. Law Society*, [1994] 2 All ER 486 at 491-2 (C.A.), per Sir Thomas Bingham MR:

> Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends on trust.

83. *Lawyers & Ethics: Professional Responsibility and Discipline*, by Gavin McKenzie, at page 26-1:

> The seriousness of the misconduct is the prime determinant of the penalty imposed. In the most serious cases, the lawyer's right to practise will be terminated regardless of extenuating circumstances and the probability of recurrence. If a lawyer misappropriates a substantial sum of clients' money, that lawyer's right to practise will almost certainly be determined, for the profession must protect the public against the possibility of a recurrence of the misconduct, even if that possibility is remote. Any other result would undermine public trust in the profession.

84. *R. v. Manolescu* (July 24, 1997) unreported (Alta. Prov. Ct.) per Judge R.A. Jacobsen at pp. 6-7:

> The demand upon, and the standard expected of a lawyer in respect of his or her trust accounts is very high. The standard is virtually one of perfection. The Law Society of Alberta acknowledges that innocent human or machine error can occur, but it does not tolerate the results and insists on immediate rectification. Dishonesty in respect of trust accounts is not to occur. In practical terms, other peoples' monies are to be treated by lawyers as a sacred trust.

E. Matters Going to the Ability of the Law Society to Govern the Profession

85. The Preface to the Code of Conduct states:

> The legal profession is largely self-governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis.

86. The ability of the Law Society to govern the profession is essential. Without that ability, the self-governing aspect of the profession is put at risk. Various types of conduct undermine the ability to govern the profession. These include (but are not limited to):

- failing to respond to those involved in the Law Society process
- failing to be candid with those involved in the Law Society process
- failing to cooperate with those involved in the Law Society process
- breaching an undertaking given to those involved in the Law Society process
- practising while suspended or inactive

87. The following precedents indicate that this type of conduct should be treated as serious misconduct.

88. *Law Society of Manitoba v. Ward*, [1996] L.S.D.D. No.119 at p.5:

> In our view, the right to practice law carries with it obligations to the Law Society and to its members. The minimum obligations in our view are, compliance with rules and communication with the Society as might reasonably be expected. Ward has persistently failed to comply with the rules and to communicate with the Society. This is all without any explanation or excuse of any kind whatsoever. The justification for self government is at least partly based on the assumption that the Society will in fact govern its members and that members will accept governance. Ward has demonstrated through his behaviour that he does not accept governance.
>
> We regard this as a serious matter. . . .
>
> [Mr. Ward was declared to be an ungovernable member and was disbarred. The Law Society of Manitoba adopted this excerpt in another case: *Law Society of Manitoba v. Levine*, [1996] L.S.D.D. No.120 in which the solicitor was also disbarred.]

89. *Law Society of Upper Canada v. Hollyoake*, [1995] L.S.D.D. No.196. In this case the member failed to cooperate with the Law Society in a variety of ways, causing the Benchers to make the following comments:

> Today, as a result of the Solicitor's actions, the Law Society of Upper Canada has been totally frustrated in their attempt to investigate serious allegations of

> wrong-doing which may well have involved -- although we have no idea whether they really did -- the Solicitor in a defrauding of two members of the public. . . .
>
> . . . Our primary obligation is to the public of Ontario. The Solicitor has, by his actions, left us in a position where the Society is unable through its investigatory arm to assure the public that this Solicitor, like all other solicitors, is amenable to our discipline and acts with propriety and acts responsibly.
>
> We therefore recommend to Convocation that he be disbarred with the understanding that the object of this disbarment is not to punish the Solicitor but to protect the public. The Law Society's credibility always depends on being seen to be able to act to discipline its members. In this case, we are no longer able to assure the public that this is so.

[He was disbarred.]

90. *Law Society of Upper Canada v. Squires*, [1994] L.S.D.D. No.156. In this case, the member failed to reply to written and telephone communications from the Law Society regarding four complaints against him. He did not attend for the hearing either. There is no indication of any record. He was disbarred. These comments were made:

> The Solicitor repeatedly breached his duty under Commentary 3 of Rule 13 to reply promptly to communications from the Society. He would appear to have deliberately adopted and maintained over a lengthy period of time a policy of flouting the administrative requirements of the Society. The Society cannot perform its function of governing the profession in the interest of the public if it tolerates such conduct.

91. *Law Society of Upper Canada v. Bronstein*, [1994] L.S.D.D. No.10 at p.19:

> Deliberate breaches of an undertaking to the Law Society, involving a lack of cooperation with the professional governing body and the unauthorized practice of law, cannot be tolerated if the Law Society is to regulate its members in the public interest.

F. Costs

92. The Alberta Court of Appeal has made the following comments on an appeal from costs imposed in disciplinary proceedings regarding a veterinarian and an allegation that the veterinarian failed to provide adequate care for a cat.

> Counsel also criticizes the amount of the costs, $8,451. That is one half, in recognition of the appellant's acquittal on some other charges. As those other charges arose late, they cannot have affected the investigation, and must have lengthened the hearing by little. So the split was very fair to the appellant.
>
> No one suggests that $16,902 was not actually spent. If the appellant did not pay his half, then all the members of the respondent would pay them, in the long run. Such expenses will not disappear by wishing them away or ignoring them. They were incurred in the exercise of a statutory duty, not hobby litigation. One must also keep up with the shrinking value of a dollar. $8,500 was once a large sum of money, but it does not buy nearly so much today. We cannot call the sum unreasonable.

> Nor is this a fine or other punishment; it is simply what it says: costs. In other words, reimbursement of (half) of the actual expense of the proceeding.
>
> Therefore, we also affirm the costs order.

Carteledge v. Alberta Veterinary Medical Association, [1999] A.J. No. 458 (C.A.).