

CONDUCT ASSESSMENT AND DISPOSITION GUIDELINES

I. PREAMBLE

The purposes of these guidelines is to guide the members of the Discipline Committee in their evaluation and disposition of professional conduct complaints referred for that Committee's assessment. The guidelines should be used as an aid and reference to balance and inform the deliberations of the Discipline Committee. The guidelines do not restrict the discretion of the Discipline Committee and do not prescribe limits on what circumstances may be relevant or what facts may be determinative in a given case.

The Discipline Committee exercises its independent judgment in reviewing the opinions prepared by investigating counsel, including:

- a. Considering whether sufficient, relevant evidence has been gathered and assessed;
- b. Evaluating the strength of the evidence gathered, having regard to issues of admissibility, credibility and reliability; and
- c. Ensuring the relevant conduct issues have been addressed.

Rule 4-4 of the Law Society Rules sets out the actions available to the Discipline Committee after considering a complaint (the “**Actions**”). The Actions are described further in **Appendix A**. The Actions available to the Discipline Committee, other than a Citation, are referred to in these Guidelines as **Alternative Actions**.

II. SOME GENERAL GUIDELINES

1. The Public Interest is Paramount

The Discipline Committee's assessment and disposition of complaints referred for its review should be in furtherance of the Law Society's mandate “to uphold and protect the public interest in the administration of justice”, as set out in s. 3 of the *Legal Profession Act*.

Actions that are consistent with the paramount objective of protecting the public interest can serve to protect members of the public from lawyer misconduct, provide effective general deterrence to the profession, and preserve the public's confidence in the profession and in self-regulation.

The public interest can also be furthered by fair, transparent and effective regulation including Actions that may remediate, rehabilitate and deter the subject lawyer from engaging in future misconduct.

The Review Board in *Law Society of BC v. Nguyen*, 2016 LSBC 21 at para. 36, discussed the two main purposes of the disciplinary process and emphasized that the protection of the public and maintaining public confidence in the profession is paramount and that promoting rehabilitation of the lawyer is a secondary objective:

The first and overriding purpose is to ensure the public is protected from acts of professional misconduct, and to maintain public confidence in the legal profession generally. The second purpose is to promote the rehabilitation of the respondent lawyer. If there is conflict between these two purposes, the protection of the public and the maintenance of public confidence in the profession must prevail, but in many instances the same disciplinary action will further both purposes.

2. Nature and Seriousness of Conduct

In matters involving allegations of significant serious misconduct, absent exceptional circumstances, the public interest may only be upheld if the Law Society proceeds with a Citation, which will result in a transparent, public outcome. Proceeding with a Citation in matters where serious misconduct is alleged may be the only effective way to serve the objective of general deterrence and to preserve public confidence in the legal profession. Accordingly, provided there is sufficient evidence to support the Action, the more serious the alleged misconduct in a matter before the Committee, the more likely it will be that upholding the public interest requires the issuance of a Citation.

Citations should not, however, only be reserved for the most serious misconduct. Any provable discipline violation (i.e. a breach of a provision of the *Legal Profession Act*, the Law Society Rules, or the *Code of Professional Conduct for British Columbia*) might warrant a Citation. However, a Citation may not be necessary if an Alternative Action is consistent with the public interest.

3. Fraud, Money Laundering, and Misappropriation of Funds

The Discipline Committee should have regard for the importance of protecting the public from lawyer misconduct, whether intentional or otherwise, which facilitated, or increased the risk of, fraud, money laundering, misappropriation of funds or other illegal activities. Such conduct may include:

- Allowing one's trust account to be used in the absence of legal services;
- Failing to make reasonable inquiries in the face of suspicious circumstances; or

- Assisting or encouraging dishonesty, crime or fraud by another person either knowingly or in circumstances where the lawyer ought to have known.

Where a lawyer's conduct has placed the public interest in the administration of justice itself at risk, such as by aiding and abetting criminal activity, concerns such as maintaining public confidence in the legal profession and effective general deterrence of similar conduct may only be addressed by the transparency and public nature of a Citation process.

4. Progressive Discipline

To maintain public confidence in the profession and in self-regulation, Actions should take into account any history of similar problematic conduct resulting in a previous Action. Accordingly, the Discipline Committee should consider and apply progressive discipline, whereby the Committee's successive reviews of relevantly similar conduct by the subject lawyer result in more significant Action. In addition, even where the specifics of successive discipline violations are different, a pattern of failing to fulfill a lawyer's professional responsibilities generally may also warrant a more significant Action.

5. Consistency

The Discipline Committee should strive for consistency in its decisions. This does not mean that prior decisions in circumstantially similar matters should be determinative of the Action to be taken in a subsequent matter involving a different lawyer. Rather, consistency requires that decisions be made on a principled basis and not be made arbitrarily, capriciously or in an ad hoc manner. The underlying principles stated in these guidelines should guide the Discipline Committee in exercising its discretion in a consistent manner.

III. A FRAMEWORK FOR ANALYSIS

6. Citation Threshold

In considering whether a lawyer's conduct may warrants Citation, the Discipline Committee should first determine whether the Citation Threshold is met in the circumstances. The Citation Threshold will be met where:

- (a) the lawyer's alleged conduct amounts to a discipline violation; and
- (b) having regard to the available admissible evidence, there is a reasonable prospect (which requires less than a balance of probabilities) that the lawyer would receive an adverse determination following a hearing.

7. Action if Citation Threshold Not Met

If the Discipline Committee determines that the Citation Threshold is not met, absent exceptional circumstances, the matter should not result in the authorization of a Citation, as the likelihood of an adverse determination is low.

Where the Citation Threshold is not met, the Committee may direct one of the Alternative Actions if satisfied that the lawyer's conduct falls below the standard of conduct expected by the Law Society. The range of Alternative Actions includes Conduct Review, Conduct Meeting, and Conduct Letter, and the Committee may consider a referral to the Practice Standards Committee (see Appendix A). It is also open to the Discipline Committee to take No Further Action on a matter.

8. Action if Citation Threshold Met

A. General Deterrence and Confidence in the Profession and in Self-Regulation

Where the Discipline Committee determines that the Citation Threshold is met, the Committee should consider whether the paramount objective of protecting the public interest can be achieved with any of the Alternative Actions.

The Discipline Committee should consider whether a response less than a Citation will provide effective general deterrence to the legal profession and preserve the public's confidence in the profession and in self-regulation, having regard to the nature and severity of the alleged misconduct. Where the Committee determines that these objectives are not met with any of the Alternative Actions then it may be that the authorization of a Citation is the only action consistent with the public interest.

B. Remediation, Rehabilitation and Specific Deterrence

Where the Discipline Committee is satisfied that the objectives of general deterrence and maintaining confidence in the legal profession and in self-regulation will be met with one of the Alternative Actions, the Committee should then consider whether the Alternative Action will also meet the objectives of remediation, rehabilitation and specific deterrence.

The following factors or circumstances, alone or in combination, may be relevant to the Discipline Committee's assessment of whether the objectives of remediation, rehabilitation and specific deterrence may be met with any of the Alternative Actions:

a. Specific Deterrence:

Does the lawyer's conduct require the specific deterrence provided by publication of a written decision and disciplinary sanctions following a hearing; or can specific deterrence be addressed sufficiently through direct communications with the lawyer?

b. Experience:

How long has the lawyer been called to the bar and what level of practice experience does the lawyer have?

c. Record:

How long has the lawyer practised with no disciplinary action, or, conversely, how many other recent complaints and conduct concerns has the lawyer has been the subject of?

The Discipline Committee should apply to principle of progressive discipline.

d. Support:

Does the lawyer lack supervision or other supportive professional relationships or is the lawyer supervised by a senior practitioner or have supportive relationships with other lawyers and ready access to informal advice on professional conduct issues?

e. Knowledge:

Was there was a significant misunderstanding or lack of understanding component by the lawyer leading to the lawyer's problematic conduct or did the lawyer appear to have acted despite understanding the nature and significance of his or her problematic conduct?

f. Voluntariness:

Were there any involuntary or health-related factors leading to the lawyer's problematic conduct or was the lawyer's conduct voluntary and free from the effects of addiction, ill health, and duress?

g. Conduct After the Fact:

Has the lawyer, in a timely manner, voluntarily self-reported or acknowledged his or her error, accepted responsibility, and offered a genuine apology or has the lawyer has been resistant, evasive or less than candid in responding and communicating in the course of the Law Society's investigation.

h. Resulting Harm:

Has the lawyer's conduct resulted in significant harm to the interests of a client, to one or more members of the public, to the reputation of the legal profession?

i. Recompense:

Where possible, has the lawyer has taken positive steps to remedy any loss or damage caused by his or her conduct or has the lawyer has made no recompense in respect of the consequences of his or her conduct.

j. Remediation:

Where potential repetition of the problematic conduct could be avoided by changes in the practices of the lawyer or his or her staff, have such changes have been implemented or does the lawyer not appear to have changed any practices to prevent a repetition of the problematic conduct?

k. Risk:

What is the level of risk that the lawyer will engage in further problematic conduct?

l. Rehabilitation Prospect:

Will an Alternative Action be likely to provide a superior rehabilitation or remedial result, or will it be unlikely to have a meaningful effect on the lawyer's future conduct.

m. Other Considerations:

Other relevant factors or circumstances as determined by the Discipline Committee.

APPENDIX A DISCIPLINE COMMITTEE ACTIONS ON COMPLAINTS

The Actions available to the Discipline Committee when considering a lawyer's conduct include the following.

1. Citations

The issuance of a Citation results in the Law Society's most public and transparent disciplinary process. Salient characteristics of the Citation include:

- a. Publication of the Citation on the Law Society's website including the Lawyer Directory and publication of the hearing panel decisions;
- b. A Citation that is issued and not rescinded leads to a hearing, at which the allegations about the lawyer's conduct and any required facts must be proven or admitted, before disciplinary action may be ordered;
- c. If there is an adverse determination made by the hearing panel, the outcome of the Citation will form part of the lawyer's "Professional Conduct Record" which may be considered at the disciplinary action determination phase of a subsequent hearing involving the same lawyer; and
- d. In addition to facing a potential costs assessment, a lawyer who receives and adverse determination upon the hearing of a Citation may be subject to one or more of the following disciplinary actions:
 - (i) a reprimand;
 - (ii) a fine;
 - (iii) a suspension; or
 - (iv) disbarment.

2. Conduct Reviews

The Conduct Review is the most significant of the Alternative Actions. Its salient characteristics include:

- (a) Conducted by a subcommittee that must include at least one lawyer and must be chaired by a Bencher or Life Bencher;
- (b) May provide an opportunity for a complainant to discuss his or her views and concerns with the Subcommittee;

- (c) Provides an opportunity for face-to-face communication between the subcommittee and the lawyer regarding the conduct in question and any issues of concern;
- (d) Provides an opportunity for the subcommittee to test and confirm the lawyer's understanding of the issues of concern to the Discipline Committee;
- (e) May provide a more effective remedial or rehabilitative opportunity to manage the lawyer's conduct in the legal profession (in contrast with a Citation and hearing process);
- (f) Results in the subcommittee's written report to the Discipline Committee, which may then direct that no further action be taken, that a Citation be issued, that the Conduct Review be rescinded in favour of a different alternative disciplinary outcome, or that the lawyer be referred to the Practice Standards Committee;
- (g) Unless subsequently rescinded, is reflected in the lawyer's "Professional Conduct Record," which may be considered at the disciplinary action determination phase of a subsequent hearing involving the same lawyer,
- (h) Unless subsequently rescinded, will likely be reflected in a summary publication, issued to the profession and made available to the public without naming the lawyer.

3. Conduct Meeting

In contrast with the Conduct Review, the Conduct Meeting is a less serious Alternative Action. Its salient characteristics include:

- (a) Conducted by one or more Benchers or lawyers;
- (b) When a Conduct Meeting is directed, the complainant (where applicable) is informed and provided with a general explanation of what a Conduct Meeting is; the complainant does not attend the Conduct Meeting;
- (c) There is no publication of the Conduct Meeting by the Law Society, the Conduct Meeting is held in private, and neither the fact of the Conduct Meeting nor any record of the Conduct Meeting, nor any record of the Law Society's investigation of the matter is recorded in the lawyer's "Professional Conduct Record";
- (d) Does not engage the objective of general deterrence as there is no publication of the Conduct Meeting to the legal profession;

- (e) A Conduct Meeting is the final disposition of matter, and, unlike a Conduct Review, there is no written report following the Conduct Meeting.

4. Conduct Letter

Like the Conduct Meeting, the Conduct Letter is also a less serious Alternative Action than the Conduct Review. The Conduct Letter's salient characteristics include:

- a. Issued in the name of the Chair of the Discipline Committee, to confirm that the matter has been reviewed by the Committee, to express the Committee's concerns regarding the matter, and to confirm that no further action (beyond issuance of the Letter) will be taken in the matter;
- b. When a Conduct Letter is issued, the complainant (where applicable) receives notice of the Discipline Committee's direction and a copy of the Conduct Letter;
- c. Aside from the notice and copy of the Conduct Letter to a complainant, there is no publication of the fact or content of the Conduct Letter by the Law Society and neither the fact nor the content of the Conduct Letter, nor any record of the Law Society's investigation of the matter, is recorded in the lawyer's "Professional Conduct Record";
- d. A copy of the Conduct Letter is placed on the lawyer's "Member File" with the Law Society;
- e. Provides an opportunity for an expression of the Discipline Committee's concerns in circumstances where it is determined that face-to-face communication is not needed; and
- f. A Conduct Letter is necessarily a final disposition of a matter and, in contrast with a Conduct Review, a Conduct Letter does not result in a subsequent written report to the Discipline Committee.

5. No Further Action

Under Rule 4-4 of the Law Society Rules, the Discipline Committee also has the option of directing that a matter be concluded with no further action taken, where it determines that the circumstances of the matter do not warrant any response. This may be on the basis that the Committee is satisfied that the conduct, on a balance of probabilities, cannot be proven or does not fall below the standard of conduct expected by the Law Society.

A record of the complaint, though, along with the Discipline Committee's decision, is retained by the Law Society.

6. Referral to the Practice Standards Committee

The Discipline Committee may refer a matter to the Practice Standards Committee either on its own or concurrently with another action such as a Conduct Review. The Practice Standards Committee has the authority to assist lawyers to achieve and maintain competency by assisting lawyer's in implementing appropriate office systems and procedures, recommending remedial studies or mentoring, and, where necessary, the imposition of practice restrictions.