Law Society of Alberta

Threshold Test Guideline

November 28, 2024

Table of Contents

THRESHOLD TEST GUIDELINE

Introduction

1. During a regulatory proceeding, the Law Society of Alberta has an obligation to protect the public interest, while ensuring that fairness is maintained throughout the process.

2. This Guideline provides direction on the use and application of the Threshold Test ("Test"). The Test is used to determine if a lawyer's conduct warrants regulatory action and provides guidance as to its application.

3. In this Guideline, "decision-maker" means an individual who applies the Test.

4. Nothing in this Guideline supersedes or replaces any provision of the *Legal Profession Act* ("Act") or *The Rules of the Law Society of Alberta* ("Rules").

The Threshold Test

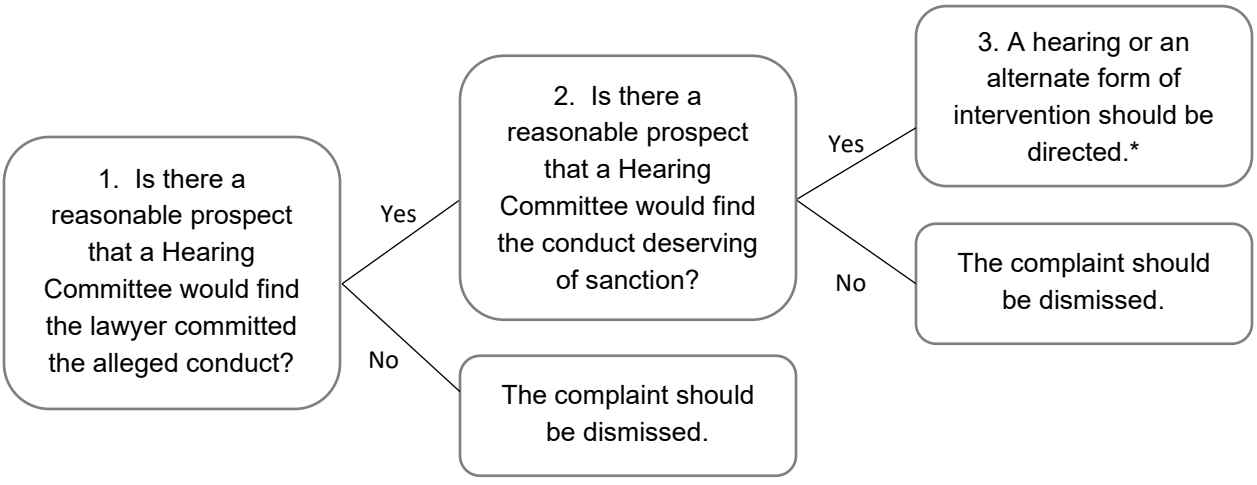
5. Pursuant to Rule 88(4.2), the Test is:

   (1) Is there a reasonable prospect that a Hearing Committee would find the lawyer committed the alleged conduct, and

   (2) If so, is there a reasonable prospect that a Hearing Committee would find the conduct deserving of sanction.

Application of the Test

6. To apply the Test, the following steps are taken, where applicable:



* Alternate forms of intervention may include a referral to the Practice Review Committee, a Mandatory Conduct Advisory, or a dismissal with Letter of Caution.

7. When applying the Test, the decision-maker will rely on the evidence before it. The decision-maker should not attempt to anticipate evidence that may be brought forward at a later date.

8. If both questions of the Test are answered in the affirmative, prior to directing a hearing, the decision-maker may consider whether there are any public interest factors that indicate an alternate form of intervention is appropriate.

Reasonable Prospect

9. A "reasonable prospect" is something more than a *prima facie* case but less than proof on a balance of probabilities. A probability of a finding of conduct deserving of sanction is not required.

10. A *prima facie* case is "one which covers the allegations made and which, if they are believed, is complete and sufficient to justify a [decision] in the complainant's favour in the absence of an answer from the [lawyer]" (para 28 in *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536, 1985 CanLII 18 (SCC)).

11. A "reasonable prospect" is explained as follows (modified from the criminal standard at para 31 in *Proulx v. Quebec (Attorney General)*, [2001] 3 SCR 9, 2001 SCC 66 (SCC)):

> To say that the [decision-maker, for purposes of the Test,] must be convinced [of a lawyer's guilt before a hearing is directed] is obviously incorrect. That is the ultimate question for the trier of fact, and not the [decision-maker] to decide. However, the [decision-maker, in addressing the Test,] must have sufficient evidence to believe that guilt *could* properly be proved [on a balance of probabilities] before a hearing can be initiated.

12. The standard of a "reasonable prospect" has been adopted as an acceptable standard, and is something more than a *prima facie* case. Requiring no more than a *prima facie* case can lead to absurd results. For instance, there may be a *prima facie* case even where there is an obvious defence. There may also be a *prima facie* case where a witness maintains a certain position despite objective unreliability of the evidence. In either case, it would not make sense to proceed with a hearing.

13. The alleged conduct does not have to be proven, but the decision-maker should believe that the information presented could reasonably provide the basis for proof at a hearing.

14. As noted in *The Report of the Attorney General's Advisory Committee on Charge, Screening, Disclosure, and Resolution Discussions* ("Martin Committee Report"), 1993, Ontario Ministry of the Attorney General, (https://archive.org/details/mag_00049289), which reviewed criminal prosecutions:

> …the proper standard, or proper threshold test, must be one that does not unduly restrict … prosecutorial discretion, but at the same time prevents the process … from being used oppressively, where there is no realistic prospect of a conviction on the evidence. (p. 51)

Conduct Deserving of Sanction

15. If the decision-maker believes there is a reasonable prospect that a Hearing Committee would find the lawyer committed the alleged conduct, the next part of the Test requires an assessment of whether there is a reasonable prospect that a Hearing Committee would find the alleged conduct deserving of sanction.

16. Section 49(1) of the Act defines "conduct deserving of sanction" as:

> …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,
>
> …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.

Assessment of Information

17. The decision-maker's role is not to usurp the function of the Hearing Committee. However, some assessment of the information that supports the allegations must be made when applying the Test. The role of the decision-maker is to ensure that matters do not proceed to a hearing where there is no reasonable prospect of a finding of conduct deserving of sanction.

18. If a conduct matter is referred to a hearing, any citations issued must reflect the allegations and information provided to support the allegations. The decision-maker must determine if there is a reasonable prospect that certain findings of fact could be made by a Hearing Committee to establish the factual underpinnings of the citation.

19. When applying the Test, the decision-maker may consider several factors, discussed below.

The Probative Value of the Evidence

20. The decision-maker considers a summary assessment of the probative value of the information provided to support the allegations, including a basic assessment of the accuracy, credibility or reliability of witnesses, without usurping the role of the Hearing Committee.

21. The Martin Committee Report, *supra*, provides the following guidance on assessing the credibility of witnesses:

> The Committee agrees that the credibility of witnesses is generally for the trier of fact, particularly where the assessment of credibility is based on the demeanour of the witness. The Committee considers, however, that, in

> some cases, some assessment of the credibility of witnesses is not only desirable, but necessary, before invoking the criminal law process. (p. 56)

The report also states:

> Thus, the review of credibility or other capacities of witnesses undertaken for purposes of the threshold test should be founded on **objective** indicators, such as incontrovertible evidence from an independent source that a particular witness is mistaken or lying. (Emphasis added, pp. 68-9)

> As the Committee has observed, some assessment of the credibility of witnesses is appropriate in deciding whether the threshold test is satisfied. However, this assessment of the credibility of witnesses has a limited purpose and is of a limited kind. Once the threshold test is satisfied, the credibility of witnesses is for the trier of fact. (p. 69)

Admissibility of Evidence

22. The decision-maker considers the admissibility of the information provided, as the Test will not be met where information necessary to the prosecution is clearly and obviously inadmissible.

23. Section 68(1) of the *Act* provides that a Hearing Committee is not bound by rules of law concerning evidence in judicial proceedings.

24. When applying the Test, evidence of prior insurance or regulatory matters cannot be considered for the purpose of determining whether there is a reasonable prospect of a finding that a lawyer committed the alleged conduct or that the alleged conduct would be deserving of sanction.

25. If the Test is met, prior insurance and regulatory matters may be considered in determining whether alternatives to a hearing are appropriate.

Defences

26. The decision-maker considers any potential defences, and considers whether any contrary information is raised.

27. The decision-maker should be cautious when considering a lawyer's potential defences, and should not pre-judge the potential outcome of a hearing. The assessment of a lawyer's defence may involve a preliminary assessment of credibility and the probative value of the evidence, as described under heading (a).

Public Interest Factors

28. Public interest factors may only be considered after the Test has been met. Public interest factors do not justify directing a matter to the Hearing Committee if the Test is not met.

29. Prior to directing a hearing, the decision-maker may consider whether there are any public interest factors that indicate an alternate form of intervention is appropriate, rather than a referral to a hearing.

30. Alternate forms of intervention may include a referral to the Practice Review Committee, a Mandatory Conduct Advisory, or a dismissal with Letter of Caution.

31. Public interest considerations may include:

    a. the circumstances of the complainant, where relevant, although these will not be determinative;

    b. the need to maintain public confidence in the profession and the effect on the reputation of the profession if the matter is not referred to a hearing;

    c. the appropriateness of alternatives to a hearing; and

    d. the lawyer's regulatory and insurance history.