

Conduct Committee Guideline

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Conduct Committee Guideline

Introduction

1. This Guideline provides guidance to the Conduct Committee or a panel of the Conduct Committee (a “Panel”) about its role under Part 3 of the *Legal Profession Act* (the “Act”).
2. This Guideline applies only to the following Conduct Committee or Panel processes:
 - a. reviews of a lawyer’s conduct (s. 56);
 - b. referrals that can be made by a Panel during or after the course of its review, pursuant to sections 58 and 78(5);
 - c. applications to the Conduct Committee, as follows:
 - i. applications to approve Admissions of Guilt (s. 60);
 - ii. discontinuance applications (s. 62); and
 - iii. applications for extension of payment of hearing costs or fines (s. 79 and Rule 99.1).
3. In this Guideline, a reference to:
 - a. “Executive Director” includes the Executive Director’s delegate;
 - b. “President” includes the President-Elect; and
 - c. “lawyer” includes a student-at-law.
4. Nothing in this Guideline supersedes or replaces any provision of the Act or the *Rules of the Law Society of Alberta* (the “Rules”).

Preliminary Matters

Potential Bias and the Conduct Committee Panel

5. From time to time, a concern may arise as to whether a member of a Panel is ineligible to participate in a matter due to the reasonable apprehension of bias. Although a Panel is not acting in an adjudicative role, Panel members should avoid circumstances that give rise to a reasonable apprehension of bias.
6. The test is, “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide

fairly.”¹

7. Prior knowledge about the lawyer whose conduct is the subject of review will not necessarily create a reasonable apprehension of bias, as information about the lawyer’s record will be disclosed. Beginning from a strong presumption of impartiality, the decision-maker should consider whether the facts, in their entire context, “point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities.”²
8. Panel members may consult with the Chair of the Conduct Committee if they are uncertain whether it would be appropriate to participate in a matter. If a Panel member decides it would be inappropriate for them to continue to participate, notice should be given to the Conduct Department as soon as possible in order to permit an alternate to be appointed.

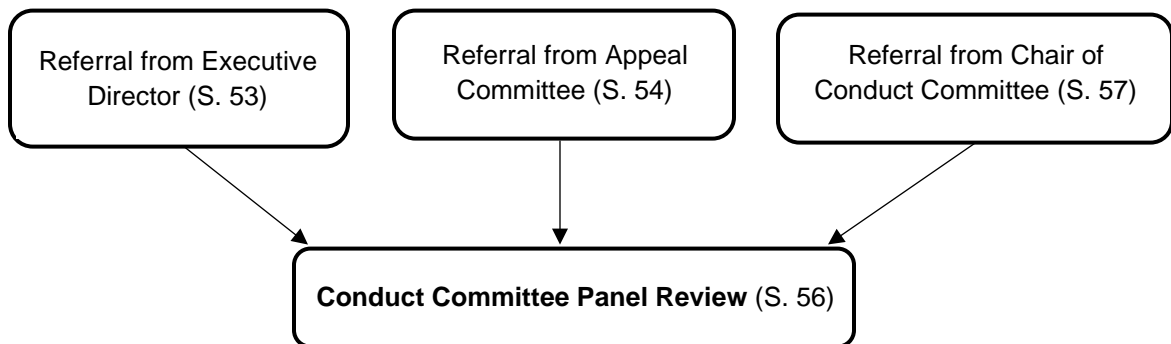
Referrals to the Conduct Committee

9. Section 56 of the Act provides that the Conduct Committee must review any conduct of a lawyer referred to it under section 53 (Executive Director), 54 (Appeal Committee) or 57 (Chair of Conduct Committee). In each of these cases, section 56(3) provides that the Conduct Committee has the authority to direct that:
 - a. the matter be dismissed; or
 - b. the conduct be dealt with by a Hearing Committee.
10. Rule 88 sets out further guidance respecting Conduct Committee Reviews. Subrule (1) allows the Conduct Committee to sit in panels of 3 members to conduct reviews and make determinations as provided in section 56 of the Act.
11. Approximately once a month, Panels of three Conduct Committee members meet to review the matters that have arisen since the last meeting. This means that any given matter might be reviewed by more than one Panel during the course of a Conduct Committee review and no one Panel is seized of a particular matter. *Ad hoc* Panel meetings may also be held as required.
12. The following flowchart depicts the various referrals that can be made to the Conduct Committee:

¹ *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369 at 394

² *Wewaykum Indian Band v. Canada* [2003] 2 S.C.R. 259 at 295

Sources of Referrals to the Conduct Committee:



Referral from the Executive Director (Section 53)

13. The Act requires the Executive Director to review any conduct that comes to the attention of the Law Society that is “incompatible with the best interests of the public or of the members of the Society or tends to harm the standing of the legal profession generally.” (See sections 49(1) and section 53(1) of the Act). The Conduct Committee considers matters after the Executive Director has reviewed the conduct of the lawyer. The *Conduct Protocol* and the *Independent Counsel Protocol* describe the process of the review by the Executive Director or Independent Counsel prior to a matter being referred to the Conduct Committee.
14. The Executive Director only refers matters to a Panel at the conclusion of the review under Part 3 of the Act if the Executive Director concludes that the “Threshold Test,” which is set out in the *Threshold Test Guideline*, has been met. In those cases, the Executive Director will provide the Panel with a report, pursuant to section 53 of the Act, that includes the following:
 - a. a summary of all relevant information;
 - b. an analysis of and a legal opinion on the issues;
 - c. a legal opinion as to whether the Threshold Test is met;
 - d. a recommendation as to the next steps in the regulatory process;
 - e. any proposed citations;
 - f. the lawyer’s regulatory history; and
 - g. a copy or excerpts of relevant material relied upon during the section 53 review.

Referral from the Appeal Committee (Section 54)

15. In cases where a dismissal by either the Executive Director or Independent Counsel at the conclusion of a review under section 53 has been successfully appealed by the complainant, the Panel will receive all materials that were before the Appeal Committee, as well as a copy of the Appeal Committee's decision. The Panel's review proceeds in the same fashion as a referral from the Executive Director.

Referral from the Chair of the Conduct Committee (Section 57)

16. If the Chair of the Conduct Committee is of the view that the Executive Director, the Conduct Committee or the Appeal Committee:
 - a. may have overlooked a significant legal or factual element; or
 - b. may not have been aware of all of the significant legal and factual elements when making a determination to dismiss a matter,

the Chair of the Conduct Committee may consult with the Chair of the Professional Responsibility Committee and the President. If a majority of those persons are of the view that the matter should be re-examined, the matter will be referred to the Conduct Committee for review or a second review.

17. For further guidance on how a referral is directed to the Conduct Committee pursuant to section 57, the Conduct Committee should refer to the *Section 57 Re-Examination Guideline*. Once the Conduct Committee receives a referral under section 57, a Panel will engage in a section 56 review and this Guideline applies.

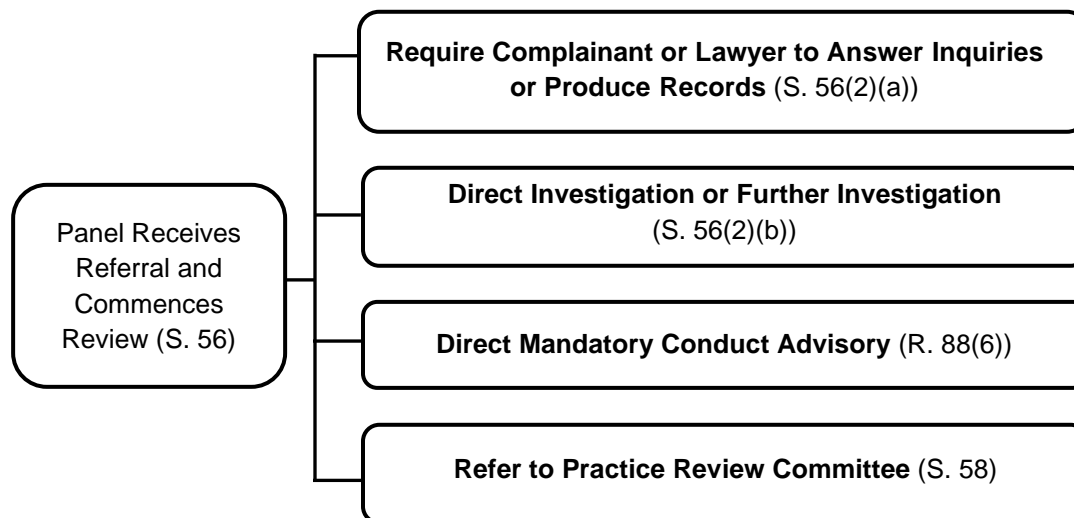
Section 56 Review Process

18. Rule 88(4) requires that the Panel make its decision on the basis of the report from the Executive Director or Independent Counsel under section 53 of the Act, and the answers to the Panel's inquiries of the Executive Director or Independent Counsel respecting:
 - a. that report;
 - b. the report of any investigation directed by the Panel; and
 - c. the answers to the Panel's inquiries and the records, if any, received from the complainant or lawyer pursuant to section 56(2)(a) of the Act.
19. The Executive Director or Independent Counsel will be present at the Panel meeting to answer any inquiries respecting the review conducted in accordance with section 53 of the Act.
20. The *Threshold Test Guideline* offers clear guidance on the process for making a

determination during the course of a section 56 review.

21. The Panel reviews the lawyer's conduct and the supporting materials provided through the referral from the Executive Director, the Appeal Committee or through a section 57 re-examination referral. The Panel may conclude its review at that time. However, in some reviews, the Panel may require further information or investigation before the Conduct Committee can conclude its review. In other cases, the Panel may be of the view that an alternative form of intervention, such as a Practice Review Committee referral or a Mandatory Conduct Advisory, or both would be appropriate. The options available to the Panel to obtain further information are discussed below.
22. In considering the appropriate option for obtaining further information or an alternative form of intervention, Panels are encouraged to consider the governability of the lawyer whose conduct is the subject of review. 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.
23. Various types of conduct undermine the Law Society's ability to govern, including:
 - a. failing to respond to those involved in the Law Society process;
 - b. failing to be candid with those involved in the Law Society process;
 - c. failing to cooperate with those involved in the Law Society process;
 - d. breaching an undertaking given to those involved in the Law Society process; and
 - e. practising while suspended or inactive.
24. If any of the conduct set out in paragraph 23 is present, options that require cooperation from the lawyer, such as a Mandatory Conduct Advisory or a Practice Review Committee Referral, may not be appropriate.
25. The following flowchart depicts the options available to a Panel before concluding a review pursuant to section 56 of the Act. A Panel may elect to pursue more than one of these options simultaneously:

Options Available to a Panel Before Concluding a S. 56 Review:



Answer Inquiries or Produce Records (Section 56(2)(a))

26. During the review, the Panel may require the complainant or the lawyer to answer any inquiries or to produce any records that the Panel considers relevant for the purpose of the review.
27. The Panel may provide a brief description of the information it requires and may impose a deadline by which the lawyer or the complainant are to reply, pursuant to rule 88(3).

Investigation (Section 56(2)(b))

28. The Panel may direct an investigation or further investigation of the lawyer's conduct. In this case, the Panel returns the review to the Executive Director or Independent Counsel to implement the Panel's direction. Once the investigation directed by the Panel is concluded, the matter will be resubmitted to a Panel.

Mandatory Conduct Advisory (Rule 88(6))

29. In circumstances where the Conduct Committee has reason to believe that the lawyer's practice is being conducted in a manner that may not be in the best interests of the public or the legal profession, or both, a Panel may direct that further investigation of the conduct of a lawyer take place by way of a Mandatory Conduct Advisory (MCA). An MCA is a private meeting with the lawyer and one or more Benchers, directed by the Conduct Committee, to discuss the conduct in question and the reasons for the concern.

30. The MCA process is designed to help the Conduct Committee investigate the principal reason why the alleged misconduct occurred. It is typically used to ascertain the lawyer's understanding of their ethical obligations in the circumstances and to provide direction to the lawyer who is the subject of a complaint on how to better address similar issues in the future. An MCA assists the Conduct Committee in determining if the public interest can be satisfied by an MCA process, or if a full hearing is required.
31. The public interest can be satisfied in circumstances where the lawyer subject to the complaint understands their obligations in the circumstances and is committed to ensuring the conduct is not repeated in the future.
32. The Conduct Committee should refer to the *Mandatory Conduct Advisory Guideline* for a detailed explanation of that process.
33. Rule 88(6) provides that the Bencher(s) who carried out the MCA will provide a report to the Conduct Committee (the "MCA Report"). The matter will be reviewed by a Panel convened for that month. The Panel will then determine whether the MCA was an acceptable alternative measure to deal with the conduct of the lawyer in the public interest and continue or conclude its review.

Referral to Practice Review Committee for Formal Review (Section 58)

34. Section 58 of the Act provides that a Panel may direct the Practice Review Committee to carry out a general review and assessment of the lawyer's practice in addition to the review conducted by the Panel under section 56. The Panel should make this type of referral if it is concerned that the manner in which the lawyer's practice is being conducted may not be in the best interests of the public or the legal profession, or both, and there is a likelihood that this conduct will continue or recur.
35. This direction may occur during the Panel's section 56 review, or after it has concluded. If the Panel has specific concerns, it may identify those concerns to assist the Practice Review Committee in conducting its review.
36. A Panel should direct a section 58 referral if the following three questions are answered in the affirmative:
 - a. Do the circumstances of the complaint indicate a problem or deficiency in the lawyer's practice?
 - b. Are there indications of a pattern of conduct or a systemic problem within the practice?
 - c. Is there a reasonable prospect that a referral to the Practice Review Committee will reduce the risk of continuation or recurrence of the conduct of concern?

37. Factors that may be considered in assessing whether to refer the matter to the Practice Review Committee include:
- a. length of time the lawyer has been in practice;
 - b. disruption in business elements of practice (associates, support staff, premises, telephones, office hours);
 - c. personal or mental health issues;
 - d. whether the conduct under review suggests:
 - i. concerns regarding the lawyer's knowledge, skill or judgment;
 - ii. lack of concern for interests of clients or trust responsibilities to third parties;
 - e. availability of peer support;
 - f. type and volume of practice;
 - g. whether a continuing professional development plan has been implemented;
 - h. financial sustainability of the practice; and
 - i. any other factors that the Panel considers relevant for the purposes of the assessment.
38. The Practice Review process may take several months to conclude, so the Panel may continue its section 56 review contemporaneously to avoid delay. In most cases, the Practice Review process will be separate from the section 56 review, as it will address the lawyer's practice generally while the section 56 review will focus on the specific conduct referred to the Panel. Therefore, the Panel may make its final determination under section 56 before the Practice Review Committee has completed its review and made its report to the Panel.
39. Please see paragraphs 48-50 for guidance on situations where the Practice Review Committee reports back to the Conduct Committee, and its review of the report pursuant to section 58(7) of the Act.

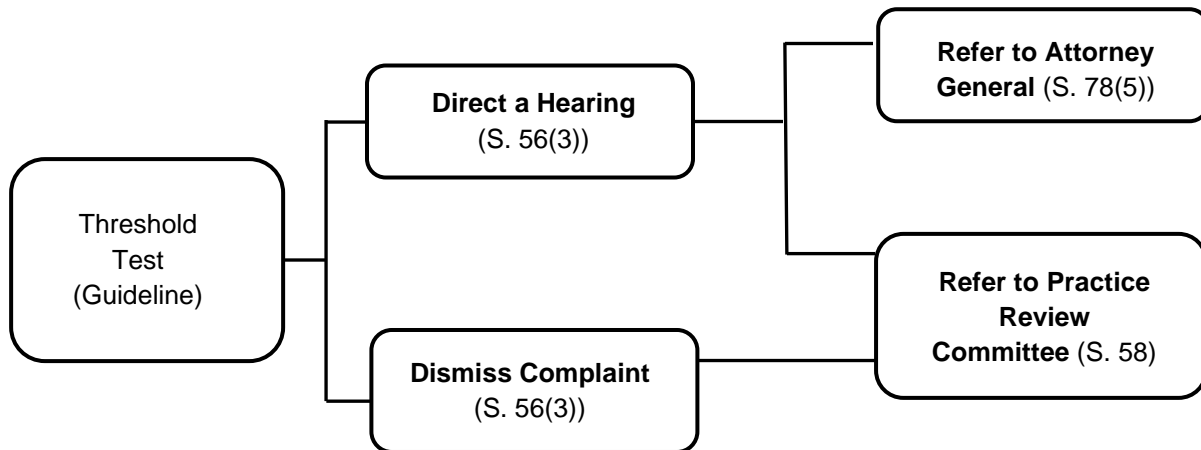
Conclusion of a Section 56 Review

40. Upon completing its review, section 56(3) of the Act provides that the Panel shall either:
- a. direct that the matter be dismissed; or
 - b. direct that the conduct be dealt with by a Hearing Committee.

The Panel should apply the Threshold Test to make this determination.

41. The Panel's decision should be recorded in minutes.
42. Once the Panel has made its determination, it may make additional referrals in certain circumstances described below and depicted in the following flowchart:

Options when Concluding a S. 56 Review:



Dismissal

43. Upon completing its review under section 56, the Panel may dismiss the matter if it does not meet the Threshold Test.
44. If an MCA has been directed, the Panel may determine that it has sufficiently addressed the matter, based on the MCA Report, even if the Threshold Test has been met.
45. In accordance with Rule 88, a Panel's decision to dismiss a matter regarding a lawyer's conduct must include a written explanation. The Executive Director will notify the lawyer and the complainant of the Conduct Committee's decision. This decision will also be considered should an application be made for a re-examination pursuant to section 57.

Directing Conduct to a Hearing Committee

46. If the Panel directs that the conduct should be dealt with by a Hearing Committee, it will do so based on the citations proposed by the Executive Director. Deference should be given to the wording of the citations used by the Executive Director.

Referral to Attorney General

47. During the course of its review, a Panel may form the opinion that there are reasonable and probable grounds to believe that a lawyer has committed a criminal offence. In these cases, section 78(5) of the Act provides that the Panel may direct the Executive Director to advise the Minister of Justice and Attorney General.

Referral to Practice Review Committee

48. Whether the Panel decides to direct the conduct to a hearing or to dismiss the matter, it may also direct the Practice Review Committee to conduct a general review of the lawyer's practice in accordance with section 58 of the Act if it has not done so already. This will be the case if the Panel is concerned that the manner in which the lawyer's practice is being conducted may not be in the best interests of the public or the legal profession, or both, and there is a likelihood that this conduct will continue or recur. Despite the original conduct matter being dismissed, the general assessment of the lawyer's practice is a broader review that can be directed at any time during or after the section 56 review.
49. At the conclusion of a section 58 review, the Practice Review Committee will provide the Conduct Committee with a report, summarizing the results of its review, any recommendations or undertakings obtained from the lawyer, and whether the lawyer followed its recommendations or satisfied the undertakings.
50. If additional conduct matters have arisen during the course of the section 58 review, they should be treated as new matters. Examples include circumstances where the lawyer has breached an undertaking given to the Law Society in the course of its review, or where the review reveals additional concerns. Upon receiving the report from the Practice Review Committee, a Panel may direct that conduct mentioned in the report be dealt with by a Hearing Committee, or that an investigation be made into the conduct before making a determination, pursuant to section 58(7).
51. Please see paragraphs 34-37 above for further guidance on when to make a section 58 referral.

Applications Brought to Conduct Committee Panels

52. The Act and the Rules identify several applications that may be brought before a Panel, as follows.

Admission of Guilt

53. Section 60 provides that a lawyer may submit a Statement of Admission of Guilt of conduct deserving of sanction (the "Admission") in respect of any or all of the acts or matters that

- are the subject of proceedings under Part 3, Division 1 of the Act at any time before a Hearing Committee makes its findings.
54. Section 60(2) provides that, if a Hearing Committee has not yet been appointed, the Admission is presented to a Panel for acceptance. In this case, the Admission is presented in lieu of a report pursuant to section 53 of the Act.
55. An Admission should be accompanied by the necessary facts to support the Admission. The Admission must be signed by the lawyer. It may be submitted jointly by Law Society Counsel and the lawyer.
56. An Admission should include the lawyer's confirmation that the lawyer:
- a. is making the Admission freely and voluntarily;
 - b. unequivocally admits guilt to the essential elements of the citations describing the conduct deserving of sanction;
 - c. understands the nature and consequences of the Admission³; and
 - d. understands that, while the Hearing Committee will show deference to a joint submission on sanction submitted by the lawyer and Law Society Counsel, the Hearing Committee is not bound by any joint submission.
57. Provided the above considerations are confirmed, if the Admission has been submitted jointly by the lawyer and Law Society Counsel, the Panel should give deference to it, as it has been achieved through the process of a negotiated settlement. Similar principles have been applied to Admissions that are jointly arrived at as with joint submissions on sanction.⁴ Accordingly, the Admission should not be rejected unless it would bring the administration of justice into disrepute or is otherwise contrary to the public interest.⁵
58. Pursuant to section 60(4), if the Panel accepts the Admission, each admission of guilt is deemed for all purposes to be a finding of a Hearing Committee that the conduct of the lawyer is deserving of sanction. The Executive Director will advise the lawyer and the complainant of the Panel's decision. The Chair of the Conduct Committee will then appoint a Hearing Committee to make a determination respecting the appropriate sanction for the admitted conduct, and to make determinations on any remaining matters for which guilt was not admitted.

Application to Extend Time to Pay Hearing Costs or Fines

59. Section 79 provides that a lawyer will be automatically suspended for failing to provide payment in full and on time where there has been an order to pay a penalty or costs of

³ 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)

⁴ Please see *Law Society of Alberta v. Pearson*, 2011 ABL 17.

⁵ Please see *R. v. Anthony-Cook*, 2016 SCC 43.

any proceeding under Part 3, Division 1, unless otherwise directed by the Conduct Committee. A lawyer can apply to the Conduct Committee to extend the deadline for payment but must do so within sufficient time for the Conduct Committee to make a determination before the expiration of the period prescribed by the order.

60. If the Panel determines that an extension is warranted in the circumstances, Rule 99.1 provides that it may also impose such terms and conditions on repayments as the Panel deems fit and appropriate under the circumstances, including the payment of interest.
61. When making a determination on an application to extend time to pay costs or fines, the Panel should consider:
 - a. the personal and financial circumstances of the lawyer and the lawyer's ability to pay;
 - b. whether the lawyer has previously applied for an extension;
 - c. whether the lawyer has proposed a payment plan, and if so, the reasonableness of that proposal;
 - d. whether the lawyer has provided supporting documentation.
62. If the lawyer is granted an extension and fails to meet the new deadline set by the Panel, the lawyer will be automatically suspended.

Discontinuance Application

63. Section 62(1) authorizes a Panel to discontinue a proceeding any time before a hearing has commenced, if it determines that the circumstances of the conduct at issue do not justify the continuation of the proceeding.
64. Deference should be shown to the original Panel. There are limited circumstances in which a discontinuance application may be considered, as follows:
 - a. where Counsel for the Law Society takes the position that the Threshold Test is not met. In such cases, the position of Counsel for the Law Society is entitled to deference; or
 - b. where new information has arisen, where that information was not before the original Panel and where that information is material in the sense that it could reasonably have had an impact on the decision made by the original Panel.
65. The Threshold Test, as set out in the *Threshold Test Guideline*, should be applied.
66. The reasons for reaching a determination to discontinue a proceeding must be set out in writing.