

# Mandatory Conduct Advisory Guideline

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# Mandatory Conduct Advisory Guideline

## INTRODUCTION AND PURPOSE OF GUIDELINE

1. The purpose of this Guideline is to set out how a Mandatory Conduct Advisory (MCA) will be completed after the Conduct Committee<sup>1</sup> directs that an MCA will occur.
2. An MCA may be directed under section 56 or 58(7) of the *Legal Profession Act* and sub-Rule 88(6) of the *Rules of the Law Society of Alberta*. All MCAs will be directed in accordance with the *Conduct Committee Guideline* and *Threshold Test Guideline*.
3. Nothing in this Guideline should be taken as superseding or replacing any provision of the *Legal Profession Act* (Act) or the *Rules of the Law Society of Alberta* (Rules).

## SUMMARY OF THE MCA'S PURPOSE AND GOALS

4. The Bencher approved goals of an MCA are to:
  - a) pursue additional investigation of the conduct, if necessary;
  - b) determine whether the lawyer understands why their conduct was of concern to the Conduct Committee;
  - c) be a means of taking steps to ensure that the particular conduct is not repeated;  
and
  - d) although the MCA is a private meeting between the lawyer and the Law Society, still serve the public interest.
5. 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.

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<sup>1</sup> As defined in the *Legal Profession Act*, RSA 2000, c L-8.

6. 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.
7. 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.
8. An MCA is a private meeting between a lawyer and one or more Benchers<sup>2</sup> appointed to complete an MCA.

## **STEPS IN THE MCA PROCESS**

9. This section outlines the steps in the MCA process, including the obligations incumbent upon the lawyer subject to the complaint, the Law Society and the Bencher(s) who conduct the MCA.
10. The Law Society will inform the lawyer who is the subject of a complaint that an MCA has been directed by the Conduct Committee as soon as is practical. The lawyer will be provided a notice setting out:
  - a) excerpts from the Conduct Committee minutes directing that an MCA will occur including a summary of the purpose and goals of the MCA in the circumstances; and
  - b) a copy of this Guideline.
11. The Law Society will provide the complainant with a copy of the materials sent to the lawyer as soon as is practical.
12. One or more Benchers will be assigned to conduct the MCA based on the Benchers' availability and willingness. The Benchers' geographic region and practice area will be considered, if appropriate, given the nature of the matter.
13. When one or more Benchers are assigned to conduct the MCA, the Law Society will provide the Bencher(s) with a copy of:

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<sup>2</sup> As defined in the Act.

- a) the Conduct Committee minutes;
- b) the letter sent to the lawyer who is the subject of the complaint;
- c) a copy of this Guideline; and
- d) the section 53 report described in the *Conduct Protocol*.

(collectively the Materials)

14. No copy of the section 53 report will be disclosed to the lawyer subject to a complaint or to the complainant, as it is privileged and confidential. The lawyer may receive copies of any exhibit to the report, in advance of the MCA.
15. The Bencher(s) assigned to complete the MCA shall review the Materials and ascertain whether they are willing to proceed with the MCA.
16. The Bencher(s) will confirm with the Law Society whether they are willing to complete the MCA or not. Benchers are encouraged to confirm their acceptance or rejection of an assignment to conduct an MCA to the Law Society as soon as is practical.
17. After confirming with the Law Society that the Bencher(s) will oversee the completion of an MCA, the Bencher(s) will then contact the lawyer to arrange a date, time and place for the meeting.
18. The Bencher(s) conducting the MCA may, without disclosing the name or any other information that might identify the member concerned, seek advice from a practitioner knowledgeable in the area of law relevant to the complaint (Rule 88(6)(b)).
19. When the Bencher(s) meet with the lawyer, they will review the fact situation, identify concerns, identify any further pertinent information, assess the lawyer's understanding of their ethical obligations and dispense appropriate practice advice, as required.
20. If a lawyer resists or ignores the Benchers' efforts to schedule an MCA, the Bencher(s) shall report this conduct to the Conduct Committee including details of attempts to contact the lawyer. The Conduct Committee may take whatever further steps they deem appropriate in accordance with the Act and Rules.

21. It is anticipated that MCAs will be completed within four weeks of being assigned, and any summary report of findings will be submitted to the Law Society within three weeks of the completion of the MCA (the MCA Report). Circumstances may require extending these timelines, but the parties are encouraged to complete the MCA within the anticipated timeframe.
22. When the meeting is completed, the Bencher(s) will complete the MCA Report. The MCA Report should include the following information:
- a) the topics covered in the meeting;
  - b) a summary of advice given to the lawyer;
  - c) the Benchers' assessment as to whether the lawyer understood the ethical issues that arose and will take appropriate remedial action in the future;
  - d) the lawyer's attitude toward and acceptance of advice and directions;
  - e) answers to any inquiries directed by the Conduct Committee; and
  - f) the Benchers' assessment as to whether the complaint should be dismissed or not and, if appropriate, a recommendation as to whether the lawyer should be referred to the Practice Review Committee, if they have not already been referred.
23. A copy of the MCA Report will be provided to the lawyer subject to a complaint before it is submitted to the Conduct Committee. The MCA report will not be provided to the complainant.
24. The lawyer will have seven days to write a response to the MCA Report. Lawyers are advised to ensure that the MCA Report is accurate and complete.
25. If a lawyer disputes the content of the MCA Report they should provide a response noting their disagreement. This response will be provided to the Conduct Committee with the MCA Report.
26. A completed MCA may not necessarily conclude the matter.
27. The Conduct Committee will review the MCA Report and any response from the lawyer subject to the complaint, and then decide whether to dismiss the complaint or direct further action in accordance with the Act and Rules.

28. The Benchers who completed the MCA should not sit on the Panel that reviews the MCA Report (Rule 88(6)(c)(ii)).
29. The Law Society will inform the lawyer and the complainant of the Conduct Committee's decision.

## **FUTURE USE OF MCA INFORMATION**

30. The existence of the MCA and the MCA Report does not form part of a lawyer's public disciplinary record.
31. The fact of a past MCA and the MCA Report may, in some circumstances, be referenced in subsequent conduct proceedings or regulatory processes.

### **Conduct Committee**

32. Should subsequent conduct be alleged, a lawyer's past MCA may be raised and the MCA report may be provided to a future Conduct Committee but only to assist the Committee to determine the appropriateness of an alternative complaints resolution process.
33. The existence of a past MCA and the content of the past MCA Report will not be used by the Conduct Committee as evidence to assist in satisfying the Threshold Test, as set out in the *Threshold Test Guideline*. Each complaint must satisfy the Threshold Test on its own merits.

### **Hearing Committee**

34. The fact of a past MCA and the MCA Report may also be presented to a Hearing Committee<sup>3</sup> in the following circumstances:
  - a) if the prior conduct can be properly admitted as similar fact evidence; or

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<sup>3</sup> As defined in the Act.

- b) in a sanction hearing, where the prior conduct covered by the MCA is relevant to sanction.

35. Past MCAs can be an aggravating factor in sanction, especially if a lawyer was warned about a specific practice problem and it arises again. The applicable Hearing Committee will determine the admissibility of any past MCA or MCA Report.

36. The Law Society shall advise the lawyer in advance if it intends to raise a past MCA in any hearing, and the basis for seeking the admission of the past MCA and MCA Report. The lawyer will be provided with an opportunity to object to the admissibility of that evidence before the Hearing Committee.