

Pre-Hearing and Hearing Guideline

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Pre-Hearing and Hearing Guideline

Introduction

1. The Law Society of Alberta (the “Law Society”) conducts several types of hearings as part of its regulatory mandate. The Law Society’s Tribunal Office provides administrative support for all hearings.
2. This *Pre-Hearing and Hearing Guideline* provides guidance to the Benchers, Adjudicators and lawyers on the conduct pre-hearing and hearing processes carried out under Part 3 of the *Legal Profession Act* (the “Act”) and Part 3 of the *Rules of the Law Society of Alberta* (the “Rules”) (“Conduct Proceedings”) once conduct is directed to a hearing and citations are issued pursuant to section 56 of the Act.
3. The Guideline addresses matters that commonly arise prior to and during Law Society conduct hearings. This Guideline may be applied by analogy to other Law Society hearing processes where it does not conflict with existing Rules or Guidelines applicable to those hearings.
4. Applicable guidelines for other types of hearings are as follows:
 - a. the *Resignation Guideline* applies to:
 - i. resignations in the face of discipline under section 32 of the Act, and
 - ii. resignations under section 61 of the Act;
 - b. the *Reinstatement of Disbarred Persons Guideline* applies to reinstatement applications from former members who were disbarred or resigned in the face of discipline;
 - c. the *Credentials and Education Hearings Guideline* applies to hearings before the Credentials and Education Committee under Part 2 of the Rules and Part 2 of the Act;
 - d. the *Pre-Appeal and Appeal Guideline* applies to appeals to the Benchers under section 75 and 76 of the Act; and
 - e. the *Assurance Fund Claims Guideline* applies to hearings under Part 6 of the Rules.
5. Nothing in this Guideline supersedes or replaces any provision of the Act or the Rules.

Definitions and Interpretation

6. In this Guideline:
- a. “hearing” means a hearing as defined by Rule 1(1)(h.2);
 - b. “Hearing Committee” is defined in section 1(d) of the Act, and means a three-member Hearing Committee or a Single Bencher Hearing Committee;
 - c. “panel” means an adjudicative panel of any committee, the Benchers or a panel or committee of Benchers, other than a Hearing Committee;
 - d. “lawyer”
 - i. has the same meaning as “member” in the Act and the Rules and includes a student-at-law, and
 - ii. includes the lawyer’s counsel, where applicable;
 - e. “party” or “parties” means the lawyer and the Law Society;
 - f. “proceeding” includes a Conduct Proceeding or a matter other than a Conduct Proceeding;
 - g. “Single Bencher Hearing” means a hearing presided over by a single Bencher, in accordance with section 60(3) of the Act.

Pre-Hearing Issues and Proceedings

Notice of Hearing

7. Once a conduct matter is directed to hearing, the Tribunal Office will send the lawyer a notice, in accordance with Rule 90, indicating the lawyer’s conduct has been directed to hearing (“Notice of Hearing”), a list of citations and an initial pre-hearing conference (“PHC”) notification.
8. The parties may be represented by counsel at any stage of the proceedings, in accordance with section 64 of the Act. If the Tribunal Office is advised that the party is represented by counsel, then all further communication will be sent to counsel until the Tribunal Office is notified otherwise.
9. No party, representative, witness or interested party may communicate directly with the PHC chair or the Hearing Committee outside of the PHC or hearing. All communications outside a PHC or hearing must be in writing, through the Tribunal Office.

Pre-Hearing Conferences

10. For hearings under section 59 of the Act, the Tribunal Office will schedule a PHC after the matter has been directed to be dealt with by a Hearing Committee, unless both parties agree to waive a PHC (Rule 90.1(1)(a)).
11. For conduct hearings before a Single Bencher Hearing Committee, or for any other type of hearing under the Act or Rules, a PHC will be scheduled by the Tribunal Office:
 - a. at the request of either party; or
 - b. by direction of the chair of the applicable committee.
12. A PHC notification sent by the Tribunal Office will include instructions for participating in the PHC. Most PHCs will take place by telephone and in some cases by videoconference.
13. A PHC will be chaired by a Bencher appointed by the chair of the applicable committee, depending on the type of hearing. Generally, for hearings under sections 59 and 75 of the Act, the Chair or a Vice-Chair of the Conduct Committee will chair the PHC.
14. If a PHC is scheduled, the attendance of the lawyer or the lawyer's counsel, and Law Society counsel at a PHC is mandatory. Pursuant to Rule 90.3(2) the PHC may continue in the absence of the lawyer and the lawyer's counsel once the PHC chair confirms that the lawyer or the lawyer's counsel was given notice of the PHC.
15. In accordance with Rule 90.3(4), the PHC is recorded by the Tribunal Office for the purpose of preparing a written report after each PHC ("PHC report"). The PHC report will include any deadlines or directions issued by the PHC chair. Each party will receive a copy of the PHC report. If a party notes any significant inaccuracies in the PHC report, they must notify the Tribunal Office immediately.
16. The recording of the PHC will not be made available to the parties and will be destroyed after all appeal periods have expired, or all appeals have concluded, including any appeal to the Court of Appeal.
17. Rule 90.3(6) provides that the portions of the recording of the PHC or the PHC report that set out directions made by the PHC chair, and failures to comply with those directions, are admissible at a hearing related to the same proceeding, at the discretion of the Hearing Committee.
18. A Hearing Committee may consider admitting all of or a portion of a PHC report based on the submission that it is relevant to an issue that will be considered by the Hearing Committee.

Powers and Limitations of the PHC Chair

19. The powers of the PHC chair are set out in Rule 90.2(2).
20. The PHC chair may permit or direct amendments to citations or may permit the withdrawal of citations, provided the amendment or withdrawal does not result in the discontinuance of Conduct Proceedings respecting the lawyer.
21. The PHC chair may not decide that a matter will be heard by a Single Bench Hearing Committee, nor appoint a Hearing Committee. Those are decisions of the Chair of the Conduct Committee under section 59 and section 60(3) of the Act.
22. The PHC chair may not determine that a statement of admission of guilt of conduct deserving of sanction (“Admission”) is in an acceptable form. That is a decision for either the Conduct Committee or the Hearing Committee, pursuant to section 60 of the Act.
23. The PHC chair may not approve or ratify an agreement with respect to sanction. That is a decision for the Hearing Committee.
24. The PHC chair may not participate in any subsequent hearing or appeal related to the same matter unless the lawyer and Law Society counsel consent to the PHC chair’s participation, subject to the discretion of the Chair of the Conduct Committee (Rule 90.2(4)).

Mediation and Dispute Resolution

25. Pursuant to Rule 90.2(2), the PHC chair may canvass the lawyer and Law Society counsel as to whether they may be interested in mediation. However, the PHC chair may not act as mediator.
26. The parties may enter into without prejudice mediation or dispute resolution discussions during the pre-hearing stage of the proceedings to try to reach agreement on facts or sanction, or to narrow the issues to be determined at the hearing.
27. Either party may initiate informal resolution discussions. Such discussions may result in a statement of admitted facts or a joint submission on sanction or both. Any agreement that is reached must be accepted by either the Conduct Committee or the Hearing Committee, as the case may be. Specific guidance is provided in the sections “Statement of Admission of Guilt” at paragraphs 46-53, and “Joint Submission on Sanction”, at paragraphs 209-217.

28. The parties may pursue formal mediation or dispute resolution. Both parties must explicitly agree to participate in any formal resolution process, including an agreement about responsibility for payment of the associated costs. A formal mediation or dispute resolution can be discontinued at any time by either party.
29. The parties must mutually agree on a mediator or facilitator for resolution discussions. The Tribunal Office may assist the parties to identify an appropriate mediator, upon request.
30. Any matters that remain unresolved after mediation or resolution discussions will be decided by the Hearing Committee.

Disclosure and Particulars

31. As soon as is practicable after a matter has been directed to a hearing under section 59 of the Act, Law Society counsel will disclose to the lawyer a copy of the relevant documents in the Law Society's possession, in accordance with Rule 90.6(1) and the *Pre-Hearing Disclosure Protocol*. Disclosure will be provided in electronic form.
32. Law Society counsel will provide particulars of the citations to the lawyer upon request, in accordance with section 59(1) of the Act, Rule 90(1)(b)(ii) and the *Pre-Hearing Disclosure Protocol*.
33. Law Society counsel will advise the lawyer as soon as practicable if a suspension or disbarment is being sought.
34. The lawyer may apply to the PHC chair for additional disclosure or further particulars in accordance with Rule 90.6(2).

Notice to Admit Facts and Authenticity of Documents

35. Not less than 45 days before a hearing under section 59 of the Act is scheduled to begin, the lawyer and Law Society counsel may serve the other party with a Notice to Admit the truth of facts and the authenticity of documents ("Notice to Admit"), pursuant to Rule 90.4(2).
36. The Notice to Admit must be in writing, setting out the specific facts and attaching a copy of the documents for which an admission is requested.
37. For the purpose of Rule 90.4, "authenticity" means:



- a. a document that is said to be an original was printed, written, signed and executed as it purports to have been;
 - b. a document that is said to be a copy is a true copy of the original;
 - c. if a document purports or appears to have been transmitted, the original was sent by the sender and received by the addressee; and
 - d. in the case of an electronic record, an original or copy of a document that has been created, recorded, transmitted or stored in digital form, in the usual and ordinary course of business and in accordance with acceptable standards that support the integrity of the record and its original format and contents.
38. A party who is served with a Notice to Admit must reply in writing within 21 days of service unless that time is extended by agreement of the parties or by a direction of the PHC chair.
 39. The reply must admit or deny each fact or the authenticity of each document for which an admission is requested.
 40. For any denials, parties must include reasons that fairly meet the substance of the requested admission.
 41. In accordance with Rule 90.4(8), if a party fails to respond to a Notice to Admit within the specified time frame, the party is deemed to admit the truth of the facts or the authenticity of documents set out in the Notice to Admit, unless otherwise directed by the Hearing Committee in accordance with Rule 90.4(12). A decision to relieve a party of a deemed admission is within the sole discretion of the Hearing Committee.
 42. An admission of the authenticity of a document does not constitute an admission of the truth of the contents of the document.
 43. In accordance with Rule 90.4(9), admissions made in response to a Notice to Admit do not constitute an admission of conduct deserving of sanction. The Hearing Committee must determine whether the admission supports a finding of conduct deserving of sanction.
 44. If the facts or the authenticity of documents are denied and later proven at the hearing, the Hearing Committee may consider this factor when determining hearing costs, in accordance with Rule 90.4(10).
 45. If a party has made an admission or a denial, they may amend or withdraw it provided the other party consents, or if they have been granted permission to do

so on application to the PHC chair or the Hearing Committee, as the case may be (Rule 90.4(11)).

Statement of Admission of Guilt

46. Section 60 provides that before a Hearing Committee makes its findings, a lawyer may submit an Admission, which must be approved as being in an acceptable form by either the Conduct Committee or the Hearing Committee.
47. To be in an acceptable form, the Admission must:
 - a. include the facts necessary to support a finding of guilt on the essential elements of the citation;
 - b. include the lawyer's confirmation that the lawyer:
 - i. is making the Admission freely and voluntarily,
 - ii. unequivocally admits guilt to the essential elements of the citations describing the conduct deserving of sanction,
 - iii. understands the nature and consequences of the Admission, and
 - iv. understands that if there is a joint submission on sanction, while the Hearing Committee will show deference to it, the Hearing Committee is not bound by any joint submission; and
 - c. be signed by the lawyer.

Approval by the Conduct Committee

48. The Conduct Committee may consider an Admission if it is submitted before a Hearing Committee is appointed. The Conduct Committee must decide whether the Admission is in an acceptable form before it can be acted upon.
49. If the Admission is accepted by the Conduct Committee, the Hearing Committee is deemed to have made a finding that the admitted conduct is conduct deserving of sanction. As a result, the Hearing Committee does not have jurisdiction to make further findings with respect to the admitted conduct.
50. The chair of the Conduct Committee may appoint either a three-member Hearing Committee or a Single Bencher Hearing Committee to determine the appropriate sanction.

51. A Single Bench Hearing Committee is appointed only where:
- a. an Admission has been accepted by the Conduct Committee; and
 - b. the proposed sanction is not suspension or disbarment.

Approval by the Hearing Committee

52. If the Admission is submitted on or after the day on which a Hearing Committee is appointed, the Hearing Committee will consider it. An Admission that is in a form acceptable to the Hearing Committee is deemed to be a finding that the admitted conduct is conduct deserving of sanction.
53. The hearing will then focus on the appropriate sanction for the admitted conduct.

Abeyances

54. Law Society proceedings must be conducted in a timely manner in fairness to the lawyer and in the public interest. Law Society proceedings may be subject to an abeyance, which is a temporary suspension of proceedings.
55. Section 49(7) of the Act makes it clear that Conduct Proceedings may be commenced, maintained or concluded even if the conduct at issue is the subject of other proceedings under any other Act. However, there may be exceptional circumstances for placing the Conduct Proceeding in abeyance.
56. The lawyer or Law Society counsel may make a request to the PHC chair for an abeyance of the proceeding by consent or by application where there is no consent. A request for an abeyance is set out in a written application.
57. The written application must set out why a request is being made to place the proceeding in abeyance, and will include the following:
- a. the circumstances that give rise to the request for abeyance, including any supporting documentation such as medical reports or other relevant documents where applicable;
 - b. where the parties agree to an abeyance, confirmation that both parties consent;
 - c. the specified period of the abeyance that is requested;
 - d. a written waiver in a form acceptable to the PHC chair executed by the lawyer acknowledging that they may not raise any argument based on delay or other prejudice resulting from the abeyance at any time; and

- e. any other information that is relevant to the request for an abeyance.
58. In considering an application to hold the proceeding in abeyance, the PHC chair may consider:
- a. whether the lawyer's personal circumstances or health issues impede the lawyer's ability to participate fully in the hearing process;
 - b. if the lawyer is engaged in a parallel proceeding in another forum, its benefit to the proceeding with respect to particular factors, including the specialization of the other tribunal and the evidence in that proceeding, and whether there is a reasonable expectation that the parallel proceeding will conclude in a timely manner;
 - c. whether the circumstances are such that placing or not placing a proceeding in abeyance will either prejudice or benefit the lawyer or the hearing process;
 - d. whether measures are necessary and have been taken to protect the public interest in the interim;
 - e. whether steps other than an abeyance may be taken to address the circumstances that give rise to a request for an abeyance;
 - f. whether conduct has been directed to a hearing by the Conduct Committee, but the Tribunal Office has not been able to effect service on the lawyer;
 - g. whether it would be appropriate to consolidate proceedings that are in various stages;
 - h. whether the proceeding was previously placed in abeyance;
 - i. the overall delay that may occur in the final adjudication of the proceeding; and
 - j. other circumstances that may be deemed relevant.
59. The PHC chair will review the request for an abeyance and will make a decision to either deny or approve the request. When the lawyer and Law Society counsel consent to a request for an abeyance, the PHC chair will give deference to the request.
60. If the PHC chair agrees to an abeyance request, the PHC chair will place the proceeding in abeyance for a period not exceeding one year. The PHC chair will issue a written order either denying the request or approving the request and placing the proceeding in abeyance.

61. If a proceeding is placed in abeyance, neither party will take a step or compel the other party to take any steps required by the Rules. Neither the lawyer nor Law Society counsel may subsequently raise an argument based on delay or other prejudice resulting from the abeyance.
62. If the proceeding was placed in abeyance due to the lawyer's involvement in parallel proceedings, the lawyer shall provide both timely and regular updates as to the progression of the parallel proceedings and, as soon as is practicable following the conclusion, the outcome of the proceedings to Law Society counsel.
63. Requests for additional abeyances of the same proceeding may be made not more than one month before the expiration of the current abeyance period. In each case, the process and the factors considered will be the same as for the initial application.
64. The abeyance of a proceeding will terminate once the period of the abeyance has expired.
65. Notwithstanding paragraph 64, an abeyance may terminate before the period of the abeyance has expired either by consent of the lawyer and Law Society counsel, or upon application by either party.

Discontinuances

66. Either party may make an application for discontinuance. In accordance with section 62 of the Act, Conduct Proceedings may be discontinued by a resolution of the Conduct Committee or a Hearing Committee if the applicable Committee is satisfied that the circumstances of the conduct do not justify the continuation of the proceedings.
67. If a hearing has not yet commenced and there is sufficient time prior to the hearing to do so, a written application for discontinuance may be made to the Conduct Committee. If a hearing is imminent or has commenced, an oral application for discontinuance may be made to the Hearing Committee.
68. The process for such an application is set out in the *Conduct Committee Guideline*. When considering whether Conduct Proceedings should be discontinued, the Conduct Committee or the Hearing Committee should apply the threshold test set out in the *Threshold Test Guideline* to determine whether the circumstances of the conduct justify the continuation of the proceedings respecting that conduct.

69. If a Hearing Committee discontinues Conduct Proceedings, a resolution setting out the reasons for the decision shall be provided in accordance with section 62.
70. All Conduct Proceedings relating to a lawyer will automatically be discontinued:
 - a. when the lawyer resigns pursuant to section 61 of the Act, subject to any conditions prescribed by the Benchers pursuant to section 61(3)(a) of the Act;
 - b. when the lawyer resigns in the face of discipline pursuant to section 32 of the Act; or
 - c. upon the lawyer's death.

Scheduling a Hearing

71. Hearings are scheduled at the request of one of the parties during a PHC. The parties should be prepared to advise the PHC chair regarding:
 - a. whether there will be any preliminary applications, and the nature of those applications;
 - b. the number of hearing days requested;
 - c. the number of witnesses, including expert witnesses;
 - d. whether the parties expect to have an agreement on exhibits and plan to prepare and enter one, joint set of exhibits ("Agreed Exhibit Book");
 - e. any requested accommodations (e.g., interpretation, accessibility concerns); and
 - f. any other matters that may impact hearing dates.
72. When the hearing is scheduled, Tribunal Office will provide the parties with:
 - a. a Notice setting out the time, date and location of the hearing, and a private hearing application notice, where applicable (section 78 of the Act); and
 - b. a Letter of Appointment confirming the Hearing Committee or panel composition.

Mode of Hearing

73. All oral hearings proceed as virtual hearings, subject to the process to vary the mode of hearing as set out in the Rules. The process for virtual hearings is set out in the *Virtual Hearing Guideline*.

Hearing Readiness

Hearing Materials

74. A party must provide to the Tribunal Office and to every other party, not less than 14 days before the date set for the commencement of the hearing, copies of all documents that the party intends to introduce into evidence at the hearing (Rule 90.7(1)(c)).
75. The parties may work together to prepare an Agreed Exhibit Book containing the exhibits on which both parties intend to rely at the hearing. The parties may agree that the exhibits contained in the Agreed Exhibit Book are authentic and admissible. It is not necessary for the parties to agree as to the truth of the contents of the exhibits.
76. Rule 90.7(1)(b) requires each party to provide a list of the case law and other authorities to be relied on at the hearing to the Tribunal Office and the other party 14 days in advance of the hearing.
77. Copies of case law and other authorities that are referred to in written submissions or argument must be provided with the submission or argument.
78. Notwithstanding the above, if the case law or other authorities are included in the electronic *Tribunal Office Book of Authorities* (“Book of Authorities”), then the parties may refer to the Book of Authorities, rather than providing copies to the Tribunal Office.
79. If the parties are providing written submissions or argument prior to a hearing (e.g., in an appeal or regarding a preliminary application), the PHC chair may establish deadlines for the exchange of the submissions between the parties.
80. The Hearing Committee retains discretion to consider any additional case law submitted during the hearing or during closing submissions.

Witnesses

Notice to Attend

81. The parties may serve Notices to Attend on their respective witnesses, in accordance with section 69(5) of the Act.
82. The parties may obtain a Notice to Attend template from the Tribunal Office website or by contacting the Tribunal Office.
83. Any witness, other than the lawyer, is entitled to be paid fees, expenses and allowances (“Witness Expenses”) as are payable to witnesses in an action in the Court of King’s Bench, in accordance with section 69(6) of the Act. Each party is responsible for paying Witness Expenses to their own witnesses. The lawyer may be responsible for the cost of the Law Society’s witnesses in the event the lawyer is found guilty of conduct deserving of sanction.

Provision of Witness Lists

84. Pursuant to Rule 90.7(1)(a), no later than 14 days before the hearing is scheduled to begin, the parties will provide to the Tribunal Office and the other party, the name of each witness that the party intends to call to give evidence at the hearing.
85. In cases where the witness will be giving evidence remotely, the witness’ contact information must also be provided to Tribunal Office 14 days in advance of the hearing. If either party wants the other party’s witnesses’ contact information, they may contact Tribunal Office, which will determine whether the contact information can be released.
86. If expert witnesses are testifying, Rule 90.7(2) requires that the parties must exchange the experts’ qualifications and reports no later than 60 days in advance of when it will be entered into evidence. Within 14 days of receiving an expert witness report, the receiving party must notify the other party whether it intends to provide a rebuttal expert report. In accordance with Rule 90.7(3), the rebuttal report must be provided to the Tribunal Office and the other party not less than 14 days before the hearing date.
87. The parties may attempt to reach agreement on the witnesses’ qualifications to provide expert testimony and the scope of their expertise.

Use of Interpreters

88. When a witness is unable to provide oral evidence in the language in which a hearing is to be conducted, the party calling that witness must provide an interpreter.
89. The party whose witness requires an interpreter must notify the Tribunal Office and the other party as early as possible and provide the name of the proposed interpreter.
90. An interpreter must be competent and independent from the witness and the parties. Any concerns regarding the competence or independence of the interpreter must be raised as early as possible with the other party and the Tribunal Office, or the Hearing Committee if the hearing has commenced.
91. Before the witness is called, the interpreter for that witness must take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation to the witness, the questions put to the witness and the witness' answers.

Request for Accommodation

92. A party or witness will notify the Tribunal Office as early as possible if they require accommodation during the hearing process. This means providing appropriate supports and resources for parties and witnesses who require additional assistance to participate in the hearing.

Remote Participation of Witnesses and Affidavit Evidence

93. Witness testimony must be given orally before the Hearing Committee whenever possible. Subject to the discretion of the Hearing Committee and the mode by which the hearing is proceeding, oral testimony may be given in person, by videoconference or, in exceptional circumstances, by telephone.
94. Parties may apply for a determination regarding the mode by which a witness may give evidence to:
 - a. the PHC chair, in accordance with Rule 90.2(2)(l); or
 - b. the Hearing Committee, in accordance with section 68 of the Act.
95. In considering the application, the PHC chair or the Hearing Committee may consider whether exceptional circumstances exist, including but not limited to:
 - a. the costs, efficiency and timeliness of the hearing;
 - b. the avoidance of delay;
 - c. fairness to the parties;
 - d. public health and safety concerns, including public health advisories;
 - e. an inability to attend (e.g., due to extreme weather, unexpected family obligations, illness);
 - f. the convenience of the parties and the witness(es); and
 - g. where the Hearing Committee is considering the application, the PHC chair's decision.
96. By application to the Hearing Committee, a party may seek to enter affidavit evidence in cases where it is not possible or practical for a witness to give oral evidence.

Limitations on Calling Practice Advisors as Witnesses

97. Pursuant to Rule 31.1(5), staff of the Law Society's Office of the Practice Advisor cannot be called by the Law Society to give evidence in a Conduct Proceeding unless the lawyer has either put into issue communications between the lawyer and the Office of the Practice Advisor, thereby waiving confidentiality, or has consented to the staff being called.

Varying the Timelines for Hearing Materials and Witnesses

98. Any request to vary the deadlines set out in Rule 90.7(1) to (3) in accordance with Rule 90.7(4) must be submitted to the Tribunal Office with a copy to the other party. The Tribunal Office will direct the request to the PHC chair, or the Hearing Committee based on the proximity of the request to the hearing date.
99. The PHC chair or the Hearing Committee may grant permission to vary the deadlines set out in Rule 90.7. Pursuant to Rule 90.8, the Hearing Committee may do so subject to terms or conditions and may also make an order directing an adjournment of the hearing for such time as the Hearing Committee considers reasonable.

Hearing

Guiding Principles

100. The purpose of disciplining lawyers is to protect the public interest and maintain public confidence in the legal profession. By enforcing ethical and professional standards, the Law Society is fulfilling its regulatory mandate and supporting the rule of law, the proper administration of justice and the independence of the legal profession.
101. The Law Society is committed to a hearing process that is fair, efficient, transparent, proportionate, principled and proactive, while at the same time addressing the harm caused by lawyers who fail to meet the standards or whose conduct diminishes the standing of the legal profession generally.
102. In addition, the Law Society has an obligation to be prudent and efficient in its management of the resources required to support its conduct processes and hearings. To the extent possible, the parties will be expected to conduct hearings expeditiously and to cooperate in their efforts to shorten the time required for hearings.

Rules of Evidence, Burden of Proof and Standard of Proof

103. As an administrative tribunal, a Hearing Committee is not bound by the common law rules of evidence that apply in court proceedings. A Hearing Committee has the discretion to admit evidence in any manner it considers proper in accordance with section 68 of the Act and Rule 90.8.

104. Generally, Law Society counsel has the burden to prove the citations on a balance of probabilities.
105. In accordance with section 67 of the Act, if it has been established or admitted that the lawyer has received money or other property in trust, the lawyer has the burden to prove that the money or other property has been properly dealt with, on a balance of probabilities.
106. In practice, where there is an allegation that trust funds have not been properly dealt with, Law Society counsel will bring evidence that the lawyer has received money or property in trust. The onus then shifts to the lawyer to prove that they complied with the Act, Rules and Code of Conduct. Where applicable, they may be required to bring evidence to establish that they exercised an appropriate standard of care in dealing with the money or property received in trust. The burden of proof is not on the Law Society, but it may bring evidence that the lawyer dealt with the money or property in a manner that breaches the Act, the Rules or the Code of Conduct.

Quorum and Appointment

107. The chair of the Conduct Committee appoints the Hearing Committee in accordance with the provisions of the Act, the Rules and the *Adjudicative Panel Appointment Guideline*.
108. The Hearing Committee consists of three or more persons, one of whom must be a Bencher or former Bencher. Certain exceptions to the constitution of the Hearing Committee are permitted by section 59(2) of the Act.
109. If an Admission has been accepted by the Conduct Committee prior to the appointment of a Hearing Committee, the chair of the Conduct Committee may appoint:
 - a. three or more persons, at least one of whom must be a Bencher or former Bencher (section 59(1)(b)); or
 - b. a Single Bencher Hearing Committee.
110. A Single Bencher Hearing Committee will decide on sanction, conditions, and costs.
111. In accordance with section 66(3) of the Act, if, after the commencement of a hearing, any member of a Hearing Committee is unable to continue, the remaining members may continue to act if at least two members, including at least one Bencher or former Bencher, remain.

Preliminary Applications

Generally

112. A party who anticipates that a significant preliminary, evidentiary, procedural or substantive issue will arise should notify the other party as soon as possible. Issues should be resolved prior to the commencement of the hearing whenever possible.
113. A preliminary application that is in writing must be served on the other party and filed with the Tribunal Office to be considered by either the PHC chair or the Hearing Committee. The PHC chair or the Hearing Committee, as the case may be, may consider an oral preliminary application.
114. A party may bring an application before the PHC chair if a Hearing Committee has not yet been appointed and the PHC chair has authority under Rule 90.2 to deal with the matter.
115. If the PHC chair does not have authority to deal with the application, then the application must be considered by the Hearing Committee.
116. The PHC chair or the Hearing Committee may direct the manner in which the application is to be brought, set deadlines and make any other directions necessary for the efficient handling of the application.
117. Material in relation to the application, if provided in writing, must be filed with the Tribunal Office and served on the other party within the deadlines set by the PHC chair or the Hearing Committee, as the case may be.
118. The PHC chair's ruling will be included in the PHC report. If the Hearing Committee finds that the PHC chair's ruling is relevant to any issues it must decide (e.g., costs), then the PHC report may be entered into the hearing record.

Adjournments

119. Rule 97 provides that before a hearing begins, a request for an adjournment may be made:
 - a. to the PHC chair; or
 - b. to the chair of the Hearing Committee.

120. The PHC chair should decline to hear a request for adjournment if the Hearing Committee has been appointed and it would be more appropriate for the Hearing Committee to hear the request, having regard to the timing of the request in relation to the hearing date.
121. On or after the day the hearing begins, a request for an adjournment may be made only to the Hearing Committee.
122. A request for an adjournment is to be made as soon as practicable. Where the party seeking the adjournment relies on case law or other authorities to make its request, they must be provided to the Tribunal Office and to the other party in advance of the date the request is heard. The other party will have an opportunity to respond and is expected to do so as soon as practicable.
123. In deciding whether to grant an adjournment, the PHC chair or the Hearing Committee may consider 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 terms and conditions of any adjournments previously granted;
 - d. the public interest;
 - e. the costs to the Law Society and the other participants of an adjournment;
 - f. the availability of the parties, counsel, and witnesses;
 - g. the efforts made to avoid the adjournment;
 - h. the requirement for a fair hearing; and
 - i. any other relevant factors.
124. Hearings may be adjourned to any other time and on any conditions that may be imposed by the PHC chair or the Hearing Committee, as the case may be.

Private Hearing Application Notices

125. In accordance with section 78 of the Act, a conduct hearing will be held in public unless the Hearing Committee determines, on its own motion or on the application of the lawyer, the complainant, a potential witness or any other interested person, that some or all of the hearing will be held in private.

126. Notice of the right to bring a private hearing application is provided to the lawyer, the complainant, any witnesses and other interested parties, in accordance with section 78(2). It is the responsibility of the lawyer or Law Society counsel, as applicable, to provide such notice.
127. The parties must notify the Tribunal Office and the other party as soon as they become aware that a private hearing application will be made. The person making a private hearing application must establish that it is warranted.
128. If an application for a private hearing is made, the Hearing Committee will allow the parties an opportunity to make submissions regarding the application.
129. In considering whether some or all of the hearing is to be held in private, the Hearing Committee must consider both necessity and the principles of transparency and accountability.
130. With respect to necessity, the Hearing Committee considers whether granting a private hearing is necessary to prevent a serious risk to an important interest and whether alternative measures would be sufficient to protect the interest at stake. The Hearing Committee also considers whether the risk is real, substantial and supported by evidence. Alternative measures include but are not limited to the policies and procedures adopted by the Society for the purpose of protecting such interests.
131. In accordance with the *Publication and Redaction Guideline for Adjudicators*, regardless of whether the hearing is held in public or private, the hearing report will be redacted to protect the personal and confidential information of complainants and third parties, solicitor-client privilege and other sensitive information.
132. With respect to the principles of transparency and accountability, the Hearing Committee may consider the following factors:
 - a. the public interest and the Law Society's regulatory commitment to transparency in open and accessible hearings;
 - b. the impact on public confidence in the ability of the profession to self-regulate;
 - c. general deterrence for the profession;
 - d. the effectiveness and efficiency of the hearing process; and
 - e. the detrimental effect on the applicant.

133. If some or all of a hearing is conducted in private, only the lawyer and the lawyer's counsel, Law Society counsel, the court reporter, Tribunal Office staff and those authorized by the Hearing Committee may attend those portions of the hearing held in private.
134. If some or all of a hearing is conducted in private, section 74(3.1) of the Act governs the release of the hearing report to the complainant.

Solicitor-Client Privilege

135. The protection of solicitor-client privilege is fundamental to the administration of justice and the independence of the legal profession. There are exceptions in professional legal regulation as law societies are entitled to access privileged information in order to perform their regulatory functions. Disclosure of privileged information to a law society does not result in a waiver or loss of privilege and client privilege must be protected in administrative proceedings.
136. Section 112(1) of the Act provides that a lawyer may not refuse to answer inquiries, provide documents or give evidence on the ground of solicitor-client privilege, when the evidence is material to the proceedings.
137. Privilege must, however, be protected in Law Society hearings that proceed under Part 3 or 4 of the Act and, pursuant to common law, under any other provisions of the Act or Rules. The lawyer, Law Society counsel and the Hearing Committee should be cognizant of the requirement to take all steps necessary to protect solicitor-client privilege as it arises in the course of a hearing.
138. Section 112(2) requires that all parts of a hearing during which reference will be made to privileged evidence must proceed in private and the public may not have access to the hearing record that contains the privileged information. Protection of solicitor-client privilege and confidentiality are compelling privacy interests in Law Society hearings. Privilege must be protected unless expressly waived by the person who has the right to claim privilege. Privilege is not waived by the making of a complaint or the failure to make an application for a private hearing.
139. Unless the party to whom the privilege is owed waives the privilege, the Hearing Committee must protect privileged information by making a private hearing order and directing that the public be refused access to the hearing record that contains the privileged information. The party claiming privilege may apply or the Hearing Committee may make this determination on its own initiative, after notifying the parties and allowing them to consider their position and make submissions.

140. The Hearing Committee must first determine that the documents or evidence are privileged. The Committee must consider the relevant case law and submissions of the parties. For guidance, the following factors will usually be considered in making any finding of privilege:
- a. whether the communication was between a lawyer and client;
 - b. whether the communication involves the seeking or giving of legal advice;
 - c. whether the parties intended the communication to be confidential;
 - d. whether there is an express waiver of privilege, or there has been a voluntary disclosure or release of the information to a third party or it has otherwise become publicly available.
141. In the absence of a private hearing application, privileged and confidential information is protected by the *Publication and Redaction Guideline for Adjudicators*.

Bias Applications

142. A party seeking to disqualify a member of a Hearing Committee based on an allegation of bias or a reasonable apprehension of bias must make an application (bias application) at the earliest opportunity and, if possible, prior to the commencement of the hearing.
143. The party making a bias application must notify the other party and provide the basis of the application to the Tribunal Office. The Tribunal Office will take the necessary steps to schedule the application in front of the appropriate committee.
144. In accordance with section 59(5)(a) of the Act, the chair of the Conduct Committee will consider an allegation of bias that is raised before the hearing. Section 59(5)(b) provides that the Hearing Committee will deal with an allegation of bias raised at or after the commencement of the hearing unless the Hearing Committee refers the matter to the chair of the Conduct Committee.
145. The bias application may be heard in any manner that the chair of the Conduct Committee or the Hearing Committee deems appropriate, including in writing, by videoconference or in person.

146. The relevant factors for a bias application include, but are not limited to:
- a. it is a fundamental principle of procedural fairness that an adjudicator must be disinterested and impartial;
 - b. this principle extends beyond actual bias and holds that there cannot be even a reasonable apprehension of bias;
 - c. the common law test for finding a reasonable apprehension of bias is whether a reasonable and informed person, viewing the issue realistically and practically and having thought the matter through, would conclude that there is a reasonable apprehension of bias; and
 - d. adjudicators are presumed to be impartial, and the threshold for finding real or perceived bias is high:
 - i. an apprehension of bias must be reasonable, and
 - ii. the grounds for an application for disqualification must be serious and substantial, and not based on a mere suspicion.
147. Oral or written reasons for the decision will be rendered. If only oral reasons are to be provided, a transcript of the reasons must be made and maintained until any appeals are decided, including an appeal to the Court of Appeal.
148. If a bias application is determined by the chair of the Conduct Committee and a member of the Hearing Committee is disqualified, the member will be replaced pursuant to sections 59(4) and (5).
149. If the Hearing Committee decides the bias application and a member of the Hearing Committee is disqualified, then the Hearing Committee may continue with the two remaining members pursuant to section 66(3) of the Act.
150. If a member of a panel is disqualified, the member will be replaced if required to maintain quorum.

Order of Proceeding at an Oral Hearing

Jurisdiction

151. The jurisdiction of the Hearing Committee is established through the following exhibits:
- a. Letter of Appointment of the Hearing Committee;
 - b. Notice to Attend to the lawyer; and
 - c. Certificate of Status of the lawyer.

152. The Hearing Committee will ask whether there are any objections to its composition or jurisdiction. If objections are raised, the Hearing Committee will determine them before proceeding.
153. In accordance with section 70(2) of the Act, a Hearing Committee may proceed with a hearing in the absence of the lawyer if it is satisfied that a Notice to Attend was served on the lawyer pursuant to Rule 4.

Private Hearing Applications

154. In accordance with section 78(2) of the Act, the Hearing Committee will ask if there are any private hearing applications. Both parties will confirm to whom private hearing application notices have been sent and will advise whether anyone wants to make an application.
155. If there are any private hearing applications, they will be heard, and a decision made as to whether some or all of the hearing will be held in private before proceeding with the hearing. See paragraphs 127-143 for further guidance.

Exclusion of Witnesses

156. The Hearing Committee will determine whether to exclude witnesses, other than the lawyer, from the hearing room before those witnesses testify.

Opening Statements

157. Law Society counsel will make their opening statement, if any.
158. The lawyer may make an opening statement at the start of the hearing or wait until the start of the defence case to make an opening statement, if any.

Documentary Evidence

159. When marking exhibits:
 - a. if there is an Agreed Exhibit Book, the documents are to be tabbed, and each tab marked as an exhibit in numerical sequence;
 - b. a document referred to in the hearing, but not authenticated or admitted in accordance with Rule 90.4, are to be marked by letter as an Exhibit for Identification (e.g., Exhibit "A" for Identification);
 - c. if an exhibit marked for identification is later authenticated and admitted into evidence, it is to be marked as the next exhibit in numerical sequence;



- d. if an exhibit marked for identification is not authenticated or admitted during the hearing, the exhibit remains an Exhibit for Identification only and will not be considered by the Hearing Committee in making its decision but will form part of the hearing record.
160. In deciding whether to admit additional evidence that was not provided to the Tribunal Office and the other party in accordance with Rules 90.6 and 90.7, a Hearing Committee may consider whether:
 - a. the opposing party consents to admitting the evidence;
 - b. the failure to provide the evidence was inadvertent or unavoidable;
 - c. the evidence was not in the possession of the party at the time that production was required by the Rules; or
 - d. for any other compelling reason, it would be manifestly unfair to exclude the evidence.
161. Rule 90.8 provides that a Hearing Committee may admit additional evidence that was not exchanged or provided in compliance with Rule 90.7, on any terms and conditions it deems appropriate.
162. If a party does not comply with Rule 90.7 and intends to rely on the discretion of the Hearing Committee to admit additional exhibits at the hearing pursuant to Rule 90.8, the proposed exhibits:
 - a. must be provided to the other party and the Tribunal Office as soon as possible prior to the hearing;
 - b. will not be provided to the Hearing Committee in advance of the hearing;
 - c. the Tribunal Office will make the proposed exhibit available to the Hearing Committee when it is presented in evidence and it will be marked as an exhibit after the Hearing Committee has ruled on its admissibility;
 - d. if provided in hard copy at an in-person hearing:
 - i. must be provided by the party seeking to enter the exhibit(s) in sufficient copies for each party and Adjudicator, the court reporter, and Tribunal Counsel (i.e., a minimum of six copies if there are only two parties and it is a three-member Hearing Committee); and
 - ii. must be provided in electronic form to the Tribunal Office as soon as possible if they are admitted into evidence by the Hearing Committee;
 - e. if provided at a virtual hearing, must be submitted in electronic form to the Tribunal Office before entering the exhibits.

Witnesses

Oath or Affirmation

163. A court reporter administers an oath or affirmation to the witness, based on the witness's stated preference. An oath may be administered to a witness in accordance with section 15, or the witness may be affirmed in accordance with section 17, of the *Alberta Evidence Act*.
164. An oath is not restricted to oaths using particular words or incorporating the Bible, Qur'an or other religious text. An oath may be made in any form using any ceremony that acknowledges the solemnity of the occasion and the importance of truth-telling, provided the witness declares that such an oath is binding on the conscience of the witness. For example, a party may wish to undertake a private or public smudging ceremony prior to providing evidence or hold an eagle feather or other sacred object when providing evidence.
165. If a witness wishes to incorporate the use of any particular words, object or practice, other than an oath on the Bible or Qur'an, the Scottish Oath, an eagle feather or the use of an affirmation, the party calling the witness must provide the Tribunal Office and the other party with notice of the intended wording, object or practice, as well as information regarding the appropriate protocols to be employed, as early as possible in advance of the hearing.

Witness Evidence

166. Law Society counsel will call their first witness for direct examination.
167. Once direct examination is completed, the lawyer has an opportunity to cross-examine the witness.
168. After cross-examination, Law Society counsel has an opportunity to re-examine the witness only for the purpose of addressing any new matters raised in cross-examination.
169. The same process is followed for each subsequent witness. Once Law Society counsel has called all of their witnesses, the lawyer will then call the lawyer's first witness and the same steps will apply.
170. In accordance with section 69 of the Act, the lawyer is a compellable witness. If the lawyer does not give direct testimony in defence, Law Society counsel may cross-examine the lawyer.

171. After the last defence witness, Law Society counsel may request the opportunity to present rebuttal evidence to reply to any new issues raised by the lawyer. The lawyer may cross-examine any rebuttal witness. Law Society counsel has an opportunity to re-examine the rebuttal witness only for the purpose of addressing any new matters raised in cross-examination.
172. Before any witness is excused, the Hearing Committee may also have questions for the witness.
173. If new issues arise as a result of the Hearing Committee's questions, the parties will be provided an opportunity to ask further questions of the witness.

Argument

174. Law Society counsel presents argument first, followed by the lawyer's argument. The Law Society then has an opportunity to respond to the issues raised in the defence argument.
175. The Hearing Committee may ask questions of the parties during argument. Following oral argument, the Hearing Committee may request written submissions on an issue or point of law.

Hearing Phases – Merits and Sanction

176. There are two phases of a hearing – the merits phase and the sanction phase. The two phases may be heard consecutively at a single hearing or may be heard separately. Whether heard together or separately, the hearing is not concluded until the Hearing Committee determines the merits and, if applicable, the sanction.

Merits Phase

177. In the merits phase of the hearing, the Hearing Committee determines whether the lawyer is guilty of conduct deserving of sanction. In order to make such determination, the Hearing Committee must find that:
 - a. the lawyer committed the alleged conduct; and, if so,
 - b. the conduct is conduct deserving of sanction in accordance with section 49 of the Act.

178. In cases where an Admission pursuant to section 60 of the Act has been accepted as set out in paragraphs 46-53 of the Guideline, the Admission is deemed to be a finding that the lawyer is guilty of conduct deserving of sanction. In cases not involving an Admission, the Hearing Committee must make a finding as to whether the lawyer is guilty of conduct deserving of sanction pursuant to section 71(1).
179. Pursuant to section 49(1) of the Act, conduct is deserving of sanction when it:
- a. is incompatible with the best interests of the public or members of the society; or
 - b. tends to harm the standing of the legal profession generally.
180. Section 49 obliges the Hearing Committee to review the effect of the conduct on the best interests of the public and the profession, and on the reputation of the legal profession. The Hearing Committee must find conduct deserving of sanction where the lawyer's conduct is incompatible with those interests, regardless of whether the conduct arises in relation to the lawyer's practice and whether the conduct occurs in Alberta.
181. If there is no finding of guilt, the citations are dismissed, and the hearing is concluded. If there is a finding of guilt, the hearing proceeds to the sanction phase.

Sanction Phase

182. At the discretion of the Hearing Committee, the sanction phase may commence immediately following the merits phase of the hearing.
183. Alternatively, the Hearing Committee may adjourn the hearing in order to render a written decision on the merits. If the Hearing Committee makes a finding of conduct deserving of sanction, the hearing will be scheduled to reconvene for the sanction phase of the hearing.

Sanction

Evidence on Sanction

184. The lawyer's disciplinary record, if any, will be entered into evidence by Law Society counsel.

Determining the Appropriate Sanction

Purpose of Sanction

185. The fundamental purposes of sanctioning are to ensure the public is protected from acts of professional misconduct and to protect the public's confidence in the integrity of the profession. These fundamental purposes are critical to the independence of the profession and the proper functioning of the administration of justice.
186. Other purposes of sanctioning include:
- a. specific deterrence of the lawyer;
 - b. where appropriate to protect the public, preventing the lawyer from practising law through disbarment or suspension;
 - c. general deterrence of other lawyers;
 - d. ensuring the Law Society can effectively govern its members; and
 - e. denunciation of the misconduct.
187. Sanctioning must be purposeful. The factors that relate most closely to the fundamental purposes outlined above carry more weight than others.

Type of Sanction

188. Section 72(1) of the Act requires a Hearing Committee, on finding a member guilty of conduct deserving of sanction, to disbar, suspend or reprimand the member. The type of sanction must be determined with reference to the purposes of sanctioning.
189. Each type of sanction fulfills the dual purposes of specific deterrence for the individual lawyer and general deterrence for the profession. The sanction imposed in each case informs the profession and the public that the lawyer's conduct is unacceptable and will not be tolerated.
190. Disbarment is appropriate in the most serious cases where the lawyer's right to practice law must be terminated to protect the public against the possibility of a recurrence of the conduct, even if that possibility is remote. Where any other result would undermine public confidence in the integrity of the profession, the lawyer's right to practice may be terminated regardless of extenuating circumstances and the probability of recurrence. The reputation of the profession is more important than the impact of sanctioning on any individual lawyer.

191. Suspension is appropriate for the denunciation of serious or repeated misconduct where it is reasonable to believe that temporarily removing the lawyer from the profession will result in compliance with professional standards in the future. Aggravating and mitigating factors may be recognized in determining the length of the suspension.
192. A reprimand is appropriate when it is not necessary to limit a lawyer's right to practise. A reprimand is delivered orally at the hearing and is meant to express the profession's denunciation of the lawyer's conduct.
193. An effective reprimand will:
 - a. state what is expected of a lawyer;
 - b. explain how the lawyer fell below expected standards;
 - c. iterate that the misconduct reflects poorly on the lawyer and the profession; and
 - d. address either the lawyer's acceptance of responsibility or the lawyer's need for further reflection.
194. In addition to ordering disbarment, suspension or reprimand, the Hearing Committee may order one or more of the following:
 - a. conditions on the lawyer's practice or suspension (section 72(2)(a));
 - b. the payment of a penalty not exceeding \$10,000 per citation by a specified deadline (section 72(2)(b)); and
 - c. the payment of costs of the Conduct Proceedings by a specified deadline (section 72(2)(c)).
195. Payments of penalties are generally imposed when a reprimand alone is insufficient as a sanction but a suspension is excessive. For example, this may occur when a lawyer has already been reprimanded for previous conduct and the Hearing Committee is of the view that there is a need for a step-up in sanction.
196. Examples of conditions that may be imposed on a lawyer's practice or suspension include but are not limited to the following:
 - a. precluding the lawyer from acting as a responsible lawyer on a trust account or having signing authority;
 - b. precluding the lawyer from practising in a specific area of law or as a sole practitioner;
 - c. requiring the lawyer to practice under the supervision of another lawyer;

- d. requiring the lawyer to engage and cooperate with practice management; and
 - e. in the case of a suspension, requiring the lawyer to complete specific tasks prior to being reinstated.
197. A Hearing Committee must refrain from imposing conditions that would take effect only upon the lawyer's reinstatement. Such conditions are within the jurisdiction of a reinstatement panel and are best considered at the time of reinstatement taking into account all the relevant circumstances, including circumstances that may arise after a conduct hearing and before reinstatement.

Factors for Consideration in Determining Appropriate Sanction

198. The prime determinant of the appropriate sanction is the seriousness of the misconduct. The seriousness of the misconduct may be determined with reference to the following factors:
- a. the degree to which the misconduct constitutes a risk to the public;
 - b. the degree to which the misconduct constitutes a risk to the reputation of the legal profession;
 - c. the degree to which the misconduct impacts the ability of the legal system to function properly (e.g., breach of duties to the court, other lawyers or the Law Society, or a breach of undertakings or trust conditions);
 - d. whether and to what extent there was a breach of trust involved in the misconduct;
 - e. the potential impact on the Law Society's ability to effectively govern its members by such misconduct;
 - f. the harm caused by the misconduct;
 - g. the potential harm to a client, the public, the profession or the administration of justice that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would likely have resulted from the lawyer's misconduct;
 - h. the number of incidents involved; and
 - i. the length of time involved.
199. 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 public confidence in the legal profession may require a particular sanction regardless of the state of mind of the lawyer at the time of the misconduct.

200. The ability of the Law Society to govern the profession is essential to self-governance. Certain types of misconduct undermine the Law Society's regulatory function and must be strongly denounced. Such misconduct includes but is not limited to:
- a. failing to respond to communications from the Law Society;
 - b. failing to be candid with the Law Society;
 - c. failing to cooperate with the Law Society;
 - d. breaching an undertaking to or a condition imposed by the Law Society;
 - e. refusing to participate in Conduct Proceedings;
 - f. inappropriate communications with the Law Society, including those that are offensive, abusive or harassing; and
 - g. practising law while suspended or inactive.
201. Integrity is the most important attribute of any lawyer. Lawyers must discharge all duties owed to clients, the court, other members of the profession and the public with integrity. Integrity on the part of lawyers is essential to the effective operation of the legal system and the regulation of the legal profession.
202. Dishonourable conduct by a lawyer in either professional practice or private life reflects adversely on the public's perception of the integrity of the profession and the administration of justice. If the conduct would bring the public's perception of the legal profession into disrepute, impair a client's trust in the lawyer or otherwise bring into question the lawyer's integrity, the Law Society may take disciplinary action.
203. Lawyers who by their conduct have proven to be lacking in integrity may lose their right to practise law. The professional obligation to act with integrity is violated by the following types of serious misconduct:
- a. misappropriation or wrongful conversion of client funds or property;
 - b. intentional interference with the administration of justice;
 - c. intentional misrepresentation to a client, the court or the Law Society;
 - d. false swearing (e.g., of an affidavit or in commissioning an affidavit);
 - e. fraud, theft or extortion; or
 - f. any misconduct involving dishonesty or deceit.
204. The Hearing Committee may consider additional factors that have either an aggravating or mitigating effect on the appropriate sanction. These factors include the following, without limitation:

- a. prior discipline record;
 - b. length of time the lawyer has been in practice;
 - c. acknowledgment of wrongdoing including self-reporting and admission of guilt;
 - d. level and expression of remorse;
 - e. level of cooperation during the Conduct Proceedings such as attendance at PHCs, adherence to the pre-hearing Rules, etc.;
 - f. medical, mental health, substance abuse or other personal circumstances that impacted the lawyer's conduct;
 - g. restitution made, whether partial or in full;
 - h. rehabilitation since the time of the misconduct;
 - i. the extent to which the lawyer benefitted from the misconduct; and
 - j. whether the misconduct involved taking advantage of a vulnerable party.
205. The sanctions imposed for conduct deserving of sanction are cumulative and prior misconduct will result in increasingly serious sanctions. The time that has elapsed between previous and current misconduct is a relevant consideration.
206. Although Hearing Committees are not bound by precedent, undue disparity with the sanctions imposed in other cases is to be avoided. When reviewing previous decisions, the Hearing Committee may consider whether the factors referred to in this Guideline were addressed by the prior Hearing Committee. The Hearing Committee may wish to place more emphasis on recent decisions as they may more accurately reflect regulatory trends in sanctioning.

Joint Submissions on Sanction

Background and the Public Interest Test

207. A lawyer and Law Society counsel may agree to jointly recommend a particular sanction. If a joint submission on sanction is presented, the parties require a high degree of certainty that the sanction recommendation will be accepted by the Hearing Committee. Accordingly, the Hearing Committee must give significant deference to the joint submission on sanction.
208. The lawyer must acknowledge that if there is a joint submission on sanction, while the Hearing Committee will show deference to it, the Hearing Committee is not bound by any joint submission.

209. A joint submission benefits both the lawyer and the Law Society in the following ways:
- a. it is a more efficient means of concluding the proceedings, saving time, costs and resources;
 - b. it provides the parties with certainty regarding the outcome, particularly in cases where either party faces challenging evidentiary issues;
 - c. complainants and other witnesses are spared from having to testify publicly;
 - d. complainants may perceive the lawyer's Admission as an important acknowledgement of responsibility or an expression of remorse;
 - e. an Admission and a joint submission on sanction provides the lawyer with an opportunity to demonstrate accountability for their conduct.
210. The Supreme Court of Canada sets out a test for assessing the acceptability of joint submissions in the criminal law context. The "public interest test" states that a judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. The judge should consider the following questions in applying the public interest test:
- a. Is the joint submission so markedly out of line with the expectations of reasonable persons aware of the circumstances of the offence and the offender that the joint submission would be viewed as a break down in the proper functioning of the criminal justice system?
 - b. Would the joint submission cause an informed and reasonable public to lose confidence in the institution of the courts?
 - c. Is the joint submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down?
211. The Supreme Court of Canada recognized that the test sets an "undeniably high threshold" but held it was justified given the importance of joint submissions to the proper functioning of the justice system. If the Hearing Committee finds that the test is met, it can reject the joint submission.
212. The public interest test has been widely adopted by professional discipline tribunals across Canada. The case law confirms that the test is appropriate and should be applied in Law Society Conduct Proceedings.

Hearing Procedure for Joint Submissions on Sanction

213. If the parties wish to make a joint submission on sanction, it must be presented on the public record at the hearing. Given the obligation on the Hearing Committee to give significant deference to the joint submission, counsel have a corollary obligation to justify their position at the public hearing of the matter. The lawyer and Law Society counsel will provide a comprehensive factual and legal analysis regarding the lawyer's conduct and any other relevant factors in support of any joint submission on sanction.
214. This obligation does not mean that the parties are required to inform the Hearing Committee of the details of the discussions leading up to the agreement to present a joint submission. Rather, the parties' submissions must satisfy the Hearing Committee that the proposed sanction does not bring the administration of justice into disrepute and is not otherwise contrary to the public interest.
215. If, after hearing the parties' submissions and applying this high threshold, the Hearing Committee is considering rejecting a sanction recommended in a joint submission, it must notify the parties of the nature of its concerns and provide the parties with an opportunity to enter additional evidence and make further submissions to address the Hearing Committee's concerns. If necessary, in the interests of fairness, the Hearing Committee may grant an adjournment.

Costs

216. If a lawyer is found guilty of conduct deserving of sanction, the Hearing Committee may order the lawyer to pay all or part of the costs of the Conduct Proceedings pursuant to section 72(2)(c) of the Act and Rule 99. The Hearing Committee may also determine the deadline for payment of costs.
217. Costs may be determined at the conclusion of the sanction hearing, or at a separate hearing at the discretion of the Hearing Committee.

Procedure at Hearing

218. Law Society counsel will provide the lawyer and the Tribunal Office with an estimated Statement of Costs prior to or as soon as possible after the conclusion of the hearing. The estimated Statement of Costs will be entered as an exhibit at the conclusion of the sanction phase of the hearing.
219. The parties will have the opportunity to make submissions on the amount and deadline for payment of the costs. Submissions may address the impact of any

adjournments or issues arising from the provision of materials and witness lists, or responses to a Notice to Admit.

Determination of Hearing Committee

220. In addition to the considerations set out in Rule 99, in assessing costs the Hearing Committee may consider:

- a. whether facts or evidence set out in a Notice to Admit Facts or Authenticity of Documents, served under Rule 90.4, were:
 - i. disputed by the lawyer and subsequently proven by the Law Society, or
 - ii. admitted by the lawyer, thereby narrowing the issues to be considered at the hearing, and
- b. the extent to which:
 - i. the lawyer complied with PHC chair directions or deadlines,
 - ii. the lawyer complied with the requirement under Rule 90.7 to provide a list of witnesses, exhibits and authorities to be relied on at the hearing,
 - iii. there were citations that were withdrawn or not proven, and
 - iv. the lawyer cooperated with the Law Society during the complaint, investigation and hearing process,

which may be considered either aggravating factors with the potential to increase an order for costs or mitigating factors with the potential to decrease an order for costs.

221. It is the Law Society's default position that when a lawyer is found guilty of conduct deserving of sanction, the actual costs of the hearing should be paid by the lawyer. This position is based on the proposition that the hearing expenses incurred in the exercise of the Law Society's statutory obligations are appropriately charged to the lawyer whose conduct is under scrutiny.

222. If the Hearing Committee orders costs, Law Society counsel will prepare a finalized Statement of Costs and submit it to the Tribunal Office to be signed by the Hearing Committee pursuant to Rule 99(4). The Tribunal Office will provide a copy of the signed Statement of Costs to the parties. The Hearing Committee may consider the financial circumstances of the lawyer and any proposed instalment arrangement when setting a deadline for payment of costs.

Disputes on Accuracy of Costs After the Hearing

223. A lawyer who disputes the accuracy of a signed Statement of Costs must, within 15 days of receipt of the Statement of Costs, provide the Tribunal Office with a request for a review by the Hearing Committee setting out the reasons for the dispute.
224. The Law Society must submit any response to the Tribunal Office within ten days of receipt of the request.
225. The Hearing Committee will review the Statement of Costs and may amend or replace it in accordance with Rule 99(6).
226. In accordance with section 79 of the Act, if a lawyer does not pay the costs within the deadline ordered by the Hearing Committee, the lawyer's membership with the Law Society will be automatically suspended.

Conclusion of Hearing

Publication Orders

227. At the conclusion of the hearing, the Hearing Committee will invite submissions and make directions about the publication and redaction of the decision and the hearing record, including transcripts and exhibits.
228. Privacy, confidentiality and privilege are protected by the Law Society in accordance with the *Publication and Redaction Guideline for Adjudicators*.
229. The decision and the hearing record related to any portion of a hearing that is held in private is confidential and will not be made available to the public.

Notices to the Profession

230. Section 85(1) of the Act requires a notice to be issued when a suspension or disbarment is ordered by the Hearing Committee. Section 85(3) affords the Hearing Committee the ability to make discretionary orders regarding publication of notices. The *Publication and Redaction Guideline for Adjudicators* provides further guidance.

Referrals to the Minister of Justice and Solicitor General

231. Law Society counsel will advise the Hearing Committee whether they are seeking a referral to the Minister of Justice and Solicitor General (“Minister”) pursuant to section 78(6) of the Act. If they are seeking a referral, they will make submissions, including identifying the relevant sections of the *Criminal Code of Canada*, and the elements necessary to establish the alleged offence. The lawyer may make submissions in response.
232. If the Hearing Committee is of the opinion that there are reasonable and probable grounds to believe that the lawyer has committed a criminal offence, the Hearing Committee must direct the Executive Director to send a copy of the hearing record to the Minister.
233. If the Hearing Committee determines that a referral to the Minister is warranted, section 78(7) of the Act sets out the information and records that must be provided to the Minister, and the relevant exceptions including the compelled statements of the lawyer and information that may be subject to solicitor-client privilege or client confidentiality.

Decision and Reasons

234. Generally, the Hearing Committee will reserve its decision and endeavour to issue a written Hearing Committee report with its decision and reasons within 90 days of the hearing.
235. In its sole discretion, the Hearing Committee may issue its decision orally, with written reasons to follow.

Hearing Committee Order for Single Bencher Hearing

236. If a sanction hearing is being heard by a Single Bencher Hearing Committee, the decision and reasons may be set out in an order. In cases where there is a joint submission on sanction, Law Society counsel will prepare a draft form of order for review by the lawyer prior to the hearing.
237. The Hearing Committee may accept or amend the proposed form of order or issue a written decision instead of an order.

Hearing Committee Report

238. The Hearing Committee report will contain the decision and the reasons for the decision, as well as any required orders or conditions.
239. If a dissent is issued, it will be appended to and issued with the Hearing Committee report.
240. A Hearing Committee may issue separate decisions on the merits and sanction phases, or it may issue a single decision on both.

Issuance and Publication of Decisions

241. The Tribunal Office will issue the Hearing Committee report or order to the parties once it is finalized. The appeal period runs from the date that the Hearing Committee report or order on sanction is provided to the lawyer or to the lawyer's counsel, as applicable.
242. The Tribunal Office will publish the Hearing Committee report or order on the Law Society's website and on CanLII and QuickLaw. The Hearing Committee report or order is generally published within one week after the decision is issued to the parties.