

HANDBOOK ON
PROFESSIONAL DISCIPLINE
PROCEDURE

March 2007

The Law Reform Commission of Saskatchewan

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TABLE OF CONTENTS

INTRODUCTION	1
1. The scope of the handbook	1
2. Professional associations legislation following the standard model	1
3. Self-governance and discipline	3
4. The public interest	3
5. Natural justice and procedural fairness	4
6. The standard model	5
INVESTIGATION OF COMPLAINTS	7
1. The Investigation Committee	7
A. The role of the Committee	7
B. Quorum	8
C. Scope of the investigation	8
D. Time considerations	9
2. Conduct of the investigation	10
A. Interviewing the accused	10
B. Search and seizure of records	11
C. Other investigative methods	11
3. Rights of the complainant during the investigation	12
4. Mediation	13
A. Availability of mediation	13
B. What is mediation?	13
C. When to consider mediation	14
D. How to proceed	15
5. Table of statutes — Investigation	16
PRELIMINARY TO THE HEARING	17
1. Laying the formal complaint	17
2. Notice of hearing	18
3. Adding or amending charges after the formal complaint has been laid	19
4. Suspension of the accused pending the final decision	19

A. Suspension for protection of the public	19
B. Suspension and other issues when criminal charges are laid against the accused	20
5. Table of statutes – Preliminary to the hearing	23

HEARING BEFORE THE DISCIPLINE COMMITTEE .. 25

1. The role of the Discipline Committee and the parties	25
A. Conduct of the hearing by the Committee	25
B. Quorum	26
C. The role of legal counsel	26
D. Attendance of the accused	28
E. Role of the complainant	28
2. The hearing requirement: Format and related matters	29
A. The right to a hearing	29
B. Public or private hearing	29
C. The form of the hearing	30
D. Adjournments	31
3. Evidence	31
A. Types of evidence	31
B. Rules of evidence	32
C. Disclosure of evidence to the accused	33
D. Evidence received by the Discipline Committee but not presented at the hearing	34
4. Witnesses	34
A. Calling and cross-examining witnesses	34
B. Witness statements and affidavits	35
C. Compelling the accused to testify	36
D. Subpoena of witnesses and documents	36
5. Table of statutes — Hearing	38

DECISION AND PENALTY 39

1. Imposing the penalty: Procedural fairness	39
2. The decision and reasons	40
3. Record of the proceedings	41
4. Table of Statutes — Decision	42

INTRODUCTION

1. The scope of the handbook

This handbook is a guide to procedure in disciplinary investigations and hearings conducted by most professional associations in Saskatchewan. Of the 50 self-governing professions in the province, 29 are governed by legislation that incorporates what can be called the “standard model” of disciplinary procedure. The handbook follows the stages of discipline proceedings under the “standard model” from receipt of the complaint to assessment of the penalty.

The handbook directs attention to statutory requirements and explains them. Decision of the courts and the general law governing procedure are discussed when they are relevant. It should be noted, however, that the law governing professional discipline is constantly evolving. Where there is doubt about the current state of the law, the handbook attempts to identify “good practice” that will likely be approved by the courts.

Apart from professions (such as law, medicine, and teaching) with distinctive discipline systems that have been developed independently through long experience, the standard model has been adopted by all Saskatchewan professional associations governed by legislation adopted or substantially amended since 1986. However, each professional association’s statute differs in detail.

Note: This handbook provides guidance for disciplinary proceedings under all versions of the standard model but does not set out the differences in detail in all cases. It is always necessary to consult the statute governing your profession.

2. Professional associations legislation following the standard model

Note: This is not a complete list of Saskatchewan professional associations. It includes only those following the “standard model” referred to above. This handbook applies only to associations with the “standard model” of discipline legislation.

Agrologists Act
Architects Act
Assessment Appraisers Act
Canadian Information Processing Society of Saskatchewan Act
Certified General Accountants Act
Certified Management Accountants Act*
Certified Management Consultants Act
Chartered Accountants Act
Chiropractic Act
Dental Disciplines Act
Dietitians Act
Engineering and Geoscience Professions Act
Forestry Professions Act
Funeral and Cremation Services Act
Interior Designers Act
Land Surveyors and Professional Surveyors Act
League of Educational Administrators, Directors and
Superintendants Act
Licensed Practical Nurses Act
Medical Laboratory Technologists Act
Medical Radiation Technologists Act*
Midwifery Act
Occupational Therapists Act
Ophthalmic Dispensers Act
Pharmacy Act
Physical Therapists Act
Podiatry Act
Psychologists Act
Real Estate Act
Registered Music Teachers Act
Registered Nurses Act
Registered Psychiatric Nurses Act
Respiratory Therapists Act*
Saskatchewan Applied Science Technologists and Technicians Act
Saskatchewan Association of School Business Officials Act
Social Workers Act
Speech-Language Pathologists and Audiologists Act
Veterinarians Act

* Act not proclaimed in force as of March 31, 2007.

3. Self-governance and discipline

The professions regulated by the standard model are self-governing. Discipline of members who breach ethical and competency requirements is the duty of the profession itself through its professional association. At one time, only a few long-established traditional professions were self-governing. It is only in the last fifty years that the self-governance model has been extended to a wide range of occupations and professions. Most of the professions governed by the standard model are in the latter category, including professions such as occupational therapists, real estate agents and interior designers. However, the standard model has also been adopted by some more traditional professions such as pharmacy, dental professionals, accounting and architecture.

Self-governance protects the autonomy of professions. It is clearly in the interests of a profession to maintain standards and protect its reputation. As Casey, *The Regulation of Professions in Canada*, has observed, “the downfall of one individual is said to diminish all members of the profession. There is an interest in ridding the profession of the incompetent and the unethical”.

4. The public interest

The responsibility of self-governance, however, is a heavy one. Self-governance is an alternative to direct licensing and regulation by government and exists only because the Legislature has delegated responsibility to the professions. Self-governance is acceptable only if it serves the public interest. The Supreme Court of Canada has stated that the primary justification of self-governance is protection of the public.¹ The public interest in professional regulation demands that disciplinary proceedings be fair, transparent and efficient. The public must be satisfied that complaints are taken seriously and properly investigated.

¹ *Rocket v. Royal College of Dental Surgeons (Ontario)* (1990), 71 D.L.R. (4th) 68.

5. Natural justice and procedural fairness

Disciplinary proceedings must also be fair to the member accused of misconduct or incompetence. Many of the procedural safeguards included in discipline legislation or imposed by the courts were adopted to ensure that a professional's career is not destroyed without giving him or her an opportunity to make a full defence before an unbiased and impartial tribunal. As the *McRuer Report (Ontario Royal Commission Inquiry into Civil Rights, 1968-71)* observed:

The most obvious feature of the power of a self-governing body to discipline its members is clearly that it is a judicial power... It is a power whose exercise may have the most far-reaching effects upon the individual who is disciplined... Where a conviction may result in what has aptly and justifiably been termed "economic death", it is vital that procedural safeguards to ensure fairness be clearly established and rigorously observed.

The importance of procedural rules as a means of protecting the interests of the profession, the public, and the accused can hardly be overemphasized. Canadian courts have long required all disciplinary proceedings to follow what have been called the principles of natural justice. This was restated in very strong terms by the Supreme Court in a Saskatchewan case in 1990.² The court held that the rules of natural justice apply rigorously to professional discipline. These principles require that:

- the accused has an opportunity to be heard, thus the accused must be fully informed of the allegations against him or her and be given a full and fair opportunity to respond to them;
- decision makers must "act judicially", that is, in a fair and unbiased manner, which usually requires a hearing before a discipline committee at which the accused may attend, present evidence, and be represented by legal counsel.

Legislation governing professional discipline embodies the rules of natural justice. The courts will enforce the rules by staying or overturning decisions of disciplinary committees, often going beyond the specific statutory requirements if justice demands.

² *Knight v. Indian Head School Division*, [1990] 106 N.R. 17.

6. The standard model

The standard model is a two-stage system:

1. When a complaint against a member is received, it is investigated by a committee of the association referred to in most of the governing statutes as the Investigation Committee, Professional Conduct Committee, or Ethics Committee. It will be referred to as the “Investigation Committee” in this handbook.
2. If the Investigation Committee concludes that misconduct or incompetence has occurred, the complaint is forwarded to a separate committee, the Discipline Committee. It is the Discipline Committee which presides over the formal discipline hearing. The Investigation Committee prosecutes the complaint and the accused member has an opportunity to be heard in defence.

The separation of investigation of complaints and determination of guilt is intended to avoid bias. The Discipline Committee is required to act as an impartial judge, making its decision on the basis of evidence presented at the hearing by the prosecution and defence.

INVESTIGATION OF COMPLAINTS

1. The Investigation Committee

A. *The role of the Committee*

In the two-stage disciplinary process, the Investigation Committee is responsible for investigating complaints and determining whether the complaint should be dismissed or forwarded to the Discipline Committee for a hearing. The Investigation Committee is distinct from the Discipline Committee.

The hallmark of the two-stage process is independence of the Investigation Committee from the Discipline Committee. The Investigation Committee is typically appointed by the Board and no member of the Investigation Committee can also be a member of the Discipline Committee. The size and composition of Investigation Committees varies, depending on the legislation governing the profession.

Separating the Investigation and Discipline Committees ensures that the accused is tried before an impartial judge. A decision of the Investigation Committee to send a complaint to the hearing stage is sometimes referred to as a “recommendation” but it is more like the decision of the prosecutor in a criminal case to lay charges. The Discipline Committee plays the role of judge.

If these roles are allowed to overlap, an appearance of bias inevitably results. The Committees must operate at arm’s length from each other during the investigation. Failure to do so may invite a court challenge, as has happened in several Saskatchewan cases.³ Good practice demands that members of the Investigation Committee should not consult with members of the Discipline Committee about individual cases and that the Investigation Committee should not make information about individual cases available to the Discipline Committee prior to the disciplinary hearing.

³ See for example *Bailey v. Registered Nurses Association* (1998), 167 Sask. R. 232(Q.B.).

B. Quorum

A committee can conduct its business only if a quorum of members is present. Discipline legislation usually does not define a quorum of Investigation Committee members. In these cases, the Saskatchewan *Interpretation Act* supplies the definition:

18(2) Where a board is established by or pursuant to an enactment:

- (a) if the number of members of the board is a fixed number, at least one half of the number of members is a quorum at a meeting of the board.

This rule applies to most Investigation Committees. However, in a few cases, the statute governing a profession states what constitutes a quorum. In such cases, the governing statute overrides *The Interpretation Act*.

Note: The statute governing your profession should be consulted to determine whether it defines quorum.

The full quorum must be involved in the investigation and participate in making the Committee's decision. However, a full quorum is not required for all investigative activities. For example, a quorum is not required when the Committee interviews the accused or the complainant so long as the information obtained at the interviews is reviewed by the Committee as a whole.

C. Scope of the investigation

An investigation is triggered by a complaint alleging professional misconduct or professional incompetence. It is the Investigation Committee's primary function to gather evidence of the alleged misconduct or incompetence. However, during the course of the investigation evidence of other instances of misconduct may be discovered. If the legislation governing the Investigation Committee does not explicitly give the Committee authority to add new allegations to the original complaint, it will be necessary to initiate a new complaint and investigation. Many, but not all, of the governing statutes now give the Investigation Committee authority to add additional allegations.

The statute governing your profession should be consulted to determine whether additional allegations can be added during an investigation.

Somewhat different rules apply when new charges are added at the hearing stage. These will be discussed in the chapter on hearings.

D. Time considerations

The standard model provides no time frame for completion of an investigation. However, both the complainant and the accused can reasonably expect that the investigation will be initiated, conducted, and concluded as quickly as possible. The courts have held that timely investigation is a matter of natural justice. The Saskatchewan Court of Appeal has held that unreasonable delay in conducting an investigation violates the *Charter of Rights*.⁴

Just what amounts to unreasonable delay depends on the circumstances of the case. Relevant factors include the seriousness of the complaint, whether the accused is under suspension, whether the accused's ability to defend against the alleged complaint is prejudiced by the delay, and the scope and complexity of the investigation.

No hard and fast rules can be stated. Most of the court decisions in which delay has been found to be objectionable involve inordinately long lapses between receipt of the complaint and the hearing. In the Court of Appeal decision referred to above, a five-year delay, during which time the accused doctor was under temporary suspension, was held to be unfair. But shorter delays may also be unfair. A 20-month delay, during which time a witness died, thus prejudicing the accused's ability to make a full defence, has been held to be unfair.⁵ On the other hand, a delay of 30 months was held to be acceptable in a sexual harassment case before a human rights tribunal because there was no evidence of prejudice on the particular facts of the case.⁶

⁴ *Misra v. College of Physicians & Surgeons* (1988), 36 Admin. L.R. 298 (Sask. C.A.).

⁵ *Freedman v. College of Physicians & Surgeons* (1996), 173 N.B.R. (2d) 315 (N.B.Q.B.).

⁶ *Blencoe v. British Columbia Human Rights Commission*, [2000] 10 W.W.R. 587 (B.C.S.C.).

A recent study conducted by the Manitoba Law Reform Commission concluded, after consultation with professional organizations, that most investigations can be completed in 90 days or less. While this time frame is obviously not practical in all cases it may be a useful bench mark.

2. Conduct of the investigation

A. Interviewing the accused

The statutes adopting the standard model all state that the Investigation Committee is to “investigate the complaint by taking any steps it considers necessary, including summoning before it the member whose conduct is the subject of the complaint”.

An interview with the member under investigation is a useful part of any investigation. While “summoning” may seem to imply a formal hearing before the Investigation Committee, that is not what is required. The purpose of the interview is to gather information and hear the member’s side of the issues. The courts have stated that the accused must be treated fairly during the investigation but this does not mean that the interview with the accused should amount to “an additional hearing”. While it is usually good practice to request that the member appear before the entire Investigation Committee, the courts have been satisfied with more informal approaches, such as an interview conducted by one member of the Committee.⁷

Dispensing with the interview entirely would be another matter. One Canadian decision has suggested that minimum procedural fairness requires the Investigation Committee to notify the member that a complaint is being investigated and to solicit a response.⁸ However, the legislation does not provide a mechanism to compel attendance at an interview. If the accused refuses to attend an interview the Investigation Committee should note the fact and proceed with the investigation.

⁷ *Hawrish v. Cundall* (1989), 39 Admin. L.R. 255.

⁸ *Tanaka v. Certified General Accountants Association* (1996), 38 Admin. L.R. (2d) 99 (N.W.T. S.C.).

B. Search and seizure of records

The *Charter of Rights* states that “everyone has the right to be secure against unreasonable search and seizure”. This section of the *Charter* has been applied to seizure of an accused professional’s records during investigation of misconduct.⁹ When properly authorized by statute, seizure of records will likely survive a *Charter* challenge.¹⁰ But most statutes governing discipline do not authorize search and seizure. In these cases, the Investigation Committee may request that relevant records be made available to it but it will not be able to seize the records if the accused member does not cooperate.

Some recently adopted statutes governing discipline do authorize search and seizure. Extensive safeguards are built into these search and seizure provisions. They require court approval (though an *ex parte* application; that is, without formal notice to the member) of the seizure, and court-ordered seizure is only available after a request to provide access to records has been denied. The section was designed to avoid a *Charter* challenge and is likely effective for that purpose.

The statute governing your profession should be consulted to determine whether it permits search and seizure. If it does, legal advice and assistance should be obtained to make the required court application.

C. Other investigative methods

Legislation gives little other guidance in regard to conduct of investigations. The general requirement of fairness of course applies, but the Investigation Committee has wide latitude in the way it carries out an investigation. As Casey, *The Regulation of the Professions in Canada* observes, “a variety of structures are utilized by professional bodies in order to perform the necessary investigations”. The courts have been reluctant to criticize or review investigative methods unless they are obviously biased or unfair.¹¹

⁹ *Lambert v. College of Physicians & Surgeons* (1992), 100 Sask. R. 203 (Sask. C.A.).

¹⁰ *College of Physicians & Surgeons v. Bishop* (1989), 56 D.L.R. (4th) 164 (B.C.S.C.).

¹¹ *Rotelick v. Institute of Chartered Accountants* (1998), 169 Sask. L.R. 180 (Sask. Q.B.).

Some of the statutes governing discipline state that the Investigation Committee may engage legal counsel or other experts to assist it. But such assistance is appropriate even if the governing legislation does not explicitly refer to it. Even employment of an undercover agent to pose as a client has been approved by Canadian courts.¹²

3. Rights of the complainant during the investigation

Both good investigative practice and fairness will usually require the Investigation Committee to interview complainants or otherwise receive information from them. If a hearing is recommended after the investigation is completed, most versions of the standard model require that notice of hearing be given to complainants who may then attend the hearing. Otherwise, the legislation does not require the Investigation Committee to communicate with complainants. The courts have not to date imposed any additional requirements in this regard, but some Law Reform agencies have suggested that more attention should be given to the rights of complainants and the courts may adopt this point of view in the future.

Certainly, some recognition of the complainant's interests is appropriate. But how far the recognition should go is a difficult question. Discipline proceedings are similar in many respects to criminal prosecutions. Although both involve wrongs done to individuals the primary goal is protection of the public. Compensation is left to the civil courts. In criminal cases, the complainant cannot insist that the Crown proceed with a prosecution and is not a party to the proceedings at trial. Nevertheless, suspicion that an Investigation Committee may have buried a legitimate complaint should be avoided. As a matter of good practice, timely communication to complainants concerning the status of an ongoing investigation is desirable.

¹² *Markandey v. Board of Ophthalmic Dispensers* [1994], O.J. No. 484 (C.J.).

4. Mediation

A. Availability of mediation

Mediation is increasing in popularity as an alternative to formal hearing and penalty assessment. It is used in a wide variety of contexts. There is, however, little guidance about it in legislation.

Some professional discipline legislation makes room for mediation by allowing the Investigation Committee to recommend no formal disciplinary action if the complaint “has been resolved, with the consent of the complainant and the member who is the subject of the investigation”. Most legislation makes no reference to mediated or negotiated settlements. However, several professional organizations have become interested in mediation as an option. Nothing in the standard model discipline legislation precludes it. Some associations have designed processes that include “stages” leading up to a disciplinary hearing. The Saskatchewan Registered Nurses Association, for example, has developed a process called “low level resolution”.

B. What is mediation?

In mediation, an independent third party will guide the parties through a discussion and, ideally, to an agreement that is acceptable to all. A mediator can help parties gain a better understanding of the issues and their impact and identify solutions to address underlying needs and concerns. A mediated settlement can be more creative and is often more acceptable to the parties than a decision dictated by the letter of the law. It can be less expensive, less time-consuming, and less traumatic for everyone involved.

Mediation usually begins with an agreement describing the terms of the process. It is important for a mediation agreement to clarify confidentiality and specify that information shared or statements made during mediation cannot be used in subsequent proceedings. It will state that a mediator cannot be called to testify in any further proceedings. These elements are important for achieving openness and full disclosure.

C. When to consider mediation

An organization may decide to design a mediation program or to begin using mediation in a less formal way— trying the process in cases which appear suitable. The question of whether mediation is appropriate is one that has to be considered on a case-by-case basis. Some factors to consider are:

1. Does an open conversation have the potential to repair a relationship or restore the confidence of the public (or a certain individual) in the profession?
2. Is it possible that an explanation, an apology, or commitments to future change will satisfy both the complainant and the public interest?
3. Has there been a breakdown in communication which has contributed to the problem?
4. Do the allegations include serious incapacity, incompetence, dishonesty or sexual abuse—or situations that might lead to the discovery of additional misconduct? (On most occasions, these situations will not be appropriate for mediation).

Generally, the opportunity for mediation arises once the Investigation Committee has concluded, in a preliminary way, that there is an issue of professional conduct that should be pursued. However, mediation may be an option at any time during the course of an investigation. In order for mediation to proceed, the member against whom the complaint is made must agree to mediation. In most cases in which mediation can be successful, the member has accepted some responsibility for the problem that gave rise to the complaint. However, this does not necessarily mean that the member must admit “guilt” in a formal sense in all cases.

The extent of involvement of the complainant is another relevant consideration. Should the complainant need to consent to the process as well? The complainant’s participation would be desirable. But in some circumstances a mediation process without complete involvement of the complainant can serve the public interest. However, many of the statutes governing discipline require the complainant to consent to a mediated resolution.

D. How to proceed

Either before mediation, or as an alternative to mediation, the Investigation Committee may serve a facilitative role to assist in negotiation to resolve the complaint.

Where mediation does proceed with an independent mediator, the professional association will need to determine how it will participate in the process. Some associations appoint a representative to participate in three-party mediation or part of it. Some may decide not to participate directly but to contribute to the terms of any agreement at the resolution stage.

It must always be kept in mind that the public protection role of professional discipline presents some unique challenges. The Manitoba Law Reform Commission warns that by “focusing on the two parties to the dispute, such a process might ignore the interests of the public generally”. This point of view underscores the importance of designing mediation programs that ensure the broader interests are protected. Care must be taken in designing and implementing a mediation program. Mediation must produce results that are satisfactory to the complainant, the profession and the member who is subject to the complaint.

5. Table of statutes — Investigation

	Investigation Committee	Scope of investigation	Search & seizure
Agrologists	s. 23	s. 24	—
Assessment Appraisers	s. 21	s. 22	—
Architects	s. 24	s. 25	—
Can. Info. Processing Society	s. 23	s. 24	—
Cert. Mgmt. Accountants*	s. 21	s. 22	—
Cert. Mgmt. Consultants	s. 21	s. 22	—
Cert. General Accountants	s. 22	s. 23	—
Chartered Accountants	s. 19	s. 20	—
Chiropractic	s. 28	s. 29	s. 31
Dental Disciplines	s. 28	s. 29	s. 30
Dietitians	s. 24	s. 25	—
Eng. & Geoscience Professions	s. 31	s.32	—
Forestry Professions	s. 26	s.27	—
Funeral & Cremation Services	s. 45	s. 46	—
Interior Designers	s. 21	s. 22	—
Land Surveyors...	s. 24	s. 25	—
League of Ed. Administrators...	s. 36	s. 39	—
Licensed Practical Nurses	s. 25	s. 26	—
Med. Lab. Technologists	s. 21	s. 22	—
Med. Radiation Technologists*	s. 25	s. 26	—
Midwifery	s. 26	s. 27	—
Occupational Therapists	s. 24	s. 25	—
Ophthalmic Dispensers	s. 23.2	s. 23.3	—
Pharmacy	s. 27	s. 28	s. 29
Physical Therapists	s. 24	s. 25	—
Podiatry	s. 25	s. 26	—
Psychologists	s. 27	s. 28	—
Real Estate	s. 34.2	s. 35	—
Registered Nurses	s. 27	s. 28	—
Registered Music Teachers	s. 23	s. 24	—
Registered Psychiatric Nurses	s. 23	s. 24	—
Respiratory Therapists *	s. 25	s. 26	—
Sask. Assoc. of School...	s. 24	s. 25	—
Sask. Applied Science...	s. 24	s. 25	—
Speech- Language Pathol....	s. 23	s. 24	—
Social Workers	s. 25	s. 26	—
Veterinarians	s. 19	s. 20	—

*Act not proclaimed in force as of March 31, 2007.

PRELIMINARY TO THE HEARING

1. Laying the formal complaint

After it has completed its investigation, the Investigation Committee must prepare a written report recommending either that:

- (1) the Discipline Committee “hear and determine” the complaint; or
- (2) no further action be taken.

If the complaint goes to the hearing stage, the Investigation Committee’s report must set out the specific allegations that will be tried at the hearing. This is referred to in the legislation as the “formal complaint”.

As suggested above, this step is analogous to the laying of a formal charge by the prosecution in a criminal case. As in the case of a criminal charge, the formal complaint must clearly set out the allegations made against the accused so that the accused can answer them.

The legislation does not set out the content of the formal complaint in detail. However, the courts have provided guidance. It has been held that the formal complaint must:

- (1) allege conduct amounting to professional misconduct or professional incompetence;
- (2) give reasonable notice of the complaint, and
- (3) inform the person charged, in general terms, of the charge against him or her with sufficient particulars to enable the accused to properly prepare a defence.¹³

The first requirement is critical. A professional can be disciplined only for behaviour that is recognized as professional misconduct or professional incompetence. What constitutes misconduct or incompetence is outside the scope of this procedural handbook but it should be noted that, for example, negligence in performance of professional duties may not be severe enough to amount to

¹³ *Golomb v. College of Physicians & Surgeons* (1976), 68 D.L.R. (3d) 25 (Ont. Div. Ct.), citing *R v. Discipline Committee of the College of Physicians and Surgeons* (1969), 6 D.L.R. (3d) 520 (Sask. C.A.).

incompetence. To determine whether behaviour amounts to misconduct or incompetence, recourse must be had to any statutory definition, the code of ethics adopted by the association and to the general law governing professional misconduct.

The legislation includes a notice requirement. It will be discussed in the next section.

The third requirement has often caused difficulty. The general rule is that the formal complaint must include enough detail (“particulars”) to allow the accused to identify the particular actions that form the basis of the complaint. Thus, for example, when a complaint alleged alteration of records but failed to specify the particular records that had been altered, the complaint was held to be deficient.¹⁴

If a complaint does not contain sufficient particulars the remedy is for the accused to demand particulars. The discipline proceeding will be stopped by the court, or a decision overturned, only if a reasonable demand for particulars is denied.¹⁵

2. Notice of hearing

Notice of hearing must be served by the association’s registrar on the accused when a complaint is forwarded to the Discipline Committee. Reasonable notice is obviously required to ensure that the accused can exercise the right to be heard and reply to the case made against him or her. Legislation sets out the minimum notice required, typically between 14 and 30 days, depending on the governing statute. Breach of the notice requirement can be a ground for overturning a decision.

The statute governing your profession should be consulted to determine the notice of hearing requirement.

Most legislation governing discipline requires that the complainant be “advised” when a hearing date is set. This is good practice whether required by statute or not since it contributes to transparency and public confidence.

¹⁴ *Mondesir v. Manitoba Association of Optometrists* (2001), 206 D.L.R. (4th) 163 (Man. C.A.).

¹⁵ *Sen v. College of Physicians & Surgeons* (1969), 6 D.L.R. (3d) 320 (Sask. C.A.).

3. Adding or amending charges after the formal complaint has been laid

In 1986, the Saskatchewan Court of Appeal ruled that a person can only be convicted of the misconduct or incompetence charged in the formal complaint. The court held that when additional instances of misconduct are discovered after the laying of the formal complaint, a new disciplinary investigation must take place and a new formal complaint must be laid.¹⁶

In response to this court decision, recently adopted or amended disciplinary legislation allows the Discipline Committee to add, amend, or substitute charges after the formal complaint is laid before it. When this is done the accused must be notified and the Committee must allow an adjournment to give the accused time to prepare a defence to the new charges.

Discipline Committees operating under older legislation cannot add or amend charges to those in the formal complaint.

The statute governing your profession should be consulted to determine whether charges can be added or amended at the hearing stage.

4. Suspension of the accused pending the final decision

A. Suspension for protection of the public

In some cases, suspension from practice of a professional accused of misconduct or incompetence pending the outcome of disciplinary proceedings is in the public interest. However, suspension will deprive the accused of his or her livelihood before guilt or innocence has been determined. Balancing these competing interests is often difficult. For that reason, the Saskatchewan Court of Appeal has ruled that an interim suspension can be imposed only when authorized by legislation.¹⁷

¹⁶ *Kapoor v. Law Society* (1986), 52 Sask R. 110 (Sask. C.A.).

¹⁷ *Brand v. College of Physicians & Surgeons* (1989), 58 D.L.R. (4th) 178.

Older disciplinary legislation usually does not give authority to suspend a member during disciplinary proceedings (except in the special case of proceedings adjourned pending a criminal prosecution against the accused member). If this is the case, interim suspension cannot be imposed.

More recently adopted or amended disciplinary legislation expressly authorizes suspension during disciplinary proceedings. Typically, the Investigation Committee may (with Board approval) apply to court for an order suspending the accused member. Court involvement is intended to provide safeguards for the accused while allowing suspension when it is required to protect the public. However, this approach has not proved entirely satisfactory. In practice, obtaining court approval for suspensions is difficult, even impractical in some cases. The courts have required evidence of probable “irreparable harm” to the public if the suspension is not granted.¹⁸

The statute governing your profession should be consulted to determine whether interim suspensions are authorized. Legal advice should always be obtained before applying for a suspension.

B. Suspension and other issues when criminal charges are laid against the accused

A criminal offence is a ground for disciplinary action in itself under many disciplinary codes. In addition, activities giving rise to an allegation of misconduct may also amount to criminal offences. Because the purposes of criminal prosecution and professional discipline are different, there is no reason in principle why both should not proceed concurrently. However, concurrent proceedings can create problems.

Requests to hold a disciplinary hearing *in camera* (that, is excluding the public and the complainant) or to stay disciplinary proceedings until the criminal charges have been dealt with are not uncommon. Although the legislation does not explicitly deal with such requests, the courts have

¹⁸ *Chiropractors’ Association v. Potapinski* (2001), 33 Admin. L.R. (3d) 334 (Sask. Q.B.).

held that it is within the scope of a Discipline Committee's authority to grant them. It is appropriate to do so if holding an open hearing might jeopardize the accused's right to a fair trial on the criminal charges. For example, publicizing the evidence presented at the discipline hearing might prejudice potential jurors. If the accused's right to a fair trial is compromised, the courts may step in to order an *in camera* hearing or stay the proceedings.¹⁹

An Investigation or Discipline Committee may elect to suspend proceedings until criminal charges have been disposed of even if the disciplinary proceedings would not prejudice the accused. This avoids the problems discussed above. It may also simplify the disciplinary proceedings. Once a conviction has been obtained, discipline can often be imposed on that ground without additional proof of misconduct.

Special problems may be encountered when the ethical code of the association states that commission of a criminal offence is itself misconduct. If the accused has not yet been convicted of the offence, it will be necessary to await conviction before proceeding with the disciplinary proceedings. A member cannot be disciplined for commission of a criminal offence until he or she has been found guilty by the courts. The Saskatchewan courts have ruled that:

[When] the professional misconduct is characterized as "unbecoming" *because* it constitutes a specific crime not yet determined by the courts, the dominant feature and focus of the proceeding is likely to be found to be a substitute police investigation. Such a proceeding is a matter for the police and criminal courts.²⁰

Note carefully that this rule does not apply to a member who has already been convicted or in a case in which the complaint alleges behaviour that would be misconduct even if it were not also a criminal offence.

¹⁹ See *Southam v. LaFrance* (1990), 71 D.L.R. (4th) 282 (Que. C.A.), but see also *Pilzmaker v. Law Society of Upper Canada* (1989), 38 Admin. L.R. 185 (Ont. Div. Ct.), where a stay was denied because the case had already been widely publicized.

²⁰ *Stromberg v. Law Society*, [1996] 3 W.W.R. 389 (Sask. Q.B.).

When a disciplinary proceeding is stayed pending disposition of criminal charges, it will usually be appropriate to suspend the accused from practice. Although a general authority to make interim suspensions is not included in most disciplinary legislation, almost all disciplinary legislation allows suspensions pending disposition of criminal charges. On application to the court by the association, a judge may order suspension in such cases.

5. Table of statutes – Preliminary to the hearing

	Laying complaint	Notice	Amending charges	Suspension
Agrologists	s. 24	s. 26	s. 26	s. 31
Assessment Appraisers	s. 22	s. 24	s. 24	s. 30
Architects	s. 25	s. 27	s. 27	s. 33
Can. Info. Processing Soc.	s. 24	s. 24	s. 26	s. 30
Cert. Mgmt. Accountants*	s. 22	s. 22	s. 24	s. 30
Cert. Mgmt. Consultants	s. 22	s. 24	s. 24	s. 30
Cert. General Accountants	s. 23	s. 25	s. 25	s. 31
Chartered Accountants	s. 20	s. 22	—	s. 27
Chiropractic	s. 29	s. 33	s. 33	s. 30, 38
Dental Disciplines	s. 29	s. 33	s. 33	s. 31, 37
Dietitians	s. 25	s. 28	s. 28	s. 26, 33
Eng. & Geoscience	s. 32	s. 34	s. 34	s. 38
Forestry Professions	s. 27	s. 27	s. 27	s. 33
Funeral & Cremation	s. 46,47	s. 50	s. 54	s. 48, 60
Interior Designers	s. 22	s. 24	s. 24	s. 30
Land Surveyors...	s. 25	s. 25	s. 29	s. 33
League of Ed. Administrators	s. 39	s. 39	s. 45	s. 49
Licensed Practical Nurses	s. 26	s. 26	s. 29	s. 27, 34
Med. Radiation Techs*	s. 26	s. 26	s. 29	s. 27, 34
Med. Lab. Technologists	s. 22	s. 24	s. 24	s. 30
Midwifery	s. 27	s. 30	s. 30	s. 28, 35
Occupational Therapists	s. 25	s. 28	s. 28	s. 26, 33
Ophthalmic Dispensers	s. 23.3	s. 23.5	s. 23.5	s. 23.3, 23.7
Pharmacy	s. 28	s. 32	s. 32	s. 30, 33, 39
Physical Therapists	s. 23	s. 28	s. 28	s. 26, 33
Podiatry	s. 26	s. 29	s. 29	s. 27, 34
Psychologists	s. 28	s. 31	s. 31	s. 29, 35
Real Estate	s. 35	s. 37	s. 37	s. 36, 36.1, 42
Reg'd Nurses	s. 28	s. 30	s. 30	s. 32
Reg'd Music Teachers	s. 24	s. 26	s. 26	s. 30
Reg'd Psychiatric Nurses	s. 24	s. 26	s. 26	s. 31
Respiratory Therapists *	s. 26	s. 29	s. 29	s. 27, 34
Sask. Assoc. of School...	s. 23	s. 27	s. 27	s. 31
Sask. Applied Science...	s. 23	s. 25	s. 25	s. 31
Speech- Language Pathol....	s. 24	s. 26	s. 26	s. 31
Social Workers	s. 26	s. 28	s. 28	s. 33
Veterinarians	s. 20	s. 22	—	s. 20, 25

*Act not proclaimed in force as of March 31, 2007.

HEARING BEFORE THE DISCIPLINE COMMITTEE

1. The role of the Discipline Committee and the parties

A. *Conduct of the hearing by the Committee*

The Discipline Committee presides over the hearing of the formal complaint and determines whether the accused member is guilty of professional misconduct or incompetence.

The Discipline Committee is the impartial adjudicator. In the two-stage procedure mandated by the standard model, prosecution is assigned to the Investigation Committee.

It is important to recognize and preserve the distinction between the roles of the Discipline Committee and Investigation Committee. The Discipline Committee must not take on the role of prosecutor or appear to be collaborating with the Investigation Committee. The courts will overturn a decision if the Discipline Committee does not remain an impartial adjudicator, or even appears to be biased against the accused. For example, in one reported case, the decision was overturned because a disciplinary board left the impression that “the member was being tried by counsel to the board”.²¹

The role of the Discipline Committee is much like that of a panel of judges in a court of law. It has responsibility to control the proceedings and maintain order but it must allow the prosecution (the Investigation Committee or its legal counsel) and defence (the accused or legal counsel) to present evidence and argue their cases. The Discipline Committee may make rulings on such matters as the admissibility and relevance of evidence (see below) and may question witnesses for clarification so long as it does not usurp the function of the prosecution and defence.

Although there are no hard-and-fast rules applying to the way in which evidence is presented, it is usual practice to allow the prosecution to present evidence and call witnesses to make its case against the

²¹ *Brett v. Board of Directors of Physiotherapy* (1991), 77 D.L.R. (4th) 421 (Ont.C.A.).

accused, after which the defence presents its evidence and witnesses. Both parties should be given the opportunity to summarize their contentions and make and respond to any arguments about points of law and procedure that arise.

B. Quorum

It is important that a proper quorum of Discipline Committee members is present throughout the hearing. Quorum requirements differ. A typical formula requires that 2/3 of the Committee or three members, whichever is smaller, constitutes a quorum. A majority of the quorum must concur in the Committee's decisions. Some legislation also allows a member of the Investigation or Discipline Committee whose term expires during a proceeding to continue until the proceeding is finished.

If the legislation does not define a quorum of Discipline Committee members, the Saskatchewan *Interpretation Act* supplies the rule:

18(2) Where a board is established by or pursuant to an enactment:

- (a) if the number of members of the board is a fixed number, at least one half of the number of members is a quorum at a meeting of the board.

The statute governing your profession should be consulted to determine what constitutes a quorum.

C. The role of legal counsel

Both the prosecution (Investigation Committee) and the accused may be represented and assisted by legal counsel. Legal representation is a right for the parties in any judicial or quasi-judicial proceeding. All disciplinary legislation following the standard model expressly recognizes the right. In addition, the legislation permits the Discipline Committee to obtain the assistance of legal counsel of its own.

Counsel to the parties play much the same role as lawyers in a court room. They are responsible for making and defending the case against the accused. Counsel to the Discipline Committee has a much different role. Because most Committee members are not legally trained they may have questions about procedure or matters of law. Counsel to the Committee acts as an advisor in these matters.

The practice of providing the Discipline Committee with a legal advisor is no doubt good policy. There is a danger, however, that counsel will exert excessive influence on the Committee, usurping its function. The Committee must itself control the proceedings before it. In an Ontario case, the court ordered a new hearing because legal counsel to the Committee had “generally speaking acted as spokesman for the Committee”.²²

An appearance of unfairness or bias can occur when counsel to the Discipline Committee, as Casey, *The Regulation of Professions in Canada*, has put it, “descends into the arena”. Thus, a decision was overturned when counsel to the Committee questioned counsel for the parties and made his views of the facts before the tribunal known.²³ It is appropriate for counsel to the Committee, with the Committee’s permission, to ask questions of witnesses for clarification but counsel should not conduct examinations of either witnesses or counsel to the parties.

A particular problem is participation of counsel to the Committee in the Committee’s deliberations and counsel’s role in preparing reasons for decision. There is a danger that the Committee’s role may be usurped at this stage as well as during the hearing itself. However, it is an established and acceptable practice for counsel to assist in writing the decision and advise on points of law.

Problems are most apt to arise if the advice of counsel to the Committee cannot be responded to by the parties. The problem is avoided if counsel’s opinions are expressed in the hearing itself so counsel to the parties will have an opportunity to reply to them. That opportunity is lost if the opinions are delivered in a closed session of the Committee while the decision is being prepared. The Manitoba Court of Appeal has recently suggested that the “desirable practice” would be to require counsel to the Committee to submit all opinions in writing to the parties if they are not delivered in open court, thus giving them an opportunity to reply. However, the court stopped short of making this a binding rule.²⁴

²² *Venzel v. Association of Architects* (1990), 41 A.C. 50 (Ont. Div. Ct.).

²³ *Adair v. Ontario Health Disciplines Board*, 15 O.R. (3d) 705 (Ont. Div. Ct.).

²⁴ *Snider v. Manitoba Association of Registered Nurses* (2000), 142 Man. L.R. (2d) 308.

Independence of counsel to the Committee from the prosecution is also obviously important. The Saskatchewan Court of Queen's Bench has strongly criticized engaging the same lawyer as prosecutor and counsel to the Discipline Committee.²⁵ A more difficult question is whether staff counsel to the Association or counsel currently engaged to advise the Association in some other capacity should advise the Committee. Since the complaint is, in a strict sense, brought by the Association, an appearance of conflict of interest may result and there is a danger that the Committee will be unduly impressed by advice from an in-house "expert". The problem is compounded if a staff lawyer also acts for the prosecution as is often the practice. To date, Canadian courts have not ruled on this issue but it may be good practice to avoid using staff lawyers or lawyers from a firm on retainer to the association as either counsel to the Investigation Committee or Discipline Committee.

D. Attendance of the accused

A formal hearing is required to ensure that the accused's right to be heard is protected. However, the right to be heard is just that. If the accused elects to make no defence, the proceedings may nonetheless continue. Disciplinary legislation expressly provides that the hearing may proceed in the absence of the accused. There are cases in which the Discipline Committee would not be justified in proceeding in the absence of the accused. But these are perhaps obvious, such as illness of the accused.

E. Role of the complainant

Until recently, the complainant was not regarded as a proper participant in disciplinary proceedings. Disciplinary legislation adopted prior to the 1990s does not give complainants even the right to receive notice of the hearing. More recent disciplinary legislation requires notification of complainants and gives them the right to attend unless an *in camera* hearing has been ordered. Whether required by the legislation or not, it is good practice to notify complainants and inform them of their right to attend if the hearing is public.

²⁵ *Bailey v. Registered Nurses Association* (1998), 167 Sask. R. 232.

However, even the most recent legislation falls short of giving complainants the right to participate in the hearing. Their role at the hearing is usually confined to giving evidence if called upon to do so by the prosecution. There is some room for participation in other ways, such as giving complainants the right to make a statement when penalty is being assessed. But, there is a danger that allowing complainants to play a direct role in prosecution of a complaint would turn a disciplinary hearing into a venue for pursuing private disputes. Here again there is a parallel to criminal prosecutions. Neither are designed to replace private law suits as a means of compensating the victim and both are justified because they protect the public interest. Discipline proceedings should be open and transparent to the complainant but the complainant should not be allowed to become a party to the hearing.

2. The hearing requirement: Format and related matters

A. The right to a hearing

The rules of natural justice clearly require that the accused be given the right to be heard. Under the standard model, if the Investigation Committee recommends prosecution of a complaint the Discipline Committee is required to hold a hearing.

There have been cases in which a professional accused of misconduct has demanded a hearing despite a recommendation from the Investigation Committee that the complaint should not be proceeded with. Presumably, the hearing would “clear the name” of the accused more effectively than a mere decision not to pursue the complaint. However, the courts have not been persuaded that justice requires a hearing in such a case.²⁶

B. Public or private hearing

Except in exceptional circumstances, the standard model requires open, public discipline hearings. However, the legislation allows an *in camera* hearing (excluding both the complainant and the public) “when the committee is of the opinion that evidence brought in the presence of the persons to be excluded will unduly violate the privacy of a person

²⁶ *Von Richter v. Law Society* (1991), 293 A.P.R. 325 (N.B.S.C.).

other than the member whose conduct is the subject of the hearing”. As noted above, the Committee may also hold an *in camera* hearing if the accused has been charged with a criminal offence and an open hearing might jeopardize his or her right to a fair trial.

Although courts and most other tribunals are usually required to hold public hearings, until recently, professional discipline hearings were usually held in private. *In camera* proceedings protected the privacy of the parties but there can be little doubt that professional organizations traditionally preferred closed hearings in order to avoid adverse publicity. The change in policy reflects growing concern that professional discipline should be open to public scrutiny. For that reason, the exception to the general rule is narrow. Note that a hearing cannot be closed merely to protect the privacy or reputation of the accused. The most obvious situation in which a closed hearing would be justified would be protection of professional-client confidentiality at the request of, and to protect the interests of, the client.

C. The form of the hearing

Hearings are usually “oral,” giving the parties an opportunity to submit evidence, call witnesses, make submissions and cross-examine witnesses. The standard model is silent on the form of hearing, though the right to cross-examination accorded the accused suggests that at least an oral component may be required in most cases.

Casey, *The Regulation of Professions in Canada*, argues that “even in the absence of an express legislative right to an oral hearing, it is submitted that common law principles would require such a hearing to be held”. In the past, disciplinary authorities routinely limited their inquiry to consideration of written submissions. This amounts to denial of the right to a full hearing and is likely unacceptable under the standard model.

Nevertheless, some administrative tribunals have experimented with innovative alternatives to the oral hearing. There is growing interest in the use of electronic communications, including teleconferencing, fax and email, to conduct hearings at which all of the participants are not physically present. In Ontario, the *Statutory Powers Procedure Act* now permits “written” or “electronic” hearings in some cases. There

is room under Saskatchewan law to experiment with innovations such as these but only if the parties consent and clearly thought-out rules governing the alternative forms of hearing have been adopted by the Discipline Committee.

D. Adjournments

Disciplinary legislation contains no general rules governing adjournment of a hearing. However, disciplinary tribunals have an inherent power to adjourn proceedings, either on their own initiative or at the request of a party.²⁷

Refusal to grant an adjournment may compromise a party's ability to make a full defence and thus amounts to a breach of the right to be heard. For example, a disciplinary decision was overturned when an adjournment to give an accused time to produce a witness was refused.²⁸

3. Evidence

A. Types of evidence

As an essential part of its role as prosecutor, the Investigation Committee will present the evidence it has gathered during the course of its investigation. The defence will present evidence to attack the case made by the prosecution. The decision of the Discipline Committee must be based on the facts disclosed in the evidence presented to it. Therefore, it is important that evidence is properly introduced at the hearing.

There is no limit on the types of evidence that can be presented at the hearing, though it typically consists of documents and the oral evidence of witnesses. However, the evidence must be relevant and must be accessible to both parties. Evidence is relevant when it bears on the issues the hearing must resolve. The Committee may refuse to hear evidence that is not relevant, though its decision to reject evidence on

²⁷ *Amourgis v. Law Society of Upper Canada* (1984), 12 D.L.R. (4th) 759 (Ont. Div. Ct.).

²⁸ *Saskatchewan Teachers' Federation v. Demoissac* (1973), 38 D.L.R. (3d) 296 (Sask. C.A.).

this ground may be reviewed by the courts. Accessibility means that documents must be presented at the hearing and available to both parties for examination and use in questioning witnesses.

B. Rules of evidence

In a court of law, evidence must also be deemed “admissible” under the rules of evidence. These rules are often complex and technical. They may not be practical or appropriate in discipline hearings, which are usually presided over by a Committee that lacks legal training. It is a well-established principle that administrative tribunals may receive all relevant evidence even if it would not be admissible in a court of law. In particular, exclusionary rules of evidence such as the hearsay rule and the technical rules governing admission of documents into evidence do not ordinarily apply. This principle has been applied by the courts to disciplinary hearings²⁹ and disciplinary legislation has confirmed it.

However, it must be remembered that the rules of evidence were developed by the courts to prevent unfairness. The notorious rule against hearsay, for example, is intended to prevent weight from being given to statements that cannot be tested by cross-examination. The rule requires that the evidence come from a witness with first-hand knowledge of the facts testified to. In general, this is probably a good rule but the exceptions recognized by the courts have produced a complex body of law. The general policy of the rule is something a Discipline Committee should keep in mind as a matter of common sense.

The courts will review decisions about reception of evidence made by Discipline Committees. Although they are generally reluctant to do so, they will overturn a decision if it is based on evidence that was clearly unreliable. On occasion, the courts have appealed to the rules of evidence to justify overturning a decision. For example, the Supreme Court of Canada overturned a disciplinary decision because it relied on second-hand evidence that was clearly open to question. In doing so, the court noted that the evidence would have been inadmissible in court under the hearsay rule. However, the decision was not overturned

²⁹ See for example *Re Kalik-Kareemi* (1989), 35 Admin. L.R. 131 (N.S.C.A.), affirming that hearsay evidence may be admitted by a disciplinary tribunal.

because it breached the rule but because it was a clear example of the danger of relying too heavily on second-hand evidence.

Decisions such as this have led some commentators to suggest that Discipline Committees cannot entirely ignore the formal rules of evidence. The Alberta Law Reform Institute, for example, has suggested it is correct to say that tribunals such as Discipline Committees “are not bound by the formal rules of evidence except to the extent that deviation from these rules would not cause unfairness to the participants” (*Powers and Procedures for Administrative Tribunals*, 1999). This perhaps overstates the extent to which Discipline Committees must be aware of the technical exclusionary rules, but it is useful as caution. In this, as in so much else, the fundamental requirement is fairness to the parties.

C. Disclosure of evidence to the accused

Until recently, there was no requirement that evidence gathered in the investigation had to be disclosed to the defence before the hearing. The Supreme Court has now imposed strict disclosure requirements in criminal cases,³⁰ and there has been a clear trend toward requiring similar disclosure in disciplinary proceedings. In an Ontario decision that has been approved by the Saskatchewan courts, disclosure was identified as a matter of natural justice:

The importance of full disclosure to the fairness of the disciplinary proceedings before the Board cannot be overstated. Although the standards of pre-trial disclosure in criminal matters would generally be higher than in administrative matters, tribunals should disclose all information relevant to the conduct of the case, whether it is damaging to or supportive of the respondent’s position, in a timely manner, unless it is privileged as a matter of law. Minimally, it should include copies of all witness statements and notes of the investigators.³¹

³⁰ *R v. Stinchcombe* (1991), 130 N.R. 277 (S.C.C.).

³¹ *Markandey v. Board of Ophthalmic Dispensers*, [1994] O.J. No. 484 (Ont.C.J.). Approved in *Thompson v. Chiropractors’ Association*, [1996] 3 W.W.R. 675 (Sask. Q.B.), and *Bailey v. Registered Nurses Association* (1998), 167 Sask. R. 232 (Sask. Q.B.).

A disclosure requirement has not yet found its way into Saskatchewan discipline legislation but must now be regarded as both good practice and a legal requirement.

D. Evidence received by the Discipline Committee but not presented at the hearing

Tribunals that conduct their own investigations may obtain evidence which is not presented at the hearing. Under the standard model's two-stage process, there is little justification for receipt of evidence by the Discipline Committee that is not presented at the hearing. Reception of evidence that is not subject to review and rebuttal by the parties undermines the Discipline Committee's responsibility to act as an impartial adjudicator.

To date, the courts have stopped short of laying down a general rule that disciplinary tribunals cannot consider evidence that is not presented at the hearing. But they have been critical of the practice. For example, the Alberta Court of Appeal was "at a loss to understand " why a Discipline Committee refused to make certain statements presented to the Committee available to the accused. However, the Court declined to overturn the Committee's decision on the ground that disclosure would not have benefited the accused in this particular case.³²

4. Witnesses

A. Calling and cross-examining witnesses

In the past, some disciplinary tribunals received the evidence primarily through written "witness statements" or affidavits submitted by the parties. Most Discipline Committees now prefer to hear the oral evidence of witnesses. This practice allows questions to be put to witnesses to clarify or expand upon their testimony and, most importantly, allows cross-examination of witnesses. While evidence of witnesses may still be presented by affidavit, the courts have been increasingly critical of disciplinary proceedings in which the right to call and cross-examine witnesses is not available to the parties.³³

³² *Re Solicitor* (1967), 64 D.L.R. (2d) 140 (Alta. C.A.).

Disciplinary legislation following the standard model recognizes the right to both call witnesses and cross-examine.

Reception of oral testimony at the hearing usually follows the general practice in courts of law. During the course of presenting their evidence, both parties call witnesses. The party (or legal counsel) calling the witness conducts the “examination in chief”: The witness is questioned to bring out the facts the party wishes to establish. The opposing party then conducts the “cross-examination”: Questions are put to the witness to test the reliability of the evidence given during examination in chief or to discover additional facts that may assist the cross-examining party. The Committee may permit a re-examination by the party who called the witness if clarification of new matters raised on cross-examination appears to be necessary.

In courts of law, there are some technical rules governing the scope of examination and cross examination. For example, greater latitude to ask “leading questions” is allowed on cross-examination than on examination in chief. Strict adherence to these rules has not been demanded of Disciplinary Committees. The Committee has a wide latitude to control the proceedings. What is important is that the Committee respect the right of the parties to make a full presentation of their cases.

B. Witness statements and affidavits

Some discipline legislation expressly allows affidavit evidence and none expressly excludes affidavits and written witness statements. However, the courts have been critical of substituting affidavit evidence for oral testimony even when the practice is specifically authorized by statute.³⁴ There remains a place for affidavits and witness statements but it is a narrow one. They may be useful to introduce evidence that is not controversial or of such a nature that there would be little point in conducting cross-examination of the

³³ See for example, *Willette v. Royal Canadian Mounted Police Commissioner* (1984), 10 Admin. L.R. 149 (Fed. C.A.) and *Kutz v. College of Physicians & Surgeons* (1987), 24 Admin. L.R. 187 (B.C.S.C.).

³⁴ *Roenisch v. Veterinary Medical Association* (1968), 66 D.L.R. (2d) 358 (Alta. T.D.).

witness. In addition, if both parties agree to allow certain evidence to be placed before the Committee in this way, there is usually no reason why the Committee should not agree to dispense with oral testimony.

C. Compelling the accused to testify

A party to a civil law suit in the courts can be compelled to testify at the insistence of another party. This rule has been applied to disciplinary proceedings.³⁵ The standard model disciplinary legislation explicitly provides that the accused may be required to testify by the prosecution. In the legal language used in the legislation, the accused is “competent and compellable” to give evidence at the hearing.

In civil proceedings before the courts, almost all potential witnesses are competent and compellable. This contrasts with criminal prosecutions in which the accused (and his or her spouse) are not compellable. The few limitations on competency of witnesses that remain in civil law likely apply to discipline proceedings. These have primarily to do with evidence of minors and mentally incompetent persons. If an issue about reception of evidence from such persons arises, the Discipline Committee should consult the relevant provisions of *The Evidence Act* and seek legal advice.

D. Subpoena of witnesses and documents

Because a disciplinary tribunal is not a court of law, it has no inherent jurisdiction to compel attendance of a witness or to compel the production of documents and records. There are obviously circumstances in which either the prosecution or defence may require testimony or documents to adequately present their cases. For that reason most, but not all, disciplinary legislation has given the parties the right to subpoena witnesses and documents. The legislation typically states that either the accused or the prosecuting Investigation Committee may apply to the registrar of the court for a “*subpoena ad testificandum*” or “*subpoena duces tecum*”. The “*subpoena ad testificandum*” is a command for an individual to attend to give

³⁵ See *Jones v. Law Society* (1982), 143 D.L.R. (3d) 379 (B.C.S.C.), which also held that the *Charter of Rights* does not apply to this issue.

testimony. The “*subpoena duces tecum*” requires a witness to produce books, personal papers, or other relevant material.

Note that the Discipline Committee is not given the power to subpoena but merely to apply for subpoenas. Thus the court issuing the subpoena retains control over the decision to issue it. The court may refuse to issue a subpoena if, for example, the testimony or records are held to be unnecessary for the purpose of prosecuting or defending an allegation of misconduct.³⁶

The statute governing your profession should be consulted to determine whether it permits parties to apply to court for subpoenas.

³⁶ See *Hanna v. College of Physicians and Surgeons* (1999), 179 Sask L.R. 181 (Q.B.).

5. Table of statutes — Hearing

	Disc. C'ttee	Disc. Hearing	Role of complainant	Subpoena
Agrologists	s. 25	s. 26	—	s. 26(8)
Assessment Appraisers	s. 23	s. 24	—	s. 24(8)
Architects	s. 26	s. 27	—	s. 27(8)
Can. Info. Processing Soc.	s. 25	s. 26	s. 26(13)	s. 26(8)
Cert. Mgmt. Accountants*	s. 23	s. 24	s. 24(13)	s. 24(8)
Cert. Mgmt. Consultants	s. 23	s. 24	s. 24(13)	s. 24(8)
Cert. General Accountants	s. 24	s. 25	—	s. 25(8)
Chartered Accountants	s. 21	s. 22	—	s. 22(8)
Chiropractic	s. 32	s. 33	s. 33(13)	s. 33(8)
Dental Disciplines	s. 32	s. 33	s. 33(13)	s. 33(8)
Dietitians	s. 27	s. 28	s. 28(14)	s. 28(8)
Eng. & Geoscience	s. 33	s. 34	s. 34(15)	s. 34(8)
Forestry Professions	s. 28	s. 29	s. 29(13)	s. 29(8)
Funeral & Cremation	s. 49	s. 51-55	s. 51(2)	s. 53(3)
Interior Designers	s. 21	s. 22	s. 24(13)	s. 24(8)
Land Surveyors...	s. 26	s. 27	s. 27(13)	s. 27(8)
League of Ed. Administrators	s. 35	s. 40-45	s. 40	s. 43(5)
Licensed Practical Nurses	s. 28	s. 29	s. 29(14)	s. 29(8)
Med. Radiation Techs*	s. 28	s. 29	s. 29(14)	s. 29(8)
Med. Lab. Technologists	s. 23	s. 24	s. 24(13)	s. 24(8)
Midwifery	s. 29	s. 30	s. 30(14)	s. 30(8)
Occupational Therapists	s. 27	s. 28	s. 28(14)	s. 28(8)
Ophthalmic Dispensers	s. 23.4	s. 23.5	s. 23.5(13)	—
Pharmacy	s. 31	s. 32	s. 32(14)	s. 32(9)
Physical Therapists	s. 27	s. 28	s. 28(14)	s. 28(8)
Podiatry	s. 28	s. 29	s. 29(14)	s. 29(8)
Psychologists	s. 30	s. 31	s. 31(13)	s. 31(8)
Real Estate	—	s. 37	s. 37(13)	s. 37(8)
Reg'd Nurses	s. 29	s. 30	—	s. 30(8)
Reg'd Music Teachers	s. 25	s. 26	s. 26(13)	s. 26(8)
Reg'd Psychiatric Nurses	s. 25	s. 26	—	s. 26(8)
Respiratory Therapists *	s. 28	s. 29	s. 29(14)	s. 29(8)
Sask. Assoc. of School...	s. 26	s. 27	s. 27(13)	s. 27(8)
Sask. Applied Science...	s. 24	s. 25	s. 25(13)	s. 25(8)
Speech- Language Pathol....	s. 25	s. 26	s. 25(11)	s. 25(8)
Social Workers	s. 27	s. 28	s. 28(11)	s. 28(8)
Veterinarians	s. 21	s. 22	—	s. 20

*Act not proclaimed in force as of March 31, 2007.

DECISION AND PENALTY

1. Imposing the penalty: Procedural fairness

The principles of natural justice apply to imposition of a penalty as well as to determination of guilt. Thus, the accused must have an opportunity to make submissions at the penalty stage of the proceedings and the decision-maker must properly consider the evidence before imposing a penalty.

Under some disciplinary legislation, imposition of the penalty is separated from determination of guilt. After the Discipline Committee has registered a “conviction” it submits its finding to the Board of the Association, which imposes the penalty.

In *Saskatchewan Teachers’ Federation v. Munro*, the Court of Appeal considered a similar regime under *The Teachers’ Federation Act*. While the court did not hold that assigning “conviction” and “sentencing” to separate bodies necessarily breaches the requirements of natural justice, it was concerned that the separation might make it difficult in practice to protect the accused’s procedural rights:

“Sentencing “(if the term may be used in relation to disciplinary proceedings) is an integral part of the adjudicative process... It is a natural conclusion derived from determinations of fact found during the “conviction” process. This proposition applies with no less force in a statutory scheme such as the one under consideration here, where the finder of fact is distinct from the party imposing (or here, imposing or recommending) sentence. To be fair and just, the consequences meted out by the Executive must bear, in our view, a close relation to the determinations of fact made by the Discipline Committee.”³⁷

Separation of the “conviction” and “sentencing” phases of discipline proceedings is acceptable only if adequate safeguards are in place. Associations operating under legislation that separates “conviction” and “sentencing” must adopt practices that will ensure that: (1) The

³⁷ *Saskatchewan Teachers’ Federation v. Munro*, [1993] 7 W.W.R. 484 (Sask. C.A.).

accused is given an opportunity to be heard and make submissions during the penalty phase, and (2) The record of proceedings is available to the board that imposes the penalty.

Perhaps as a result of the decision in *Munro*, recent Saskatchewan discipline legislation assigns assessment of penalty to the Discipline Committee as part of the disciplinary hearing.

The statute governing your profession should be consulted to determine whether the Discipline Committee or Board has responsibility for imposing penalties.

2. The decision and reasons

Discipline legislation requires that the “order” imposing a penalty be in writing and that a copy of the order must be provided to the accused and the complainant.

The legislation does not explicitly require that written reasons for decision be included in the order.

It has been held that failure to give reasons is not necessarily a breach of natural justice.³⁸ However, the Supreme Court has recently accepted that there are “strong arguments demonstrating the advantages of written reasons”. The court concluded that “it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision”. It was suggested that decisions “critical to [the] future” of the person affected would generally fall into this category.³⁹ Many disciplinary decisions will have this effect.

As Casey, *The Regulation of Professions in Canada*, observes:

It is recognized that it is preferable that reasons be given for administrative decisions. Failure to give reasons tends to undermine the confidence in the tribunal... Further, reasons given

³⁸ *Kirsten v. College of Physicians & Surgeons* (1996), 138 D.L.R. (4th) 335 (Sask Q.B.).

³⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

by administrative tribunals allow the Court sitting in appeal or on judicial review to access the decision making process.

Written reasons for decision should now be regarded as good practice in disciplinary proceedings.

3. Record of the proceedings

An adequate record of proceedings is necessary if the decision is appealed to the courts. The court will rely primarily on the record in determining whether to uphold or overturn the decision. If penalty is imposed by the Association's board rather than at the hearing, the record will be necessary for this purpose as well. The legislation sets out the materials that must be kept as part of the record. These typically include:

- (a) the formal complaint or report of the investigation committee;
- (b) the transcript of the evidence presented to the hearing;
- (c) any exhibits received in evidence;
- (d) decisions or orders made by the Discipline Committee or Board.

The record must be made available to both parties in the event of an appeal.

4. Table of Statutes — Decision

	Imposing penalty	Order/ decision	Record
Agrologists	s. 27	s. 27(3)	s. 32
Assessment Appraisers	s. 25	s. 25(3)	s. 31
Architects	s. 28	s. 28(3)	s. 34
Can. Info. Processing Soc.	s. 27	s. 27	s. 31
Cert. Mgmt. Accountants*	s. 25	s. 25	s. 31
Cert. Mgmt. Consultants	s. 25	s. 25(3)	s. 31
Cert. General Accountants	s. 26	s. 26(3)	s. 32
Chartered Accountants	s. 23	s. 23(3)	s. 28
Chiropractic	s. 34	s. 39	s. 40
Dental Disciplines	s. 34	s. 34(4)	s. 38
Dietitians	s. 29	s. 29(3)	s. 34
Eng. & Geoscience	s. 35	s. 35(3)	s. 39
Forestry Professions	s. 30	s. 30(3)	s. 34
Funeral & Cremation	s. 56	—	s. 62
Interior Designers	s. 25	s. 25(3)	s. 31
Land Surveyors...	s. 28	s. 28(3)	s. 34
League of Ed. Administrators	s. 46	s. 47	s. 51
Licensed Practical Nurses	s. 30	s. 30(3)	s. 35
Med. Radiation Techs*	s. 30	s. 30(3)	s. 35
Med. Lab. Technologists	s. 25	s. 25(3)	s. 31
Midwifery	s. 31	s. 31	s. 36
Occupational Therapists	s. 29	s. 29(3)	s. 34
Ophthalmic Dispensers	s. 23.6	s. 23.6(3)	s. 24
Pharmacy	s. 34	s. 34(3)	s. 42
Physical Therapists	s. 29	s. 29(3)	s. 34
Podiatry	s. 30	s. 30	s. 35
Psychologists	s. 32	s. 32(3)	s. 36
Real Estate	s. 38	s. 38(3)	s. 43
Reg'd Nurses	s. 31	s. 31(3)	s. 34
Reg'd Music Teachers	s. 27	s. 27(3)	s. 31
Reg'd Psychiatric Nurses	s. 27	s. 27(3)	s. 32
Respiratory Therapists *	s. 30	s. 30	s. 35
Sask. Assoc. of School...	s. 28	s. 28(3)	s. 32
Sask. Applied Science...	s. 26	s. 26(3)	s. 32
Speech- Language Pathol....	s. 27	s. 27	s. 32
Social Workers	s. 29	s. 29	s. 34
Veterinarians	s. 23	s. 23	s. 28

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