

Discipline

Committee Guidelines

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COLLEGE OF NURSES
OF ONTARIO
ORDRE DES INFIRMIÈRES
ET INFIRMIERS DE L'ONTARIO

THE STANDARD OF CARE.

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College of Nurses of Ontario 101
Davenport Rd.
Toronto ON M5R 3P1

www.cno.org

Introduction

1. The Discipline Committee of the College of Nurses of Ontario (the “Committee”) is committed to protecting the public and ensuring fairness to members of the nursing profession (“Members”) against whom allegations of professional misconduct and incompetence have been made. To promote fairness, efficiency and the timely determination of allegations of professional misconduct and incompetence, the Committee has established the following guidelines in relation to disclosure by the College, pre-hearing conferences, production of records in the possession of third parties, conduct of discipline hearings, and timelines for the issuance of decisions and reasons.

Disclosure by the College

2. The Committee recognizes the importance of disclosure of all relevant information (whether inculpatory or exculpatory) in the College’s possession to the fairness of proceedings before Discipline panels. The College’s disclosure obligation is a continuing one. Consequently, after initial disclosure has been made, it is incumbent upon the College to provide timely disclosure of information subsequently coming into the College’s possession and information previously considered irrelevant but whose relevance has subsequently come to light. The Committee recognizes that there are circumstances where the College is not required to disclose information because it is privileged.
3. The Committee adopts the principles expressed by the Ontario Court of Justice (General Division) in *Markandey v. Board of Ophthalmic Dispensers*, [1994] O.J. No. 484. In that case, the Court commented, “the importance of full disclosure to the fairness of...disciplinary proceedings...cannot be overstated”, remarking further,

...tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent’s position in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate (a) review of these decisions, if necessary. The absence of a request for disclosure, whether it be for additional disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearance of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make proper disclosure.

4. In recognition of the importance of these principles to the fairness of proceedings before it, the Committee considers that barring exceptional circumstance, disclosure should take place within the following time frames:
 - a. no later than 30 days prior to the pre-hearing conference, and
 - b. in the case of documents that come into the College's possession subsequent to the period referred to in (a), on a timely basis.
5. The Committee recognizes that disclosure can be effected by providing copies of documents to counsel for the Member (or, where the Member is self-represented, to the Member), or by providing reasonable access to original documents, or a combination of providing copies of some documents and reasonable access to others, depending on the circumstances.

Pre-Hearing Conferences

6. The Committee considers that pre-hearing conferences are a valuable and important stage in the proceedings, at which there may be a candid discussion of the strength of the College's case, the Member's potential liability for being found guilty of professional misconduct and/or incompetence, procedural issues, and the potential narrowing of issues to be determined by the Discipline panel assigned to conduct the hearing. Because of the value and importance of pre-hearing conferences, the Discipline Committee has passed a rule requiring the parties to attend a pre-hearing conference.
7. Pre-hearing conferences will be completed within 120 days of the date on which the allegation(s) of professional misconduct is (or are) referred to the Discipline Committee. Any deviation from this timeline will require the written approval of the Chair of the Discipline Committee. In the event that an extension is granted by the Chair, the new date by which the pre-hearing conference shall be completed must be specified.
8. The Committee expects that the prosecutor and counsel defending the Member will take steps to fully inform themselves about the facts of the case, the issues presented by the case and the issues to be discussed at the pre-hearing conference. The presence of the Member is strongly encouraged, and in any event, the Committee expects that the Member will be available for consultation with counsel during the pre-hearing conference, should the need arise. The Committee endorses the use of telephone conference calls only in cases where it is impossible for counsel and/or the Member to appear in person.
9. The Committee recognizes that the parties are entitled to the candid view of the pre-hearing conference Chair as to the strength of the College's case and the Member's liability to be found guilty of professional misconduct or incompetence and the appropriate penalty to be imposed in consequence of a finding of either professional misconduct or incompetence.
10. The Committee recognizes and endorses the practice of counsel to use the pre-hearing conference as a means of narrowing the issues to be determined by the

Discipline panel assigned to conduct the hearing. The Committee strongly endorses the practice of counsel agreeing as to the evidence of a particular witness or formulating agreed statements of fact, where it is possible for counsel to do so. Similarly, the Committee strongly endorses the practice of counsel agreeing as to the contents of document books to be used at hearings.

11. The *Discipline Committee Rules* provide that the pre-hearing conference Chair may schedule the date(s) upon which the hearing is to take place. For that reason, the parties and their counsel are expected to have their calendars or schedules with them at the pre-hearing conference.

Hearing Dates

12. The Committee recognizes that the public interest is served by ensuring that the Committee's mandate to impartially hear and determine allegations of professional misconduct or incompetence or applications for reinstatement, is carried out in a fair and prompt manner.
13. Hearing dates must be scheduled by the parties within six months (180 days) of the date of referral to the Discipline Committee. Where a hearing date has not been set within six months, the parties will be required to appear before a one-member panel of the Discipline Committee to set a hearing date.
14. Hearings must commence within nine months (270 days) of the date of referral. Any deviation from this timeline will require the written approval of the Chair of the Discipline Committee.
15. Requests by either or both of the parties for an adjournment of a hearing date prior to the commencement of the hearing must be made in writing and approved by the Pre-Hearing Chair or the Chair of the Discipline Committee. Late notification of adjournment requests and late notification of case settlements may attract costs sanctions. Reference should be made to the *Discipline Committee Rules* for further details.

Form of Hearing

16. For the purposes of this guideline, a hearing includes a pre-hearing conference, a motion, a discipline hearing, the rendering of an oral reprimand, and a hearing for reinstatement. Hearings will be presumptively held in electronic format, with parties and their representatives, if any, appearing by videoconference, unless the Discipline Committee orders otherwise. Where the purpose of the hearing is to deal with procedural matters or a pre-hearing conference, the electronic hearing may also proceed by way of telephone conference call, unless the Discipline Committee orders otherwise. A party may apply to the Discipline Committee for an order that a hearing or any part of a hearing be held in-person. The Discipline Committee may also on its own motion determine that a hearing or any part of it be held in-person. The factors to be considered in determining whether to hold all or part of a hearing as an in-person hearing shall include:

- a. Whether conducting the hearing electronically would cause any significant prejudice to any party;
- b. Whether conducting the hearing electronically would prejudice the Discipline panel's ability to hold a fair and adequate hearing;
- c. The parties' positions on the format of the hearing;
- d. Whether the matter is contested or uncontested;
- e. The nature, significance, and complexity of the legal and factual issues;
- f. Whether the matter is procedural or substantive in nature, whether credibility is at issue, and whether *viva voce* evidence will be heard or an oral reprimand given;
- g. Whether the member is self-represented, and whether there would be any impediments to any party's full participation in a hearing based on the proposed format;
- h. Accessibility of the hearing to the public, if the hearing is open to the public;
- i. The convenience of the parties;
- j. The cost, efficiency, and timeliness of the proceeding in which the hearing is being held;
- k. The avoidance of delay;
- l. The College's public interest mandate; and
- m. Any other matter relevant in order to secure the most just and expeditious determination of the merits of the hearing or the proceeding in which the hearing is being held.

A party requesting that all or part of a hearing be held as an in-person hearing shall give notice of the request to the Chair of the Discipline Committee or to the Discipline panel, if the hearing has commenced, and all other parties, and the Chair or the Discipline panel shall provide an opportunity to the parties to make submissions on the issue. The Chair or a Discipline panel, on their own motion, shall give notice to the parties that a hearing may be held as an in-person hearing and give the parties the opportunity to make submissions on the issue. Where the Chair or the Discipline panel orders that all or part of a hearing is to be held in-person, the Hearings Administrator shall make all the necessary arrangements for the hearing and shall give notice of those arrangements to all the persons participating in the hearing and their representatives, if any.

Procedural and Interlocutory Motions

17. A person intending to bring a procedural or interlocutory motion shall notify the Hearings Administrator, to arrange for a date and time for the motion to be heard.

The person shall inform the Hearings Administrator of the estimated length of time it will take for the motion to be heard. The Committee endorses the use of single member panels when appropriate to hear procedural or interlocutory motions, as permitted by s. 4.2 of the *Statutory Powers Procedure Act*.

Motion Materials Reviewed by Panels Prior to Motion Being Heard

18. The Committee endorses counsel's practice of providing a copy of the Notice of Motion, the Motion Record, Factums (written argument) and Books of Authorities to each member of the panel, and recognizes that resort to each of these is an important aspect of counsel's submissions when motions are heard. The Committee appreciates the fact that counsel file these items prior to the motion hearing, so that these materials are available to each panel member at the hearing of the motion and, in appropriate cases, prior to the hearing of the motion.

Productions of Records in the Possession of Third Parties

19. The Committee recognizes that the jurisdiction of Discipline panels to order production of documents within the possession of third parties is derived from s. 12 of the *Statutory Powers Procedures Act*, which requires that the discipline hearing must have formally commenced before such an order may be made.
20. The Committee encourages the practice of prosecution and defence counsel to agree that the issue of production from third parties can and should be dealt with at the outset of the hearing, before the College begins its case. If counsel cannot agree, then the issue must be dealt with at the appropriate time during the hearing.
21. The Committee recognizes that the privacy interests of third parties must be balanced against the Member's right to make full answer and defence in accordance with accepted legal principles.
22. Where a motion is made for production of a patient's medical and clinical records, the Committee anticipates that unless otherwise ordered by a Discipline panel, the following protocol or conditions will be imposed in any order made by a Discipline panel for production of such records:
 - a. Subject to paragraph (b), the medical records of Patient "A" in the College's custody, provided pursuant to a summons, are to be kept in a sealed envelope in the custody of the Discipline Committee (in the care of the Hearings Administrator) until the conclusion of these proceedings including the disposition of any appeal and any hearing.
 - b. With respect to the records that the panel has ordered to be disclosed to the parties, only prosecution and defence counsel [add third party and counsel where applicable], shall have private access to the records as may be necessary under the supervision of the Hearings Administrator. Counsel may have experts present as they see fit to assist in the review of the documents. No photocopies or reproductions of the records may be made although notes of their content may be taken.

- c. The content of these records shall not be disclosed by anyone participating in this hearing to anyone not participating in the hearing.
- d. All the medical records of Patient “A” provided pursuant to a summons shall be returned to the [set out name(s) of institutions from which records have been received and are being held at the College] after the conclusion of these proceedings, including the disposition of any appeal and pre-hearing.

Conduct of Hearings

- 23. The Committee expects and appreciates that proceedings taking place before Discipline panels will be conducted with civility and courtesy.
- 24. The Committee expects that submissions of counsel will be directed to the Chair and members of the Discipline panel.
- 25. To facilitate the orderly flow of proceedings, the Committee expects that counsel will have available ten (10) copies of any exhibit(s) they wish to enter or authorities to which they refer.
- 26. The Committee endorses the practice of assisting Discipline panels in the determination of difficult legal issues through the provision of written argument.

Access by the Public/Media Representatives to Exhibits

- 27. A member of the public or a media representative seeking access to (an) exhibit(s) at a discipline hearing shall bring a motion before the Discipline panel, on written notice to any interested persons, including the College, the Member, and any persons having a proprietary or privacy interest in the exhibit. In doing so, the person requesting access shall identify the purpose, scope of the access and the intended use being sought. If permission to duplicate the exhibit is requested, the person seeking access must provide evidence that the duplication will not adversely affect the integrity of the exhibit.
- 28. Unless an order has been made under subsection 45(2) of the *Health Professions Procedural Code*, closing the hearing, or subsection 45(3), preventing public disclosure of matters disclosed at the hearing that are contained in a Notice of Hearing, Agreed Statement of Fact or a Joint Submission as to Order, it is unnecessary to bring a motion before the Discipline panel where a member of the public or a media representative seeks access to either an Agreed Statement of Fact or Joint Submission as to Order. Copies of the Notice of Hearing, Agreed Statement of Fact or Joint Submission as to Order provided will not contain references to names of patients or institutions where doing so would serve to identify the client involved.
- 29. Prior to making its decision on the motion for access to the exhibit(s), the Discipline panel will entertain the submissions of the person seeking access, the College, the Member, and any other person(s) with an interest. Factors that the Discipline panel may consider include the following:

- a. the general principle that hearings be open to the public;
 - b. the intended use of the exhibit(s);
 - c. proprietary and privacy interests in the exhibit(s);
 - d. the timing of the request, and specifically, whether it was made during or after the hearing;
 - e. interference with the proper and orderly conduct of the hearing; and
 - f. interference with the Member's right to a fair hearing.
30. In the event that the Discipline panel decides to grant access, the scope of access and the use of the exhibit will be determined by the Discipline panel, e.g., whether inspection, copying or publication will be allowed, and, if publication is allowed, the form in which publication may take place (e.g., publication of a photograph as opposed to a verbal description of it). The Discipline panel must be satisfied that the security of the exhibit will be protected and may provide for supervision and control of the exhibit by a person designated by it.

Review of Transcripts by Non-Parties

31. A person other than the College or the Member may purchase a copy of a transcript of any part of a hearing that is not the subject of an order prohibiting public disclosure by contacting the College's Hearings Administration Team and paying the prescribed fee to the court reporter responsible for transcription of that portion of the hearing. No order of the Discipline panel is necessary. Instead, the Discipline panel meets its obligations under paragraph 48(1)(c) of the *Health Professions Procedural Code* by passing this guideline and delegating responsibility for its administration to the Hearings Administration Team.
32. Where a person seeks to review copies of transcript in the College's possession, it is understood that the College has the discretion to limit or deny access to that transcript, and that the Discipline panel lacks jurisdiction to grant access to that transcript.

Timelines for Issuing Decisions and Reasons

33. For uncontested hearings, the Panel usually provides its decision orally at the hearing and gives reasons in writing at a later date. The Panel aims to issue Decisions and Reasons within 90 days of the conclusion of the hearing.
34. For contested hearings, the Panel aims to issue Decisions and Reasons within 120 days of the conclusion of the hearing on liability, and within 90 days of the conclusion of the hearing on penalty.
35. The conclusion of the hearing is the last hearing day or the date of the last written submission.

Timing of Penalty Hearings in Contested Matters

36. In discipline hearings where the member attends the hearing and denies one or more of the allegations, and the panel makes a finding of professional misconduct and/or incompetence, the expectation is that the penalty hearing will not take place until after the release of the panel's written Decision and Reasons for Decision, unless both parties agree otherwise.
37. The expectation is that the penalty hearing will take place no later than two months after the release of the panel's written Decision and Reasons for Decision.

Decisions and Reasons Public When Issued

38. Once issued, decisions and reasons are public.

Case Management Conferences

39. As part of the Committee's ongoing effort to maximize the efficient use of scarce hearing resources, and to encourage fair processes and outcomes, the Committee expects all counsel and self-represented members to carefully consider how issues in contested hearings can be narrowed and panels can be otherwise be assisted in discharging their responsibilities in a fair and efficient way.
40. Where the parties request more than 5 days of hearing time, the Chair may direct the parties to attend a case management conference.
41. The purpose of the case management conference will be to ensure that the hearing days are used fairly and efficiently.
42. The parties will be expected to address such matters as:
 - a. use of Agreed Statements of Fact with respect to background and other non-contentious facts, even in contested hearings;
 - b. provision of a curriculum vitae for each witness;
 - c. use of affidavits for witnesses whose evidence is not expected to be contested, and/ or as a substitute for examination in-chief;
 - d. hearing evidence from panels of witnesses, as authorized by section 15.2 of the *Statutory Powers Procedure Act*; and
 - e. provision of a written list of issues for the panel to decide.
43. This list is not meant to be exhaustive.



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