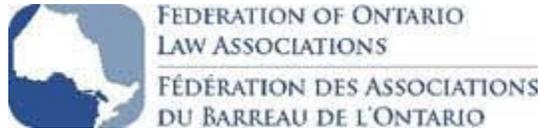


**MALPRACTICE:  
Some Observations on Lawyer Discipline in Ontario  
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## **Part I: Introduction to Lawyer Discipline in Ontario**

The term, “malpractice” is not commonly used in Ontario, it being a more popular term stateside, but it is an excellent descriptor of the wide array of activities that the Law Society governs and enforces as a matter of discipline. The term, “malpractice” is imprecise, even in those jurisdictions that actively use the term, and probably includes both negligence as well as professional misconduct (and, as we shall see, the line between the two can often blur), but this article will focus entirely on professional misconduct rather than professional negligence *per se*.

As a bencher of the Law Society of Ontario, I have had the privilege of sitting on the Proceedings Authorization Committee (“PAC”) for my entire time at the Law Society. It is a unique and ideal vantage point from which to observe professional misconduct since all matters that proceed to discipline must first be presented to, and ultimately authorized by, PAC.

I have been asked to provide this article on lawyer discipline for the Federation of Ontario Law Association’s Practice Resource website. It is based on a similar, slightly narrower (in context) paper to be delivered at the 16<sup>th</sup> Annual Real Estate Law Summit hosted by the Law Society. Given the genesis of the article, there is a slight real estate flavor to the text, but the article is intended for all Ontario lawyers, regardless of practice area and regardless of sector (yes, in-house and public sector lawyers can also be disciplined for malpractice!). In terms of style, I have left it relatively “breezy” and somewhat deliberately bereft of detailed examples or rule citations (details of discipline examples makes the paper unnecessarily “personal”, and rule citations are easy enough to find if one really needs to know the exact wording of a given prohibited conduct).

This article has three substantive sections. Firstly, there is a discussion of some miscellaneous comments on discipline, including a discussion on the likely nature of complainants, some observations about the role of PAC, the requirement for good character, and “conduct unbecoming”, a form of malpractice that occurs outside of the practice of law.

Secondly, there is a discussion of some of the discrete types of conduct that Ontario lawyers are being disciplined for (although, curiously, files rarely manifest as discrete malpractice occurrences – more often, a lawyer subject to discipline has breached several rules at once). These are not the “top” malpractice events in terms of severity – those are more obvious and do not require much in the way of observation (e.g. criminal conduct, misappropriation of money, sexual offences, conflicts of interest, etc.). Likewise, the matters discussed in this section of the paper are not the “top” malpractice events in terms of frequency -- those too are relatively obvious and do not require much in the way of observation (e.g. failure to report, failure to pay fees, failure to meet CPD requirements, etc.). Given the fluid nature of website publication, I am hoping to grow this section of the paper over time, as more discipline matters of interest cross my plate.

Finally, this paper concludes with a discussion of what I call the “hierarchy of discipline” – in effect, a summary of, and observations on, the progressive discipline remedies available to the Law Society in responding to malpractice. This is a useful read for all lawyers.

## **Part II: Miscellaneous Discipline Points**

## **1. The Nature of the Complainants**

Although clients and former clients are, by far and away, the most common complainants, the Law Society receives complaints from more than just clients. Depending on the nature of the alleged malpractice, the complainant could be a law partner, spouse or other family member, employee, competitor, opposing counsel, creditor, broker (or other business-related professional), judge, police officer, etc.

In the context of real estate, I should note that the Office of the Director of Titles can also be a complainant. While information on complaints and investigations are confidential (so the Law Society does not notify the Office of the Director of Titles of pending discipline proceedings that may relate to land registration), the same is not true the other way around – the Office of the Director of Titles will report Teraview abuses and other misconduct to the Law Society and, as necessary, to the police.

## **2. The Proceedings Authorization Committee**

All matters serious enough to require a regulatory response beyond a staff letter will be referred to PAC, an unusual committee of the Law Society comprised entirely of benchers (ironically, hearing panels deciding discipline matters at the Law Society Tribunal can and often do include non-benchers but PAC itself is comprised only of benchers). It is a very small committee (only six benchers) with a very small quorum (only two benchers are needed to constitute quorum). There seems to be a very deliberate (and appropriately so) attempt at diversity on PAC: of the current six benchers on PAC, there are two litigators (one criminal, one civil), two solicitors (one real estate, one corporate), one lay bencher, and one paralegal bencher.

PAC performs a “gatekeeper” function most analogous to the function of the U.S. Grand Jury. Staff come up with prosecution options and, based on the paper record only (PAC does not hear direct evidence), PAC decides if the matter should proceed to discipline based on reasonable belief. PAC meets monthly year-round and conducts all ITAs and Regulatory Meetings (see below). Although only lawyers vote for lawyer benchers (and only paralegals vote for paralegal benchers), PAC benchers have jurisdiction over all licensees (both lawyers and paralegals).

## **3. Conduct Unbecoming**

Most practitioners think that the Law Society only enforces misconduct in the context of the *Rules of Professional Conduct* or other misconduct that harms or affects clients. The Law Society’s regulatory vires goes far beyond that and includes “off-duty” conduct as well, even if there is no harm to any client or no specific *Rules of Professional Conduct* were breached. The Law Society has jurisdiction to discipline a practitioner who, in his/her personal or private capacity, conducts himself/herself in a manner that “tends to bring discredit upon the legal profession”. This is referred to colloquially as “conduct-unbecoming” and includes, without limitation:

- criminal acts that reflect adversely on honesty, trustworthiness, or fitness as a lawyer;
- taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill-health, or un-businesslike habits of another;
- any conduct involving dishonesty; and/or
- any conduct which undermines the administration of justice.

As should be obvious, the scope of conduct-unbecoming can be a very broad and is, frankly, a very fluid form of malpractice.

#### **4. Good Character**

PAC generally authorizes discipline of any existing licensees (both lawyers and paralegals), but PAC also has a limited jurisdiction over prospective licensees as well. One of the “miscellaneous” matters that comes before PAC relates to the “good character” required of all applicants trying to become a lawyer or a paralegal (including formerly disbarred lawyers re-applying for licensure). All prospective applicants must fill out a detailed questionnaire prompting applicants to self-report circumstances that might demonstrate any lack of good character. If the questionnaire discloses any previous conduct (ever) that might tend to suggest the lack of good character, the matter gets assigned to staff for a recommendation, then to PAC for consideration. If PAC is not concerned about the risk of lack of good character based on the staff report, PAC can dispense with a hearing to determine same. Alternatively, PAC can commit the applicant to a hearing before the Hearing Division of the Law Society Tribunal for a formal adjudication of good character.

#### **5. Capacity vs Conduct**

Not surprisingly, malpractice is often the result of mental illness, infirmity, or addiction – the same capacity issues that probably affect all of society generally. The Law Society is quite sensitized to the impact of such mental illness, infirmity, and addiction on malpractice – whenever there is a reasonable probability of a capacity issue, the alleged malpractice is dealt with as a want of capacity instead of discipline, *per se*. While the remedy can ultimately be the same (e.g. the loss of a right to practice or restrictions on the right to practice), there are obvious humanitarian reasons for proceeding as a capacity matter when the facts so present. Where incapacity is less clear, PAC can (and often does) authorize alternative proceedings (see “Conduct Application” below).

## **Part III: Conduct that Lawyers are Being Disciplined For**

### **1. Failure to Respond**

Once a complaint is received by the Law Society, the Complaints Resolution and Investigation Department will open a file. They would then typically ask the lawyer for an oral interview or written responses to the complaint. More often than not, the Law Society investigator may request the production of documents that relate to the matters under investigation (such as client files, trust account records, and transaction documents, etc.).

There is no confidentiality or privilege vis-à-vis the Law Society. You must disclose information to an investigator, even if that information would otherwise be solicitor-client privileged or confidential, and disclosure to the Law Society will not constitute a waiver of such solicitor-client privilege. Subject to limited exceptions in the *Law Society Act*, the Law Society will not disclose information gathered in an investigation.

No matter how frivolous or unmerited you feel the complaint to be, you have a professional obligation to “reply promptly and completely to any communication from the Law Society in which a response is requested” and to otherwise co-operate with the investigation. The failure to do so is, in and of itself, malpractice (i.e. regardless of what the disposition of the underlying complaint may be). A licensee may be completely exonerated of the underlying complaint and still be disciplined for a failure to respond.

Typically (but not always), a failure to respond allegation is heard at a Summary Hearing (see below). A Summary Hearing is much faster than a full hearing and can result in any regulatory remedy short of revocation (i.e. short of disbarment). A lawyer cannot be disbarred at a Summary Hearing, but where a lawyer chronically does not respond, sometimes PAC will deliberately proceed by way of a full Conduct Application hearing (i.e. not a Summary Hearing) specifically to give the hearing panel a disbarment option.

### **2. Teraview Matters**

Teraview related matters comprise a large number of real estate specific misconduct matters that the Law Society disciplines for. Electronic land registration imposes two discrete obligations on real estate lawyers.

Firstly, there is a professional obligation not to permit anyone else to have the Teraview e-reg RSA token (and before that, the USB stick and before that, the floppy disk) and to not disclose to anyone the personalized Teraview password. How lawyers could understand the obligation in the context of the USB stick and think that the obligation has changed with the shift to the RSA token is beyond comprehension, but some real estate lawyers apparently believe that the switchover to Teraview on the Web has some alleviated the obligation to guard the “stick” (now read “token”) and to not share the password.

The second Teraview-related obligation relates to registration without authorization. While the prescribed form of Acknowledgement and Direction is not strictly needed *per se* in every case, what is needed all the time is “evidence of proper authorization from the owner of the land or holder of an interest in the land that has directed the registration, prior to the submission of the document for registration in the electronic land registration system”. This is a professional obligation as well an obligation to the Ministry of Government and Consumer Services pursuant to the Electronic Land Registration Agreement that every lawyer had to sign to get his or her Teraview registration privileges. While professional misconduct is always a risk for registering without such proper authorization, the Director of Titles (by delegated authority) also has very broad powers to swiftly suspend and revoke the authority to register documents in Teraview and very much will exercise that jurisdiction as necessary.

### **3. Failure to Supervise**

There are conjoined professional obligations to: (i) directly supervise non-lawyers to whom permissible tasks and functions have been assigned; and (ii) not to assign to non-lawyers tasks requiring a lawyer’s skill or judgment. These inter-related professional obligations seem disproportionately breached by real estate lawyers – not surprising, given the nature of our practices and the large role that assistants, clerks, and conveyancers can play in a typical real estate transaction, and the large amounts of money that can pass through a real estate practice. It also happens frequently in busy litigation practices with multiple paralegal agents. The failure to supervise is almost always a factor in financial misappropriations committed by staff – the absence of oversight often leads to misappropriation, even by (often especially by) very long-time staff of very senior lawyers.

### **4. Trust Account Mismanagement**

Misappropriation of client trust funds is, of course, one of the ultimate forms of malpractice, but trust fund mismanagement can take place even without the conversion of client moneys. There is a general professional obligation to maintain books and records. For many lawyers, non-compliance with the books and records obligation manifests itself as trust account maintenance problems. There are two principal misconducts relating to trust accounts (aside from the misappropriation of trust funds).

The most common (and probably more nefarious) trust account mismanagement is the payment of fees out of trust for legal services not yet completed and not yet billed. A lawyer must always complete the legal services and send out a formal fee bill first, and then and only then, can the lawyer take the fees out of trust. We regularly discipline lawyers who withdraw fees from their trust accounts before completing the legal services and/or before properly billing for those legal services.

Another common trust account problem relates to the failure of a lawyer to properly close down trust accounts in a timely matter after the relevant matter is complete. In the real estate context,

this means dozens, hundreds, and, in some cases, over a thousand trust accounts remaining open with balances therein, long after the deals have closed. Note that this is the opposite of taking fees out before completing legal services and billing for those legal services – this is leaving money in trust long after the legal services have been completed and the trust account should have been closed! Some practitioners suggest that this is a perverse sort of tax planning (the perhaps misguided strategy of leaving money in trust to defer recognition of fees for income tax purposes – which others have told me no longer works anyway). A competing theory suggests that this has nothing to do with sophisticated tax avoidance (whether or not it actually works) – instead, this competing theory suggests that some lawyers simply do not have the wherewithal or discipline to properly close down trust accounts in a timely manner. Regardless of why trust accounts remain active long after the relevant matters are complete, the practice remains contrary to a lawyer’s professional obligations relating to trust accounts.

## **5. Failure to Serve**

There is a difference between “professional misconduct”, on the one hand, and “professional negligence”, on the other hand. Many lawyers believe that professional negligence is a LawPro matter only and cannot give rise to disciplinary action from the Law Society. This is not correct - - the “failure to serve” bridges the doctrinal gap between the two types of malpractice. The failure to serve is a disciplinary offence which is perhaps best described as professional negligence that is sufficiently egregious to warrant discipline proceedings. A lawyer owes a duty of providing adequate quality of service, and at some point along the spectrum of negligence, negligent service will constitute a failure to serve. The problem, of course, is that there is no precise way to predict, in advance (or, frankly, sometimes in retrospect) what standard of professional conduct stands as the tipping point between “mere negligence” and “negligence *cum* discipline”. The analysis is highly fact and context specific, so much so that it is difficult to explain the transition point, at least in the abstract. Real estate lawyers need to be cognizant of the risk and avoid being cavalier about the myth of negligence not attracting discipline.

## **6. Advertising Price**

The Law Society’s Advertising and Fee Arrangements Group introduced comprehensive rules to crack-down on aggressive real estate lawyer price advertising last year. They were targeting real estate lawyers announcing low (almost impossibly low) prices for residential real estate deals. The problem with these ads was that the low prices advertised were rarely the final cost, as undisclosed “disbursements” and “extras” quickly added-up to make the ultimate price borne by the client considerably higher. The practice is hardly limited to real estate lawyers, but the residential real estate world is notoriously competitive, and much of that competition is, sadly, price-driven. The Law Society was intent on levelling the playing field for residential real estate lawyers by placing very strict parameters on price advertising for real estate deals.

Real estate lawyers who advertise a price (any price) will be deemed to be advertising an “all-in” price, with no ability to subsequently tack-on any disbursements or extras, except for a very specific number of enumerated “permitted disbursements”. There are seven permitted disbursements: (1) land transfer tax; (2) government document registration fees; (3) other fees charged by government; (4) Teraview search fees; (5) the cost of a condominium status certificate;

(6) payment for letters from creditors' lawyers regarding similar name executions; and (7) any title insurance premium. Although not listed as a permitted disbursement, the rule also deems the advertised price to be exclusive of HST, so a lawyer can add any applicable HST on top of the advertised price. Furthermore, in the case of a purchase transaction, the advertised price includes the price of one transfer, one mortgage, and one discharge of mortgage, so aggressive lawyers cannot charge a fixed-price for the transfer, but then consider the mortgage and discharge of mortgage to be "extras" on top of the fixed-price. In the case of a sale, the price includes the price of acting on the discharge of the first mortgage. Although applicable to both commercial and residential real estate deals, the rule will, practically speaking, only ever apply to residential real estate since price advertising for commercial real estate is all but non-existent.

This rule only applies to "advertising" in the strict sense of the word. Real estate lawyers can still quote, on a case by case basis, their own custom retainer formulas which may include more disbursements than can be found on the list of permitted disbursements -- so long as they don't advertise a price. Once there is a number beside a dollar sign on a lawyer's advertising, the permitted disbursement rules are engaged.

So, for instance, many real estate lawyers still use conveyancers and title searchers and charge-out hundreds of dollars extra for these conveyancers and title searchers (on top of the lawyer's price for the other legal work). That practice is still permitted by the rules, but only if the lawyers who do so do not advertise a price (because once a price is advertised, it is deemed to be "all-inclusive", save and except only for the permitted disbursements, and conveyancing and title search fees are not included in such permitted disbursements). It is only the advertising of the price that attracts the operation of this rule, and there is obviously no requirement to advertise a price.

## **7. Misleading Advertising**

All lawyers are governed by the Law Society's general advertising rules, and the Law Society seems poised to more aggressively enforce the general advertising rules. These general advertising rules restrict lawyers from "marketing" (which is broader than just "advertising") unless those marketing activities are: (a) demonstrably true, accurate and verifiable; (b) neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and (c) in the best interests of the public and consistent with a high standard of professionalism.

The requirement to take into account "the best interests of the public" and be "consistent with a high standard of professionalism" is deliberately broad and is intended to curb the tasteless legal advertising that we often see and associate with legal advertising in the United States (think, "Better Call Saul!"). The sheer breadth of this proscription should be noted by any lawyers who are even thinking about pushing the boundaries of tasteful advertising!

One of the "newer" variations of this misleading advertising takes the form of false testimonials and false awards. While Martindale-Hubbell, Lexpert, and Chambers rating services have been around for some time and are relatively mainstream, several new testimonial services are somewhat less so, being more akin to "pay to play" award services, and are attracting disciplinary proceedings.

## **8. Incivility**

It is well-known that there is a duty of civility amongst licensees (and that word is used deliberately in this context since civility applies to both lawyers and paralegals – and to conduct between lawyers and paralegals as well). The absence of civility is a breach of the *Rules of Professional Conduct*, and is typically manifested in situations far less dramatic than the in-court conduct discussed by the Supreme Court of Canada in *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772. Indeed, most incivility complaints are levelled in day-to-day transaction practices (typically, deal and trial frustrations spilling-over), and in circumstances where there is little, if any, likelihood of a *Groia-esque* defense (i.e. the obligation to resolutely and fearlessly defend your client in court). Like with other misconduct discussed in this paper, it is impossible to precisely demarcate when a heated exchange will cross the line from just that, a heated exchange, to incivility. The line has always been there, but technology now leaves much of the communication trail in a well-preserved digital state, making evidence easier to assemble, but sometimes more difficult to analyze in context. While incivility tends to attract regulatory responses on the lighter end of the disciplinary spectrum (ITAs and regulatory meetings – see below), lawyers need to be mindful of this new reality.

## **9. Referral Fees**

A lawyer is prohibited from directly or indirectly share, split, or otherwise divide his or her fees with non-licensees or provide financial rewards (referral fees) for clients or matters. This is not a new proscription – indeed, the perceived need to share fees drove, in large part, the now defunct drive for alternative business structures for lawyers. This is a long-standing prohibition which has seen great regulatory attention largely aimed at (but hardly exclusive to) the personal injury defense bar. This issue will likely see considerable further attention with the next bench that is poised to deal with alleged “referral fees” paid by title insurers to real estate lawyers. It remains a regular form of malpractice.

## **10. False Affidavits**

A surprising form of malpractice relates to affidavits (and, for the purposes of this paper, this includes statutory declarations). The term “false affidavit” is broad and, frankly, a bit misleading. While it of course remains obvious malpractice for a lawyer to commission an affidavit that he or she knows to be false, this type of “false affidavit” is rare in discipline.

The more common malpractice relates to affidavits not properly sworn at all. For the time being, and notwithstanding ambitious plans for procedural reform, it remains malpractice to commission an affidavit when the affiant is not actually in one’s presence. So, even in this age of significant advancements in video conferencing, “remote commissioning” is not yet an appropriate alternative to “in presence” commissioning. It is unlikely that the practicing bar genuinely believes otherwise, as is evidenced by the new practice of “mobile notaries” that the real estate bar seems to be witnessing.

Alternatively, there is somewhat inter-related practice of “slip-sheeting” or “correcting” of already sworn affidavits. For some reason, we seem to get lawyers who believe that, if the affiant genuinely meant “X”, it would somehow be appropriate to amend a sworn affidavit to correlate with what the affiant meant (which may or may not then be supported by oral swearing – see the comment on “remote commissioning” above). Even if the affiant affirms the truth of the corrected record or admits that he/she would have sworn the corrected version had it been put to him/her, and even if nothing actually turns on the “correction” (in terms of impact on the case or file), I cannot emphasize enough how inappropriate it is to cut corners in connection with the very sacrosanct process of affidavit commissioning.

Finally, another variant of “false affidavit” is the affidavit that is factually correct, unaltered and properly sworn in person, but given for an improper purpose. The clearest example of this genre of malpractice are the affidavits and notarial copies commissioned by some lawyers for “Freeman on the Land” clients – essentially anarchists using affidavits and notarial copies to fuel frivolous litigation or unregistrable real estate and personal property filings and deposits. Although I am not aware of a professional misconduct prosecution in Ontario for these sorts of “improper purpose” affidavits, prosecutions have occurred in other jurisdictions and I am quite confident that this will eventually be found to be malpractice in Ontario.

## **Part IV: The Hierarchy of Discipline**

### **1. Letter of Advice**

A letter from a member of PAC (typically the chairperson) providing advice and admonition to the licensee based on the results of the investigation. This is not considered to be a true form of discipline *per se*, but rather, is considered a “disciplinary diversion” – a matter which might have warranted prosecution, but was not sufficiently serious to warrant anything more significant.

### **2. Invitation to Attend**

An Invitation to Attend (an “ITA”) is a meeting with benchers (typically three members from PAC and almost always held in Toronto) to “discuss” the conduct issues identified in the investigation. The ITA is not considered to be discipline *per se*, but rather, it is considered a “disciplinary diversion” – a matter which might have warranted prosecution, but was not sufficiently serious to warrant anything more significant. There is no public record of the ITA having been ordered or having taken place, but there is an internal record of the ITA so, if the licensee is again up for disciplinary proceedings, the ITA (and its obvious failure to curb further malpractice) will be considered in those subsequent matters.

The tone of ITA varies depending on the individual PAC members assigned thereto in rotation. The ITA almost always takes place at Osgoode Hall. It is rarely a convenient time or location for the lawyer (nor is it supposed to be). It amazes me that some lawyers charged with malpractice

and offered an ITA refuse same. Although it is hardly a pleasant experience, there is rarely any strategic “downside” to electing an ITA when one is otherwise offered by PAC, and the refusal to attend an ITA may result in a conduct application when the matter is sent back to PAC for re-consideration.

### **3. Undertakings**

An ITA is often coupled with an undertaking not to repeat the malpractice that gave rise to the ITA in the first place. Purists argue that an undertaking to not breach a specific rule that you are otherwise obliged to observe anyway is repetitive and moot (does an undertaking mean a lawyer is free to breach other rules that he/she did not expressly undertake to observe? does an undertaking by one lawyer mean that other lawyers who have not undertaken to observe or comply with the same specific rules are, therefore, free to breach those rules? etc.). The doctrinal debate is interesting, but the fact of the matter is that undertakings are common and seemingly becoming more so. One thing that they do very well is to reinforce the understanding of the malpractice – while ignorance of the rules is never an excuse, the requirement to sign an undertaking expressly acknowledging the malpractice and promising to observe the rule strictly going forward is incredibly reinforcing. Furthermore, and perhaps more importantly, the breach of an express undertaking regarding a specific rule is dealt with more harshly in any recidivism because the undertaking lawyer was specifically sensitized to the nature of his malpractice and had expressly put promised not to re-offend.

### **4. Regulatory Meeting**

The regulatory meeting is, for all intents and purposes, an ITA (see above) with an additional public element. This public element is provided by the attendance of Law Society staff in the meeting itself, and the publication in the Ontario Reports and the Law Society website of a notice setting for the details of the regulatory meeting immediately after the meeting is held. Furthermore, the memorandum setting forth the details of the misconduct giving rise to the Regulatory Meeting is made available to the public on request. The regulatory meeting is considered the first rung of “true” discipline (since the proceedings are public). Note that, historically, regulatory meetings were only authorized when there was a public element to the complaint – either the details of the complaint were within the public domain (e.g. received considerable press) or had been initiated by a public source (e.g. by a judge or the government). While this “public domain” reasoning alone still warrants the authorizing a Regulatory Meeting, it is no longer a necessary criterion for the authorizing of a Regulatory Meeting. It is sufficient for PAC to want a stronger remedial response than an ITA but less than a Conduct Application (see below).

### **5. Summary Hearing**

This is a form Conduct Application (see below) held before a single member of the Hearing Division (instead of a full three-member panel of the Hearing Division as is the case in a full

Conduct Application or a Capacity Application). There are only a limited and prescribed number of misconduct allegations that can be heard at a Summary Hearing, the overwhelmingly most common of which is the failure to respond. A Summary Hearing still requires authorization from PAC, but there is an expedited process at PAC for the early consideration of Summary Hearing matters. A Summary Hearing is much faster than a Conduct Application, and can still result in any remedial order otherwise available for a Conduct Application, short of a revocation (i.e. short of a disbarment) – a licensee’s right to practice law can never be revoked at a Summary Hearing.

## **6. Conduct Application/Capacity Application**

Where PAC has a “reasonable belief” that a licensee has committed professional misconduct or conduct-unbecoming, then it can authorize a disciplinary hearing before a full panel of the Hearing Division of the Law Society Tribunal. Historically, the panel would have been all benchers, but this is no longer the case, as there are non-bencher (indeed, non-lawyer) tribunal panel members. The remedial orders available under a Conduct Application cover the entire range of regulatory responses, ranging from a reprimand to full revocation (i.e. disbarment). A Conduct Application is a public process and leaves a public record, including the publication of the case synopsis, with full licensee names in the Ontario Reports.

Where the licensee’s misconduct might be as a result of incapacity, PAC may order a Capacity Application, also before a full panel of the Hearing Division of the Law Society Tribunal. Where the circumstances suggest that the misconduct might be either a Conduct Application or a Capacity Application, it is not uncommon to see PAC simultaneously authorize both, with the Capacity Application authorized as an alternative to the Conduct Application.

## **7. Interlocutory Suspension**

Under extraordinary circumstances, PAC may authorize an Interlocutory Suspension. As the name suggests, the licensee’s right to practice is suspended immediately upon investigation of the complaint (i.e. even before the merits of the complaint are tested in a Conduct Application hearing). Given the exigency of the circumstances giving rise to Interlocutory Suspensions, they are often heard and authorized by PAC on an “emergency basis”. In order for PAC to authorize an Interlocutory Suspension, PAC must believe that there are reasonable grounds of a significant risk of harm either to: (i) the public; or (ii) the public interest in the administration of justice. Although not statutorily prescribed, as a third criteria, PAC usually will not entertain an Interlocutory Suspension unless the misconduct would otherwise warrant a very lengthy suspension or revocation (e.g. disbarment). Even if an Interlocutory Suspension does not result in an immediate suspension of the licensee’s right to practice law, the Hearing Panel almost always imposes some immediate practice restrictions in lieu of a full suspension (e.g. a prohibition against the administration of trust accounts, the requirement to be supervised by another licensee, etc.). The use of Interlocutory Suspensions has gone-up materially in the past few years.

## **Part V: Conclusion**

I was unable to come-up with any witty or insightful observations, pithy or otherwise, to serve as a conclusion – the admonition to practice with integrity and within the *Rules of Professional Conduct* seemed ridiculously trite. It is, however, hoped that this short paper assists all members in understanding the truly wide variety of conduct that is regulated by the Law Society and the processes by which the Law Society exercises its disciplinary jurisdiction.



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