Overview

- Publicity
- Penalty Principles and Objectives
- Determining Penalties
- Available Penalties and Authority
- Publication / Public Disclosure
- Q & A

Publicity

- Complaints Phase
  - Most regulatory legislation contains confidentiality / secrecy provisions prohibiting disclosure of information
  - Complainants are not bound by the regulatory legislation
  - Media inquiries may occur during complaint investigation
Publicity con’t

• Discipline Phase
  - Most legislation makes discipline hearings presumptively open to the public
  - Closure of all or part typically allowed only if specific criteria are met
  - Obligation on the regulator to proactively communicate / publicize schedule of discipline hearings

Publicity con’t

• Consider what information to publicize in advance of the hearing:
  - Date, time, location
  - Name of accused
  - Summary of allegations?
• Openness may also apply to pre-hearings, motion hearings, etc.

Penalty Principles

• Principles and objectives need to be understood and applied by prosecutors as well as discipline panel members
• Prosecutors - for application during resolution discussions
• Discipline panel members - only during penalty phase of a hearing
Penalty Principles con’t

- Protect the public / consumer
- Maintain the high standards and public image of the profession
- Deterrence - specific and general
- Rehabilitation
- Punishment or retribution are not the goal

Protect the Public/Consumer

- Serving and protecting the public interest is the principal object of a professional regulatory body
- Protect them from what?
  - Damage is already done
  - Most statues don’t provide for restitution
  - Reactive vs. proactive protection

Maintain Standards/Image

- Regulators set standards of practice
  - Discipline penalties as a form of enforcement
  - Demonstrate the regulators intolerance for substandard conduct
- Public confidence in the regulator is strongly tied to its handling of complaints and discipline matters
- No confidence = no protection
Deterrence

- Specific Deterrence
  - Disincentive for the practitioner to repeat the conduct that led to the discipline hearing
- General Deterrence
  - Sends the message to the practitioner population at large regarding the consequences of the conduct at issue
  - Tied to publication / communication

Rehabilitation

- Common public perspective: any type of misconduct = revocation
- Practical reality: Regulator must be fair
- Practitioners have invested time and effort to become licensed / registered
- Not all offences require that the practitioner be removed from practice (i.e., suspension or revocation)

Rehabilitation con’t

- Gaps in knowledge, skill or judgment can be remediated
- Tools in the penalty toolbox:
  - Education
  - Supervision
  - Inspection
- Match the sanction to the deficiency
- Assumes governability
Determining Penalties

- Concept of a “baseline penalty”
  - All else being equal, the misconduct in question warrants a penalty within a certain narrow range (defined by precedent, etc.)
- Consider case-specific aggravating factors
  - Suggest a harsher penalty than baseline
- Consider case-specific mitigating factors
  - Suggest a lesser penalty than baseline

Aggravating Factors

- Seriousness of the misconduct
- Previous discipline history
- Conduct repeated over time
- Dishonesty or breach of trust involved
- Harm to specific individuals (potential harm or actual harm)
- Misleading the regulator during the investigation or during the hearing

Aggravating Factors con’t

- Willful nature of the misconduct
- Misconduct committed for personal gain
- Lack of remorse
- Misconduct brought discredit on the profession
## Mitigating Factors

- Evidence of good character
- Absence of prior discipline history
- Signs of remorse
- Guilty plea / cooperation with the regulator
- Misconduct was a brief, isolated incident
- Restitution or remedial action already taken by the practitioner

## Mitigating Factors con’t

- Practitioner has already suffered significant consequences (e.g., court proceedings, loss of employment)
- Impact of sanctions would be unusually onerous
- Wishes of the victim

## Right to a Defence

- A decision by the practitioner to defend against the allegations in a contested hearing is not an aggravating factor and cannot be the basis for imposing a harsher penalty
- A decision to enter into a plea agreement, however, should be seen as a mitigating factor
Available Sanctions & Authority

- Look to your governing legislation
  - No statutory authority = risk of appeal

- Typical penalty options
  - Reprimand / admonish / counsel
  - Fines
  - Examinations or continuing education
  - Practice inspections or period of supervision

Available Sanctions & Authority

- Typical penalty options con’t
  - Impose terms, conditions, limitations or restrictions
  - Suspension (statutory limit on duration?)
  - Revocation
  - Publication of findings and penalty order

- May be possible to suspend or postpone the imposition of a penalty

Awarding Costs

- Not a penalty / sanction
- Separate issue to be considered by the discipline panel at conclusion of hearing
- Entitlement to costs typically defined in the statute
Publication / Public Disclosure

- Why publish a decision / order?
  - Openness and transparency
  - General deterrence objective
- Should reprimands be open to the public?
- Public notice re: suspensions and revocations
  - Separate from publication of decision
  - Timing

Publication / Public Disclosure

- What other information or documents from a discipline proceeding can/should be disclosed to the public?
  - Exhibits filed during the hearing?
- What about non-disciplinary (i.e., administrative) actions taken in response to a complaint? E.g., warnings / cautions

Questions?
Thank you!

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