







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

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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.

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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

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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

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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

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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

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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

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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)

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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

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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

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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

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Aggravating Factors con't

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

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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

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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

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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

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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

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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

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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

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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

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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

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Questions?

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Thank you!

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