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# The Impact of Delay on Disciplinary Sanctions

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There is general agreement that, even where delay in investigating and prosecuting misconduct allegations does not amount to an abuse of process, delay during the proceeding can have an impact on the appropriate disciplinary sanctions that should be imposed. However, there is less agreement on how that impact should be assessed.

One rationale, borrowed from criminal sentencing principles, is that the regulator has compromised its standing to impose the punishment that would ordinarily be warranted; thus the usual sanction for the found misconduct should be reduced: *Kalam v. College of Massage Therapists of Ontario*, 2017 ONSC 7163 (CanLII); *Wachtler v. College of Physicians and Surgeons of the Province of Alberta*, 2009 ABCA 130 (CanLII).

Another rationale is that the registrant has already suffered significant consequences and, as such, there is less need for specific deterrence: *Abrametz v Law Society of Saskatchewan*, 2023 SKCA 114 (CanLII).

Under either of these rationales, the issue of whether the registrant has suffered actual prejudice may be relevant: *Christie v. The Law Society of British Columbia*, 2010 BCCA 195 (CanLII). Also, these rationales do not provide a framework for assessing the impact of delay on the remedial aspects of the sanction.

However, these rationales are arguably inconsistent with the fact that disciplinary sanctions are designed primarily to protect the public. Take, for example, *The Law Society of Upper Canada v. Abbott*, 2017 ONCA 525 (CanLII), leave to appeal refused 2018 CanLII 49698 (SCC). There a lawyer had participated in several instances of mortgage fraud and the presumptive sanction was revocation. However, there had been extensive delays in investigating and hearing the allegations. The Court said that delay should only be a consideration where there had been significant prejudice to the member (with confirmatory evidence) and where the profession and the public would understand that public protection was not compromised.

A recent decision takes this purpose-driven approach to sanctions one step further. Purpose-driven sanctions are selected primarily to ensure protection of the public, secondarily to facilitate public confidence in the profession and regulator, and lastly to denounce the conduct where appropriate. Determining sanctions in an individual case includes any necessary deterrence against future misconduct by the registrant or others and appropriate remedial measures to equip the registrant to avoid reoffending. Purpose-driven sanctions tend to avoid the aggravating and mitigating factors approach used in criminal sentencing, although proportionality of the entire sanctioning package is still important.

In *Kherani v Alberta Dental Association*, 2025 ABCA 2 (CanLII), a generalist dentist was found to have fallen substantially below the standard of practice in the orthodontic treatment of one patient over several years. The failings related to diagnostic information, treatment planning, adequacy of treatment, and patient records. The regulator imposed a sanction of a series of fines totalling $30,000 and coaching for a one-year period. Costs of $40,000 (for the discipline hearing itself; there were additional costs for the internal appeal) were also ordered, reflecting just over one-quarter of the costs of the initial hearing.

The conduct itself occurred between ten and fifteen years previously. The investigation and prosecution took about six years. The Court held that the regulator's failure to consider the impact of delay on the appropriate sanction was an error.

The Court considered how the delay affected the goals of disciplinary sanctions. The primary purpose of protecting the public diminishes as time elapses. The registrant may have already addressed the problem. The "remedial lessons learned from involvement in the disciplinary process cannot be underestimated", even where the registrant disputes the allegations." Also, delay weakens the strength of the denunciation by distancing the penalty from the proven conduct.

The purpose-driven approach also means that consideration must be given to the delay from the time of the original conduct, and not just from when the concerns were brought to the attention of the regulator.

Given the delay, the Court concluded that the deterrence and denunciation goals of the sanction could be achieved by reducing the fines by one-half, for a total of $15,000.

In terms of the coaching requirement, the Court concluded as follows:

> This was a single, complex patient with treatment occurring 10-15 years ago, and Dr Kherani continues to take professional development courses. The passage of time has disconnected the unprofessional conduct that underlies the coaching that Dr Kherani's current practice needs and was not considered to be a mitigating factor. The educational and remedial aspects of the coaching order are important to ensure that Dr Kherani has learned to meet the expected standards of practice and for the protection of the public. But, in the circumstances of this case, it should be focussed, time limited, and there no should be no risk of further disciplinary proceedings arising from the coaching exercise.

The Court reduced the length of the coaching, narrowed its focus to the core findings of misconduct, and removed the reporting requirement (other than certification that the mentoring had occurred) to remove any possible punitive aspect to it.

The Court side-stepped any discussion of what it characterized as the "purported change" to the law on costs from the decision

in *Jinnah v Alberta Dental Association and College*, 2022 ABCA 336, leaving the costs order unchanged on the basis that a finding of serious unprofessional conduct had been made.

In upholding the finding on the merits, the Court also make several interesting points:

- Even where there is the authority to formally adopt written standards of practice, the regulator can still rely on unwritten standards based on the "common expectations of the profession". "Not every detail of being a professional can practically be reduced to writing. If the Standards of Practice adopted under s 133 are the only relevant standards, no professional could be found guilty of unprofessional conduct based on a lack of knowledge, skill, or judgment where written standards do not exist, an absurd conclusion not supported by the language of [the legislation]."
- To establish a defence that a registrant's conduct was consistent with a legitimate competing school of thought, the registrant must lead opinion evidence from a "reliable" expert that establishes that the alternate school of thought exists within the province.
- The evidence of the patient's subsequent treating dentist did not constitute expert opinion evidence. The evidence "… was factual evidence from an expert. An expert fact witness is a witness whose testimony is not opinion evidence, but whose knowledge is beyond that of a layperson …." As such the formalities of expert opinions (e.g., disclosure of a written report in advance of the hearing from an independent expert) does not apply.
- It is true that "Not every breach of a standard of practice amounts to unprofessional conduct. Conduct that does not engage the broader public interest or the profession's reputation is often better addressed through other means …." However, in this case the regulator reasonably found that the breach of standards did engage the broader public interest.

This decision illustrates how a purpose-driven approach to sanctions can be more appropriate than criminal sentencing principles in the context of professional discipline hearings.

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