



Sanctions guidance:

to assist legal professional bodies and discipline tribunals in the creation of their own guidance on imposing sanctions for Unsatisfactory Professional Conduct or Professional Misconduct

Contents

Introduction & Purpose	3
Key Principles	5
Guidance & Practicalities (incl. 5-stage process)	5
Particular Sanctions	10
Decision-Making Tree	13

1. Introduction

- 1.1 The SLCC is an independent statutory body* providing a single point of contact for all complaints against Scottish legal practitioners. We investigate and resolve complaints alleging inadequate professional services, refer conduct complaints to the relevant professional bodies and have oversight of complaints handling across the profession.
- 1.2 As we operate independently of the profession, part of our oversight function is to offer guidance to the professional organisations and practitioners about their methods and systems for dealing with complaints**, with the aim of improving complaint handling and increasing trust and confidence in Scottish legal services.

* Section 1(1) *Legal Profession & Legal Aid (Scotland) Act 2007*

** Sections 36 & 40 *Legal Profession & Legal Aid (Scotland) Act 2007*

2. Purpose

- 2.1 This document is designed to support the professional organisations and disciplinary bodies in the preparation of their own guidance on the application of sanctions, where the conduct of legal practitioners has been found to amount to either Unsatisfactory Professional Conduct* or Professional Misconduct**.
- 2.2 We are not seeking to create standardised sanctions guidance, as we recognise that the professional bodies and tribunals are governed by different rules and regulations. While this guidance does not provide an exhaustive list of factors or rules to be applied, we hope that the key principles and practicalities identified will feed into any future guidance issued by the Law Society of Scotland, the Faculty of Advocates, the Association of Commercial Attorneys and the Scottish Solicitors' Discipline Tribunal and any Approved Regulators appointed under the Legal Services (Scotland) Act 2010.
- 2.3 We would highlight the need for sanctions guidance to inform (a) the parties who complain, and (b) the practitioners complained of, about the range of potential sanctions that exist, and what approach might be taken by the various conduct committees and tribunals.
- 2.4 We hope that this guidance will assist in promoting consistency and transparency in the application of sanctions for disciplinary matters. The creation of clear guidance should also demonstrate to the public and the profession that they can have confidence that the professional organisations will uphold proper standards of behaviour and conduct and impose proportionate and fair sanctions. Everyone involved in disciplinary matters should know what to expect when the gravity of a particular conduct matter is being considered and how it is to be disposed of. There should be no surprises.
- 2.5 In the lead up to the finalisation of this document, we invited experts from a range of professional regulators, as well as representatives from consumer and equality groups, to meet to discuss the challenges around the application of sanctions and the practicalities of applying sanctions in a disciplinary context. The aim of the roundtable was to share knowledge and learn from each other's experiences of applying sanctions.

- 2.6 It was clear from the discussion about the function of sanctions that the current approach to the discipline of legal practitioners is somewhat different to the approach taken by other professional regulators. The legislation and Rules governing the application of sanctions against Scottish solicitors and advocates allow for both redress and protective measures to be taken in disciplinary matters, which is not something which the majority of the other regulators were faced with. It was stressed that the purpose of applying sanctions in disciplinary matters is primarily to protect the public, but also to ensure that professional standards and the reputation of the profession is preserved. It was widely considered that disciplinary action should not be a route for complainers to obtain financial redress, and by doing so, this had the potential to shift the focus from public protection to issues of compensation and loss, which should be dealt with by alternative means (in a legal complaints context, pecuniary recompense can be sought via a service complaint dealt with by the SLCC).
- 2.7 This guidance has been prepared to assist with the application of sanctions in accordance with the current legislation and Rules, which allow complainers to claim for compensation for loss, distress and inconvenience, and for financial punishments to be directed against practitioners who have been found to have conducted themselves in an unsatisfactory manner, or who have been found guilty of Professional Misconduct. Although there is currently talk of legislative change in the legal sector, which might see the position on the application of disciplinary sanctions change in the future, there is the need for guidance to deal with the position as it currently stands.

* Section 46(1) *Legal Profession & Legal Aid (Scotland) Act 2007*

** *Sharp –v- Council of the Law Society of Scotland 1984 SLT 313 (per Lord President Emslie)*

3. Key Principles

- Preserving the reputation of the profession -v- protecting the general public
- Achieving credible deterrence
- Maintaining, improving and promoting proper professional standards and conduct for members of the profession
- Maximising proportionality, clarity, consistency, impartiality & transparency
- Ensuring decision-makers ultimately retain discretion
- Applying appropriate penalties in each individual case

4. Guidance & Practicalities

- 4.1 The purpose of imposing sanctions is not to punish, but to protect the public and the reputation of the profession. Although the application of sanctions might have a punitive effect, the objective should be to impose a sanction or a combination of sanctions necessary to achieve the Key Principles.
- 4.2 Any sanctions guidance should make sure that the parties are aware from the outset of the approach that might be taken to the imposition of sanctions following a finding of either Unsatisfactory Professional Conduct or Professional Misconduct.
- 4.3 Guidance should be considered alongside precedents emerging from historical cases (allowing for the passage of time since the decision was made). Decision-makers should study, but not be dictated by, decisions which have been made previously. Guidance and precedents should be used to support the decision making and not seek to impose a stringent tariff or to fetter discretion.
- 4.4 Decision-makers should ensure that the processes for dealing with complaints about legal practitioners are fairly applied and are in accordance with equality and human rights legislation. Decision making should always be consistent and impartial.
- 4.5 To meet the objectives of the Key Principles, decision-makers may consider applying a **5-stage process**:

Stage 1	Decide the nature and seriousness of the conduct.
Stage 2	Identify the basic penalty from the range available and/or a combination of potential sanctions.
Stage 3	Consider any aggravating/mitigating factors .
Stage 4	Consider any appropriate adjustment to (a) ensure proportionality, (b) eliminate any financial gain, (c) achieve appropriate deterrent, and/or (d) discount for admissions/rectification/engagement in process.
Stage 5	Decide the appropriate level and duration and publication requirements.

Stage 1

4.6 In assessing the **nature and seriousness** of the conduct, i.e. does the conduct amount to Unsatisfactory Professional Conduct or Professional Misconduct, and the sanctions that might be appropriate, consideration should be given to the following factors (not an exhaustive list) and weight to be attached to each:

- Full facts and circumstances of the case
- Quality of the evidence available
- Nature, extent and importance of standards breached
- Intention
- Seniority/supervisory position
- The culpability of the practitioner, i.e. sole responsibility
- Dishonesty, deliberate action or recklessness
- Whether caused/encouraged others to be complicit
- Duration/frequency/repetition
- Influence(d)
- Number/type of people/organisations adversely (or potentially) affected
- Attempts at rectification
- Continuation of failure to adhere/comply
- Conviction of criminal offence
- Previous disciplinary sanctions
- Impact of loss or harm caused by the conduct
- Any financial benefit derived (or intended to be derived)
- Risk/loss of substantial sums of money

4.7 The parties should always be given the opportunity to make representations as to the level of sanction to be imposed.

Stage 2

4.8 The **basic penalty** will be subject to any statutory/rules limits of amount ceilings on (a) fines, or (b) compensation. In some cases, a tariff may set out the basic penalty, including categories of seriousness and a range of basic awards.

Stage 3

4.9 Once a basic penalty has been agreed, consideration should be given to any **aggravating features**, such as:

- Pre-meditation/intent
- Repeated actions over a long period of time
- Recklessness/knowledge of risks and likely consequences
- Negligence/incompetence
- Collusion (with colleagues/clients)
- Cumulative complaints
- Position of responsibility
- Vulnerability of the client/third party
- Attempts to hide/deceive/lay blame elsewhere
- Delayed/no acceptance of actions

- Limited/no remedial action
- No apology
- Lack of remorse
- Delayed/no reaction to complaint
- No co-operation or hindered investigation process
- Failure to attend disciplinary hearing
- Previous disciplinary actions
- Misuse of illegal substances
- Discrimination on any grounds
- Concerns about probity, i.e. being honest/trustworthy

4.10 Consideration should also be given to any **mitigating factors**, such as:

- (early) admissions of unsatisfactory conduct/misconduct
- timescales, i.e. immediate reaction to complaint/delay
- apology provided
- action taken to remedy harm (financial or otherwise) caused
- (early) offers of settlement
- co-operation in the investigation
- expressing insight/demonstrating reflection
- one-off action
- no history of disciplinary action
- was deliberately misled
- no gain or profit
- junior position and lack of training/experience/supervision
- adhering to principles of good practice, i.e. keeping up to date, working within their area of competence
- personal and professional matters, e.g. personal medical conditions/bereavement/work-related stress
- lapse since the incident occurred
- limited duration of loss/harm
- heat of the moment
- acted on advice from professional body
- good references

4.11 References and testimonials may be produced to support good standing and character. Decision-makers should consider whether the authors are fully aware of the events and what weight, if any, to attach to this evidence.

Stage 4

4.12 Making an **appropriate adjustment** is important, as this tailors the sanction to the individual circumstances of the case and to those of the paying party. Proportionality plays a great part in dealing with the application of sanctions and is essential to eliminate any financial gain.

4.13 Decision-makers should always have at the back of their minds the first Key Principle:

**‘Preserving the reputation of the profession -v-
protecting the general public’**

- 4.14 **Means** - is the proposed sanction proportionate to the means of the paying party, including income, benefits/liabilities & assets? If the practitioner is not employed, what financial resources are open to them?
- 4.15 Consideration should be given to any insurance arrangements (which should not be a reason to increase the amount if available). In addition, requests for time to pay/instalments should be acknowledged, although it might be helpful to limit any instalments to a maximum period, as small instalments over a lengthy period of time can be expensive to administer and involve costs to the profession in excess of the original sanction.
- 4.16 **Employment** – consider whether the sanction may impinge on the future employment of the paying party, e.g. a sole practitioner who is put out of business due to imposition of significant fine? The amount of revenue generated by the practitioner/firm could be a factor when assessing the size of fine to be ordered, as well as profitability, number of clients, size of firm / number of partners etc.
- 4.17 **Deterrent** – does the proposed sanction have deterrent value? Is the sanction sufficient to deter practitioners from behaving below the expected standards of competent legal professionals? A strong deterrent effect may be achieved by the certainty of sanctions being made, as well as the severity of the sanction. Consistently applying and maintaining sanctions is important to deter practitioners from behaving contrary to the expected conduct standards.
- 4.18 In order for sanctions to deter, practitioners must be made aware of sanction risks and consequences. Sanction policies and awareness of sanction risks is an essential part of deterrence. Steps should be taken to ensure that information about sanctions and any modifications are clearly publicised.
- 4.19 **Discounts** - any action already taken against the practitioner by other bodies, such as the courts, regulators and other professional bodies should be taken into account, e.g. if a practitioner has already been fined by a court, it would not be usual to fine again for the same ‘offence’, but it may be appropriate to apply other sanctions. The decision-makers should not take a less stringent line because of the prospect of legal action.

Stage 5

- 4.20 Once all of the circumstances and surrounding factors have been considered, decide the **appropriate sanction(s), level and duration** (as applicable). Depending on the sanction(s), the following considerations might apply:
- 4.21 **Reasons** should be given for any sanction(s) applied and where there has been a departure from the general guidance (if applicable). Reasons should also be given for discounting the sanctions it rejects, e.g. if there is to be a suspension, reasons should be given about why a lesser sanction, i.e. a reprimand or restrictions, was not appropriate.

It is good practice to explain why it is not necessary to impose the next most severe sanction.

- 4.22 Where errors have been made or standard practice/codes/regulations have been breached, this may not, of itself, amount to Unsatisfactory Professional Conduct or Professional Misconduct. If **no finding** is made and **no sanction** is imposed, **clear reasons** must be given.
- 4.23 Where there **is a finding** of Unsatisfactory Professional Conduct or Professional Misconduct, only **rarely/exceptionally** would it be appropriate **not to impose a sanction**, e.g. if the practitioner was severely incapacitated at the time of the conduct or the impact of the conduct (on the client or other third party) was so minimal. The decision should provide:
- a full/clear explanation of what the rare / exceptional reasons are;
 - why the circumstances are exceptional; and
 - how the exceptional circumstances justify taking no further action.
- 4.24 Where a practitioner has **resigned** or has been **expelled** from membership of the professional organisation, this should not normally influence the sanctions to be applied, but it may limit the range of sanctions available. Consideration should always be given to applying a sanction as if the practitioner was still a current member.
- 4.25 Where a **combination of sanctions** might be appropriate, consider all of the circumstances, the appropriateness of the proposed sanctions both individually and collectively (N.B. there will always be a combination of sanctions where there is a finding of Unsatisfactory Professional Conduct, as the 2007 Act requires a censure to be made). Sanctions should be considered separately and in order of severity, e.g. a practitioner should not be expelled unless suspension or restriction is considered insufficient to protect the public, offer a suitable deterrent and maintain confidence in the profession.
- 4.26 **Multiple complaints**, e.g. same / similar wrong-doing committed concurrently. Is it proportionate / unjust to impose a sanction for each matter? Consider the totality or impose sanctions for the more serious allegations and whether it is appropriate to make no separate order for lesser matters.
- 4.27 **Duration** - sanctions may be applied **immediately** or **delayed** (unless restricted by terms of statute / rules). Full reasons should be given for either approach. A separate explanation as to why the sanction should last for a particular period should be provided.
- 4.28 **Publication** - decisions should (usually) be pronounced publically. Consideration should be given to whether **all** decisions should be published, including those where no findings are made. Publicity may be restricted if there is any risk to the health or well-being of the practitioner or anyone associated with the practitioner. A public interest test may require to be applied in each case. **It is good practice for decisions to be widely published and available to the general public, e.g. on the professional organisation's website or public journal.**

5 Particular types of sanctions

5.1 In addition to the guidance above, the following considerations may also apply when considering which of the available sanction(s) may be the most appropriate to the circumstances of the case:

Sanction	Considerations
Written undertaking	There may be provision for a written undertaking to be accepted from the practitioner as an alternative to a statutory sanction. The decision-makers must be satisfied that an undertaking is sufficient to protect the public. Evidence to support the undertaking may be required, e.g. evidence of remedial action.
Censure, admonition	A censure or admonition marks the disapproval of the decision-makers, but does not affect the practising status of the practitioner. The admonition may be made verbally, or as a written reprimand.
Compensation (limited by statute/rules)	<p>Compensation may be appropriate where the complainer has suffered distress, inconvenience and/or actual loss (and can vouch those losses) as a direct result of the conduct.</p> <p>The practitioner may or may not have accepted the amount of compensation; this should not prevent a direction for compensation to be made. Similarly, it should not be necessary for a complainer to actively claim compensation. If the decision-makers are satisfied that compensation should be paid, then such a direction may be made.</p> <p>It is not necessary, but it might be helpful if a tariff sets out the amounts of compensation which might be awarded, depending on the seriousness of the conduct. It is usual to see bandings in the tariff, such as 'limited', 'modest', 'significant' and 'serious'.</p>
Fee abatement & refunds (incl. outlays)	Fee abatement/refund may be appropriate where it is found that fees have been unreasonably charged for work which was not carried out or where the work carried out was deficient. There might also be a fee refund if excessive fees have been charged.
Fine (limited by statute/rules)	Where there are limited funds, priority should be given to any award of compensation rather than the imposition of a fine.
Training Orders	Training may be necessary to be ordered to improve the professional competence of an individual, ensure that the practitioner is trained to deal with a particular area of practice, prevent further non-compliance with rules or regulations. Such Orders should be approved and compliance monitored by the professional organisation.
Supervision	If supervision is to be ordered, is there someone suitable to supervise; how is the supervision to be monitored and by whom?

<p>Suspension</p>	<p>Suspension has a deterrent effect and can be used to send out a signal to the individual, the profession and the public about what is regarded as behaviour unbecoming of a competent legal practitioner. It has a punitive effect, removing the practitioner's right to practice during the period of suspension.</p> <p>Suspension may be appropriate for conduct that is serious but falls short of requiring expulsion or exclusion, e.g. where there has been an acknowledgement of fault and steps taken to rectify the position and where the conduct is unlikely to be repeated. The length of suspension should be carefully reasoned and take into account the risk to public safety and seriousness of the matter. In some circumstances (and if the legislation/rules allow), a period of interim suspension might be necessary.</p>
<p>Conditions, restrictions & revocations</p>	<p>Conditions, restrictions or revocations are likely to be appropriate and workable where the practitioner has performance/training issues. The following factors might be relevant to the suitability of this sanction:</p> <ul style="list-style-type: none"> • Does the practitioner have insight into the concerns and the potential to react positively to training/supervision? • Does the practitioner have any deep-seated or attitudinal issues? • Is the practitioner a danger to the public if a restriction is not made? • Are there identifiable areas of practice to be developed? • Is the practitioner willing to take part and be honest and open with colleagues/supervisors/professional body? • Does the practitioner have insight into any health issues? <p>Conditions should be appropriate, proportionate, workable and measurable. Objectives should be set so the practitioner knows what is expected of them. This will assist decision-makers at any future review hearings to understand (a) the original concerns, and (b) the exact proposals to resolve them. It should also assist in evaluating whether the concerns have been resolved.</p>
<p>Review hearings</p>	<p>Where there has been a restriction/conditions imposed, it is important that a practitioner is not able to resume unrestricted practice unless they are deemed safe to do so. In most cases, a review panel should consider whether the practitioner has shown that (a) they accept the full gravity of the conduct, (b) there has been no repeat offence, (c) they have kept up to date in their particular area(s) of practice, and (d) there is no longer a risk to the public.</p>
<p>Expulsion, exclusion</p>	<p>Expulsion or exclusion (in full or for short periods of time) should only be appropriate if:</p> <ul style="list-style-type: none"> • the conduct seriously falls short of what the profession expects, • it is necessary to protect the public,

	<ul style="list-style-type: none">• the action is necessary to maintain confidence in the profession, and• no other sanction or combination of sanctions is sufficient given the nature and seriousness of the conduct. <p>Decision-makers should also take into account the impact that preclusion will have on the other members of the firm, as it is important that the sanctions which are applied in respect of the conduct of one practitioner should not have an adverse knock on effect to other members of the firm.</p>
--	---

5.2 **Costs** should also be considered. It is not the purpose of a costs order to serve as an additional punishment, but to compensate for the costs of bringing the proceedings. Any order should never exceed the amount actually and reasonably incurred. Evidence of financial means to pay should be obtained before a decision is made.

Decision-Making Tree

