



**Discipline Committee
Policy and Guidance Manual**

Working Draft 1.

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Acknowledgement:

This document has used information directly from (or has modified information from) the following sources:

Association of BC Forest Professionals

College of Alberta Professional Foresters

Ontario Professional Forester Association

Association of Registered Professional Foresters of New Brunswick

HANDBOOK ON PROFESSIONAL DISCIPLINE PROCEDURE
The Law Reform Commission of Saskatchewan March 2007

WHAT DOES IT MEAN TO BE A SELF-GOVERNING REGULATED PROFESSION?
A Discussion Paper Presented to the 4th Annual Workshop of the
Saskatchewan Assessment Appraisers' Association October 2006
Robert Schultze, MBA, AAAS, AACI, CAE

THE EXPECTATIONS THAT AFFECT THE MANAGEMENT OF PUBLIC FOREST AND RANGE LANDS
IN BRITISH COLUMBIA: LOOKING OUTSIDE THE LEGISLATION
Discussion Paper prepared for the Ministry of Forests and Range
and the Ministry of Environment (February 2006)
by Roberta Reader

Individual references, or footnotes from these various sources has not been provided.

Disclaimer:

The information presented in this document is designed to be guidance for holding a Discipline Committee Hearing and for other elements of the Discipline process.

The information presented in this manual is not binding on the Discipline Committee/Hearing Panel who maintains the right to vary/conduct the Discipline Process as they see fit within the confines of the Forestry Professionals Act.

Variance from this document does provide grounds for appeal.

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2.0 Terms of Reference

Purpose:

The Association of Saskatchewan Forest Professional (ASFP) is a self-regulating profession which among its responsibilities includes the power to discipline its members, who committed professional misconduct, are professionally incompetent or have breached the Association's Code of Ethics. The Discipline Committee highest duty is to ensure public interest is served and protected, and that the membership of the ASPF maintains the highest standards of professionalism, ethics and excellence.

Integrity:

To maintain the integrity of Association and the public trust the Discipline Committee whose powers are authorized by the Forestry Professional Act will:

- Act independently of Council, the Professional Conduct Committee and other committees of the Association when a complaint has been made against a member.
- Outside of the established processes of the ASFP, members of the Discipline Committee (and hearing panel members) will not discuss any aspect of a complaint, investigation, hearing or appeal, with any member of the Association, the Professional Conduct Committee, Council, or the original complainant, till after the case fully is resolved.

Duties of the Discipline Committee:

- The review and approval of a settlement proposal where the member in question through mediation or a dispute resolution system have reach equitable solution with the ASFP.
- Issue the formal complaint by the association to a member in question. **check**
- Conducts hearings for the purpose of determining professional misconduct or professional incompetence.
- Assigns appropriate orders and penalties against members found guilty.
- Monitors to ensure orders are completed.
- Maintain a pool of senior ASFP forestry peers to be available for the hearing panel duties.
- Report annually to the membership and publishes outcomes.

Duties of the Chair of the Discipline Committee:

- Chairs meetings of the Discipline Committee.
- Responsible for the implementation of the key functions of the Committee.
- Subject to the Act and the bylaws, leads the development of the rules relating to the committee's business and proceedings.
- Reports annually to the membership and council.

Discipline Committee Membership:

The Discipline Committee shall be:

- At least 3 persons appointed by Council of which one is the member of council appointed pursuant to section 9 (Section 28). (Bylaw change need?, - Act says at least 3, bylaw 91 says shall be 3)
- The section 9 person is appointed by the lieutenant Governor and becomes a council member. If this person has not been appointed, or is absence/unable to act as member of the discipline committee. The discipline committee is not impaired to act. (Section 9)
- No member of the Professional Committee is eligible to be a member of the Discipline Committee (Section 28)
- At least one member of the council shall be appointed to the committee to act as chair (bylaw 79)
- Appointments are for a three year term (unless specified differently by council) and are automatically renewed unless the member asks to be excused. (New bylaw needed?)

Guidance on membership selection.

The size of Discipline Committee should be larger than the minimum of 3 persons, in order to have a pool of individuals available to select from for a Discipline Hearing.

To be eligible for appointment to the Discipline Committee it is recommend that ASFP members have at least ten years of forestry experience and have been a registration member of a Professional Forestry body for at least five years (ASFP or another provincial forestry assoication).

3.0 Dispute Resolution without a Discipline Hearing

The formal discipline hearing process is a potentially costly process for all parties involved. Alternatives to the formal discipline hearing process have the ability to reach an equitable solution for all parties involved.

The Discipline Committee role is to review the final proposed settlement package from Alternate complaint resolution (ACR) for suitability and if acceptable, issue the “official order” as per section 30 of the Act.

Procedures:

- 1) The ACR settlement proposal is to be submitted to the Discipline Committee chair by the chairman of the Professional Conduct Committee.
- 2) The ACR settlement proposal will be received at anytime up to start of a discipline hearing, but not after the hearing has commenced.

- 3) A Discipline Committee meeting will convene (of at least 3 members) to review the ACR settlement proposal for suitability. The meeting will consist of the discipline committee chairman and two other disciplines committee members, of which one should (if available) be the public appointee person subject to section 9(7)).
- 4) The ACR settlement proposal should include sufficient information to confirm the proposal is in the public interest, and that the order and/or penalties are appropriate.
- 5) The Discipline Committee may:
 - a. Accept the proposal, or
 - b. Accept the proposal, with a modified official order.
 - c. Rejects the proposal, and may provide recommendation for improvement.
- 6) Discipline Chair on behalf the committee informs the Chair of the Professional Conduct committee if the settlement proposal is approved or rejected.
- 7) If approved the Discipline Chair then prepares and signs the official order on behalf of the Association.

Proposal accepted with modified order, or proposals that are rejected can be appealed by going to a formal Discipline Hearing.

4.0 Prior to the Hearing

Before a Discipline Hearing commences several procedural items must occur as per the Act (such as official notification). The Discipline Committee Chairman must also ensure several administrative items have occurred (such as disclosure).

The Professional Conduct Committee investigation report recommends a disciplinary hearing, the formal complaint (which must be specific in regards to the offence, time and place) is to be included in the report. (Section 27 (3)).

This report is to be provided to the Registrar, Council, the Complainant and the member subject of the investigation (Section 27(5))

Procedures:

1) Hearing Panel Selection

The **Chair of the Discipline** committee will assign a hearing panel of three or more from among the discipline committee members (including the public appointment to council, if available). The Chair may arrange for his own legal advice and counsel to assist with the hearing process.

Should the term of office of a hearing panel member ceases after evidence has been heard and before the matter is disposed of, the person remains a member of the hearing panel until the final disposition.

A panel member becomes unable to continue to act, the remaining members may continue the hearing and render a decision despite the lack of a quorum.

Conflict of Interest:

Discipline Committee members may not be on the hearing panel if they have taken part in any investigation or consideration of the subject matter of the hearing beforehand (unless it was at a previous hearing of the committee).

Hearing Panel members, as decision-makers, must remain disinterested and unbiased. Even an appearance of bias could be sufficient to nullify a hearing. An appearance of bias can occur through pre-judgement by the committee, the conduct of the committee during the hearing, the relationship of a panel member to a participant in the hearing, or a monetary or other interest in the outcome of the hearing. A practitioner may be able to waive an apprehension of bias, but must be aware of its existence and expressly or by conduct to waive the concern.

2) Notification of Hearing

The Registrar (section 29(1)) shall at least 14 days before the date of the discipline committee is to sit, *by double registered mail*, sent to the accused member.

- A copy of the “official complaint and charge”.
- Notice that a hearing will be held at a specified date, time and place of the hearing. The notice may include:
 - (a) *That the accused member is entitled to have his/her own Counsel.*
 - (b) *A statement that the purpose of the hearing is for a discipline proceeding, and not merely a preliminary or investigative meeting;*
 - (c) *Reference to the statutory authority under which the hearing will be held*
 - (d) *A statement that, if the member does not attend at the hearing, the Discipline Committee may proceed in his or her absence, and he or she will not be entitled to any further notice in the proceedings*
 - (e) *A copy of the investigation report if not already provided.*
 - (f) *Provide information as per the disclosure requirements.*
 - (g) *Names of hearing panel members with a deadline to provide an objection to a panel member based on a conflict of interest.*

In order to ensure the member knows the case he or she has to meet and defend, the member is entitled to reasonable information regarding the allegations. This is normally provided with the notice of hearing, in the form of a statement of allegations containing an outline of the material facts, and the legal conclusion to be drawn from the facts (i.e. unskilled practice of forestry)

3) Disclosure Requirements

Disclosure provides an opportunity to examine evidence before the hearing begins and it is a good practice for both parties to share information (not just the prosecutor) as this sharing may lead to avoiding a formal hearing. However, there is a greater onus on the prosecutor to ensure the relevant material is made available to the member and his counsel. Disclosure provides more detail than that contained in the notice of hearing, and enables the member to prepare the best possible defence. The member shall be afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing this includes disclosures of expert witness reports.

Although no time limit is specified, 10 days before a hearing is a commonly accepted practice.

Without proper disclosure, the evidence may not be admissible during the hearing. However, the Discipline Committee Hearing Panel does have the discretion to admit evidence if it is necessary to rebut evidence previously presented at the hearing, or if the Discipline Committee Hearing Panel believes the evidence is necessary to make a fair decision. It is common for a discipline committee to admit late evidence provided it was not deliberately withheld, and the committee can give directions to ensure the member is not prejudiced. For example, the hearing can be adjourned to enable the member or the prosecution to respond to the evidence.

The duty of disclosure continues even after the hearing and any appeals are completed, in the event subsequent information shows innocence or raises doubt as to guilt. The prosecutor should inform the person receiving disclosure, normally defense counsel, that they have a duty to ensure disclosure materials are not improperly disseminated. In some circumstances, it may be necessary to take steps to protect the privacy of complainants and witnesses. Material that is privileged does not have to be disclosed unless it is essential for the defence.

Disclosure includes items such as: e-mails, investigation notes, calculations and calculation notes, pictures/photographs, copies of documents, sworn statements collected itemized list of evidence, etc.

4) Hearing Room and Administration

The Registrar will make the necessary meeting room arrangements, including having the hearing recorded by court reporter.

The Registrar will ensure that associated costs with the hearing, association staff, professional conduct committee, expert witness and discipline member's expenses are recorded accurately.

5.0 Conducting a Discipline Hearing.

A discipline hearing is similar to a court proceeding. It is adversarial in nature with two competing parties, the association and the member, presenting their cases to the Discipline Committee. The Discipline Committee acting similar to a panel of judges in a court of law ensures that both sides present their cases fairly, listens impartially to the evidence and arguments, and decides the issues after the parties have completed their presentation. The Discipline Committee may make rulings on such matters as to the admissibility and relevance of evidence and may question witnesses for clarification so long as it does not usurp the function of the prosecution or defence. In this section Chair refers to the Chair of the Hearing panel, and Association Counsel refers to the prosecution lead by the Professional conduct committee or their legal counsel

Outline of a typical hearing:

The initiating party, normally the prosecutor, leads evidence first and is then followed by the member who leads his or her evidence. The prosecutor may then call reply witnesses. In calling witnesses, the party calling the witness leads that witness's evidence, the other party cross examines, and the party calling the witness re-examines. In closing argument, the prosecutor goes first, the member second, and the prosecutor may reply. In re-examination or reply, the party should confine himself or herself to points raised by the other party and not repeat points he or she has already covered. If the panel intervenes at any point by, for example, asking questions of a witness or a party, each party is allowed to respond once and the party whose stage of proceeding is interrupted responds last. Discipline Hearing Panels have the flexibility to vary these guidelines where appropriate.

Generic Procedural steps:

1. All proceedings of the hearing shall be recorded by a Court Reporter.
2. The Chair calls the hearing to order, makes Opening Remarks (i.e. authority to hold a hearing, the name of case, acknowledgement of individuals present, the days schedule, meeting room house keeping items). Describes the role of discipline committee counsel in the proceedings.
3. The charge is read by the Registrar. If the accused member is not present, the Registrar demonstrates proof that the charge and Notice of the hearing were delivered to the accused member. *If the accused member fails to attend the hearing, the discipline committee, on proof of service of the notice on the member, may proceed with the hearing in his or her absence. (section 29 (10))*
4. The Chair inquires if the accused member admits or denies the charge.
5. If the accused member admits the charge, the Chair will receive any submission the accused member may wish to make concerning mitigating circumstances and penalties to be imposed.

6. The Association's Counsel will then outline the severity of the charge, and make a submission regarding penalties.
7. If the accused member denies the charge, evidence must be called by both parties.
8. The Association's Counsel outlines the facts relating to the charge and refers to the specific provision of the Forestry Professionals Act, By-Law, or Code of Ethics that is alleged to have been violated. The Association's Counsel should outline any interpretation and principles of law that are pertinent.
9. Members of the Discipline Committee (hearing panel) should raise any questions they may have regarding the meaning of any part of the Act, By-Laws or Code of Ethics, or they may ask for clarification regarding matters of law.
10. The Association's Counsel submits evidence in the form of documents, and calls witnesses
11. The testimony of witnesses is to be under oath or affirmation administered by the chairperson of the discipline committee. (section 29 (6))
12. Each witness called by the Association's Counsel may be cross-examined by the accused member, or his/her Counsel. The witness may then be briefly re-examined by the Association's Counsel.
13. Following the examination of each witness, the Chair should inquire if any member of the Discipline Committee wishes to question the witness. After any such questioning, both Counsels may briefly re-examine regarding matters arising from questions by members of the Discipline Committee.
14. Counsel for the accused member then submits evidence and calls witnesses, which may include evidence given by the accused member. Each witness may be cross-examined and re-examined.
15. When all the evidence has been submitted, and examination of all witnesses is complete, each Counsel will submit a summary of the evidence and state the facts which they feel are supported by the evidence.
16. The Chair will then have various alternatives:
 - a. The hearing may be briefly adjourned while the Discipline Committee considers a decision.
 - b. The hearing may be adjourned, to be reconvened at a specified time and place when a decision will be given.
 - c. The hearing may be adjourned with the accused member being told he/she will be informed of the decision by mail.

17. In the case of a guilty decision, where the offence is serious, or where Discipline Committee considers there may be mitigating factors, the Hearing Chair may reconvene the hearing to hear arguments regarding the penalty to be imposed. In this case the accused member shall be informed of the decision and be given a suitable time to prepare arguments. The Professional Conduct Committee Chair or Counsel would also submit arguments concerning penalty.
18. The accused member is informed in writing regarding the decision, the order and penalty.
19. The Registrar is instructed by the Discipline Chair to see that the penalty is carried out

Caveats:

The information in this section is not binding on the Discipline Committee/Hearing Panel who maintains the right to vary/conduct the hearing procedures as they see fit within the confines of the Act.

The information presented here is typical approach for holding discipline hearing and provides a general understanding of the process. Other approaches are available to conduct a fair hearing.

Variance from this guidance document does provide grounds for appeal.

6.0 Issues during a Discipline Hearing.

The following are some of the more common items that might occur during a hearing. This information borrows heavily from the *Handbook on Professional Discipline Procedure* and references the Forestry Professional Act. In some cases a legal opinion should be sought before proceeding.

Legal Counsel for the Discipline Committee.

Members of the Discipline Committee are usually not legally trained and may have questions about procedures rules or on matters of law. Counsel for the Discipline Committee acts as an advisor to the committee on these legal and procedural questions raised during the hearing. Counsel can also be retained by the Discipline Committee to provide legal advice on points of law and in assistance in writing the final decision (legal clarity). Should the Discipline Committee obtain Council, then:

- The person select for counsel to the discipline committee shall not be the same person advising/leading the prosecution as this introduces a perceived bias to the fairness of the hearing.

At the start of the hearing the role of Counsel to the Discipline Committee should be fully explained to both all parties and entered into the recording. Specific topics that should be mention:

- Counsel is not acting as the general spokesman for the hearing panel of discipline committee or is replacing the roles/duties of the panel members in the hearing.
- The counsel with permission of the hearing panel members may ask questions of the witness for clarification but is not to conduct examination of either witnesses or counsel of the parties.
- The decision making rests with the panel members and the retained Counsel is not member of the panel. Counsel (if used in this role) will assist in writing the decision based on the decision made by the panel.
- If, during deliberation phase, the hearing panel members request a written opinion on a point of law from their counsel. The hearing panel will provide a copy of this opinion to all parties and will accept a written reply.

Right to a hearing.

The rule of natural justice clearly requires that the accused be given the right to be heard. However, if after investigation of a compliant the decision is made not to proceed with a discipline hearing there is no obligation to hold hearing so the accused can “clear his name”. The courts have not been persuaded that justice requires a hearing in these cases.

Attendance by the member.

While attendance by the member at the hearing is preferred, it is not mandatory and if proper notification was given the hearing can commence in his absent.

Should the member choose not to attend and send his representative (i.e. legal council) to the hearing on his behalf, the hearing will proceed in his absent. However, this is not a recommended practice, nor does it become grounds for appeal.

Public vs Private Hearing

Section 29 (13&14) states subject to section 15 that hearings are to be public and allows for the complainant to attend.

Section (15) allows the discipline committee to exclude members of the public and the person who made the complaint from any part of the hearing when the committee is of the opinion that evidence brought in the presence of the person or persons to be excluded will unduly violate the privacy of a person other than the member whose conduct is the subject of the hearing.

The request to exclude the public is made by motion and can be made at any time, by any party or person, or by the Discipline Committee. The Committee may also order the public to be excluded while it receives evidence or submissions on the motion or while it

deliberates on the matter. If the circumstances apply, the Committee still must balance whether the competing interest outweighs the public interest in an open hearing.

In interpreting this sec 29(14 & 15) the Discipline Committee may consider:

- matters of public security that may be disclosed,
- avoiding disclosure of personal or financial information outweighs the desirability of a public hearing
- the safety of a person may be jeopardized
- unduly violate the privacy of a person

The discipline committee also has the power to have witnesses remain outside the hearing room except when actually providing testimony; this includes the complainant if acting as a witness. This decision about witness testimony is to be made at the start of the proceedings.

Evidence

(Sec 29 (4)) The discipline committee may accept any evidence that it considers appropriate and is not bound by rules of law concerning evidence.

Generally speaking, tests of relevance, fairness and accessibility (access to both parties for examination and use in questioning witnesses) apply when determining admissible evidence and for “new” evidence.

Pre- hearing disclosure should be provided to all parties in timely fashion whether damaging or supportive of the respondent’s position. It should include all information unless privileged as a matter of law.

Witnesses

Section (29 (7)) at a hearing by the discipline committee, there is to be full right:

- to examine, cross-examine and re-examine all witnesses;
- and to present evidence in defence and reply

The Discipline Committee hearing panel can question any witness who testifies but must take care not to display any hostility or lack of impartiality, and must ensure that it does not appear to advocate a position. Questions should be limited to those intended to clarify an area of evidence, and should not be directed to new areas not covered by either party. The chair should intervene if a panel member asks an improper question or asks too many questions. The chair should ask questions last, and as the impartial moderator, should ask the least number of questions. After the Committee has asked all its questions, the chair should invite the parties to re-examine the witness on evidence elicited by the questions

In civil lawsuits a party can be compelled to testify at the insistence of another party. Discipline hearings are not a court of laws having no inherent jurisdiction to compel attendance of a witness or to compel the production of documents or records. However, Section (29 (8)) allows by applying to the Registrar of a court to subpoena to testify or to produce records from:

- a member whose conduct is the subject of a hearing pursuant to this Act;
- a member of the professional conduct committee;
- a member of the discipline committee.

Other Members may also become subject to discipline action if they don't follow to bylaw 93

By law (93) All members shall co-operate fully with the discipline committee or its representative during the course of any investigation undertaken and shall produce all documents or other information that, in the opinion of the discipline committee or its representative, are necessary to complete a proper investigation.

New or amended Charge

Section 29 (11): If, during the course of a hearing, the evidence shows that the member whose conduct is the subject of the hearing may be guilty of a charge different from or in addition to any charge specified in the formal complaint, the discipline committee shall notify the member of that fact.

Section (12): If the discipline committee proposes to amend, add to or substitute the charge in the formal complaint, the discipline committee shall adjourn the hearing for any period that the discipline committee considers sufficient to give the member an opportunity to prepare a defense to the amended formal complaint, unless the member consents to continue the hearing.

Criminal Concerns

Often a criminal conviction may be grounds for discipline actions and conversely an investigation into professional misconduct/incompetence may reveal a possible criminal offence. While an Investigation and Discipline hearing can be technically be held while criminal investigation or trial is proceeding, issues about the accused right to fail trial on the criminal charges can arise. Likewise a member can not be found "unbecoming" from a criminal offence before convicted of the criminal offence. The preferred practice is to let the criminal proceeding to conclude first.

Three sections of the Forestry Professionals Act provide direction:

Section 31 states when a member is convicted of criminal code, the discipline hearing process is similar. This includes a report by the professional conduct committee and the discipline hearing.

A section 32 states there is a duty to report should the investigation or hearing believes the member may be guilty of criminal offence. The investigation or hearing can be immediately discontinued and a report is made of the committee's findings to:

- (a) the president of the association; and

(b) the Deputy Minister of Justice.

In some cases, suspension from practice of a professional accused of misconduct or incompetence pending the outcome of a disciplinary proceeding is in the public interest. However, section 32 the Forestry Professionals Act is the only section that allows for suspension before completion of hearing as follows:

A judge of the court, on the application of the council, may direct that a member be suspended pending the disposition of a criminal charge where:

- (a) a criminal charge is laid against the member; and*
- (b) the member has applied to the court for a stay of any disciplinary proceedings against the member.*

7.0 Decision Making and Setting Orders

The Discipline Committee must first decide what it is the member has done, and then decides whether it constitutes professional misconduct or Professional incompetence. In the process of deliberation it is helpful to separate the finding of guilt from the penalty determination process. The following are some general principle to consider for each phase. *(this section is borrow from the OFAP and still needs clean-up editing – red font are additions and changes)*

7.1 Nature of Professional Misconduct

Section 25 of the Forestry Professionals Act

Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, is professional misconduct within the meaning of this Act if:

- (a) it is harmful to the best interests of the public or the members;*
- (b) it tends to harm the standing of the profession;*
- (c) it is a breach of this Act or the bylaws; or*
- (d) it is a failure to comply with an order of the professional conduct, committee, the discipline committee or the council.*

Findings of professional misconduct are often challenged or defended on the basis that the provision defining the misconduct is invalid or does not apply to the facts of the case, the member did not have the required intent to perform the misconduct, or there is a legal impediment preventing the committee from making a finding in the case. Challenges to the validity of provisions defining misconduct are often constitutional and involve complex legal arguments increasing the likelihood that the committee's decision will be reviewed by the courts. Other challenges may also be made based on principles of common law and legislative interpretation which could either render the provision invalid or result in a narrow interpretation.

Challenges that the definition of professional misconduct does not apply to the facts of the case are common. Issues that may considered are whether the definition applies to conduct that occurred before the member joined the Association (for example, criminal convictions), or

whether it applies to conduct outside the Ontario *province* or outside the practice of professional forestry. Professional misconduct is defined by Regulation *the Act, byways and standards of the Association as harmful to the best interests of the public, or the members, or the standing of the profession* and includes provisions relating and relates to conduct, failing to maintain standards of practice, record keeping, confidentiality, conflict of interest, fees, advertising and so on. The Committee must interpret the meaning of the definition and courts will normally defer to the Committee as long as the interpretation is reasonable.

Other defences to charges of professional misconduct can include mental illness on the part of the practitioner, abuse of process or delay on the part of the Committee, the issue has already been decided by the Association, the hearing is held while the person is not a member, the member has legal immunity, and the breach is too trivial to prosecute.

Unskilled Practice of Forestry Nature of

7.2 Nature of Professional Incompetence

Section 24 of the Forestry Professionals Act

Professional incompetence is a question of fact, but the display by a member of a lack of knowledge, skill or judgment or a disregard for the welfare of a member of the public served by the profession of a nature or to an extent that demonstrates that the member is unfit to:

- (a) continue in the practice of the profession; or
 - (b) provide one or more services ordinarily provided as a part of the practice of the profession;
- is professional incompetence within the meaning of this Act.

Where misconduct involves unethical or dishonest conduct, ~~unskilled practice of forestry~~ *incompetence* involves the status or condition of the member and is assessed based on the quality of a member's advice or services performed for clients or employers. The ~~unskilled practice~~ *incompetence* must relate to the member's professional advice and services rather than managerial or other errors. It must also relate to a deficiency in knowledge, skill or judgement, or a disregard for the forest. Finally, it must be of a nature or to an extent that demonstrates that the member is unfit to engage in the practice of professional forestry or that the member's practice should be restricted **from a particular aspect of forestry**.

A mere failure to maintain the standards of practice of the profession or an instance of malpractice does not necessarily constitute ~~unskilled practice~~ *incompetence*. Rather, it involves a fundamental or basic error, **often associated with education/knowledge weakness** suggesting that the member cannot be trusted with the practice of professional forestry in at least some circumstances.

Legal defenses to allegations of ~~unskilled practice~~ *incompetence* are similar to those available for allegations of professional misconduct. To place evidence of ~~unskilled practice~~ *incompetence* in perspective, the Committee can consider evidence that the member generally acts in a competent

manner, or evidence as to the context in which the alleged ~~unskilled practice~~ *incompetence* occurred.

7.3 Incapacity

Section 30 of the Act allows the Discipline committee when a member is guilty of professional misconduct or professional incompetence to make an order that individual obtain medial treatment or other treatment or counselling.

~~Act states that a member shall be found to be incapacitated if the member is suffering from a physical or mental condition or disorder that makes it desirable in the interest of the public that the member no longer be permitted to practice or that the member's practice be restricted.⁵³ In these cases~~ the member ~~must~~ **should** not only be found to have a physical or mental condition or disorder, but that condition must also warrant some restrictions on the member's practice. The member ~~must~~ **tends to** demonstrate a lack of insight into his or her illness to the extent that there is a valid concern that he or she will practice inappropriately. For example, many mental or substance abuse illnesses would meet this definition, and most incapacity cases involve those situations. **It may also be the case for with those with anger management issues. Members with other disabilities or illnesses will not normally be considered incapacitated even if the condition has the potential to affect their practice.**

The purpose ~~of the incapacity~~ **of this** provision is not to punish or blame a member for his or her illness, but to protect the public from members whose illnesses are interfering with their ability to practice and to ensure that the member receives treatment and is supervised and monitored in such a way that he or she can continue to practice if possible.

7.4 Decisions and Orders

Section 30 of the Forestry Professionals Act describes the powers discipline committee to make orders:

Section 30(1) Where the discipline committee finds a member guilty of professional misconduct or professional incompetence, it may make one or more of the following orders:

- (a) an order that the member be expelled from the association and that the member's name be struck from the register;
- (b) an order that the member be suspended for a specified period;
- (c) an order that the member be suspended pending the satisfaction and completion of any conditions specified in the order;
- (d) an order that the member may continue to practise, but only under conditions specified in the order, which may include, but are not restricted to, an order that the member:
 - (i) not do specified types of work;
 - (ii) successfully complete specified classes or courses of instruction;
 - (iii) obtain all or any medical treatment, other treatment or counselling;
- (e) an order reprimanding the member;
- (f) any other order that the discipline committee considers just.

(2) In addition to any order made pursuant to subsection (1), the discipline committee may order:

- (a) that the member pay to the association, within a fixed period:
 - (i) a fine in a specified amount not exceeding \$5,000; and
 - (ii) the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and the costs of legal services and witnesses; and

(7.4.1) Possible Orders

Expelled from the Association: ~~Revocation: Revoking~~ Expelling the member from the association and striking from the register ~~certificate of registration~~ removes the member from the profession for at least a year (unless the Committee specifies an ~~earlier~~ longer date), after which the onus is on him or her to apply to be permitted back into the profession. **This includes meeting the admission requirements and successfully completing the examination.** It is the harshest possible punishment for a member, but is intended primarily to protect the public interest. It should be reserved for repeat offenders and the most serious cases of misconduct or ~~unskilled practice~~ **incompetence** involving, for example, premeditation, exploitation, dishonesty or lack of integrity.

Suspension: Suspension is a temporary removal of a member from the profession, and a suspended member should not be considered a member of the Association. It is normally for a fixed period of time (except for cases of ~~unskilled practice~~ **incompetence** where suspensions could be indefinite) and could be conditional by, for example, becoming suspended or lifted if the suspended member permits an inspection of his or her practice. A suspension could also be imposed that will end upon the occurrence of an event, but it must be clear exactly what will end the suspension (for example, completing a specified course with a mark of 75% or higher). Suspensions of six months or longer are considered quite severe, while those of two months or less might be viewed as ineffective or even as a welcome break.

Terms, Conditions and Limitations: The power to impose terms, conditions and limitations provides the Committee with considerable flexibility in addressing discipline issues. Terms, conditions and limitations can be for specified or indefinite periods. A "term" involves a continuing restriction and can imply that some positive action must be done. A "condition" refers to a requirement needed in order to practice (e.g. completing a course). A "limitation" is a restriction that implies avoiding certain actions. These words are usually used together since their meanings overlap.

A term, condition or limitation must relate to the finding made by the discipline committee, must be reasonable, and must not be excessive in relation to the finding or impossible to fulfil. Examples include requirements to obtain retraining, cooperate with an investigation, restrict his or her scope of practice, and apologize in writing. They must be clearly stated, and must describe the scope of the restriction, consequences of breaching it, and what must be done to remove it.

Reprimands: A reprimand is an expression of disapproval by the practitioner's peers and the public **and is usually made in writing.** It involves the committee verbally conveying its views to

the practitioner regarding his or her conduct and how to correct the problems. Normally only the practitioner is present. The committee can direct that the fact of the reprimand be recorded on the register, but the content of the reprimand is not recorded in the register. Including a notation of the reprimand on the register means it is available to the public and results in the practitioner's name being included in the publication of the decision.

Fines: The discipline committee can impose a fine in an amount up to **\$ 5,000** and the cost of the investigation and hearing, costs of the professional conduct committee, and discipline committee and legal representation. If a fine and costs is imposed, the committee should outline the consequences of failure to pay by a specified date (e.g. a period of suspension).

Postponed Imposition of Penalty: The committee may direct that the imposition of a penalty be postponed for a specified period and not be imposed on a member if specified terms are met within that period (for example permitting the inspection of his or her practice). A postponed or suspended order acts as an incentive to encourage the member to behave in a certain manner in future. It also allows the committee to take into account mitigating factors in a serious case that would otherwise have resulted in the full order. The period for which the order is suspended should be clearly stated. The committee can delegate the power to decide whether the conditions to lift the suspension have been met (for example, the quality assurance committee could decide when the member's records have been brought up to an acceptable standard). The committee should also decide whether to note the postponed order in the register.

(7.4.2) Factors to Consider in Making Decisions and Orders

In exercising its broad discretion in making orders, the discipline committee should begin by considering the impacts on the parties affected, namely the public, the profession and the practitioner. Will the order be sufficient to protect the public, including the complainant, bearing in mind that the primary purpose of the association is to protect the public interest? Will the order act as a general deterrent to the profession and reflect how seriously the association views the conduct? Will the order both deter the member and assist in his or her rehabilitation **verses being overly punitive and destructive to the member's livelihood**. The committee should next consider the seriousness of the conduct, any factors which aggravated or mitigated the conduct, and any prior orders it has made concerning the conduct.

a. Nature of the Misconduct or Incompetence

The order should reflect the seriousness of the conduct. Court rulings have indicated that conduct that is intentional is more serious than that which is inadvertent; conduct carried on over a period of time is more serious than an isolated incident; and immoral, dishonest or criminal behaviour or behaviour which involves a breach of trust is considered serious. Conduct motivated by personal gain is considered an aggravating factor. Conduct caused in part by a psychiatric condition or a substance abuse problem, however, is considered less serious perhaps because the motivation of the member is different.

b. Prior Decisions

The committee should review its prior decisions in similar cases or, if none exist, look to decisions in similar cases from other professions or provinces. Decisions should not stray too far from precedents without good reason in order to survive court scrutiny.

c. **Prior Conduct by Practitioner**

Prior conduct can both aggravate and mitigate an order, but the rules for considering past conduct must be followed carefully. Steinecke outlines these rules as follows:

“The general rule is that the discipline committee can only consider the conduct alleged in the notice of hearing because it is unfair for the committee to receive evidence of other instances of such conduct or evidence of other forms of misconduct, given that the practitioner has not come prepared to defend him or herself against such allegations. However, this general rule has some exceptions. The first exception is that if the practitioner places his or her good character in issue, then the Association college can introduce evidence of other instances of misconduct to show that the practitioner’s character is not as good as he or she suggests. Also, if the practitioner suggests that the conduct in issue was an isolated instance, the Association college can lead evidence of other instances. Another exception is that the discipline committee can consider a prior finding of misconduct against the practitioner as an aggravating factor. The prior finding has already been proved and demonstrates that the practitioner may not have learned from the first order. Prior findings refer to findings by the discipline committee. In some circumstances, such as where the allegation is a breach of the criminal law, prior findings of the criminal court might be relied upon as well. Undue weight should not be put on a prior finding, particularly if it did not constitute similar misconduct or was made long before the proceeding at hand. Also, if the other finding was made after the conduct alleged in the current case, then it is not truly a prior finding because the practitioner has not had an opportunity to learn from the first order. It is, however, still relevant to show that the conduct was not an isolated incident.”

d. **Subsequent Conduct of Practitioner**

Although subsequent bad conduct cannot usually be used against the member, subsequent good conduct can often be a mitigating factor in deciding which order to make regarding the member. For example, the member may have made restitution for damage caused or took other steps to remedy his or her deficiencies or conduct. The passage of time without a repetition of the misconduct can also be a mitigating factor.

e. **Conduct of Practitioner’s Defence**

Opinion is mixed as to whether or how the discipline committee should consider this factor. On one hand, the member has the right to conduct a vigorous defence and the committee’s order should not be more severe if the member requires the association to prove all of its allegations. On the other hand, a plea of guilty could be considered as a mitigating factor since it represents an admission of wrongdoing and makes rehabilitation more likely. For example, the reasons behind changing a plea during the course of hearing can be very foretelling.

f. **Character of Practitioner**

Good character should be considered by the committee as a mitigating factor. Factors such as a member’s abilities, length of practice, devotion to his or her work, academic achievement and reputation can result in a less severe order, unless the misconduct is so serious that this would be out of the question. Evidence of bad character should not be introduced by the association unless the member puts his or her character into issue first.

g. Effect of Order on Practitioner

The discipline committee should consider the effects of its order on the member's practice, family life, reputation and emotional state. Evidence regarding these factors and the member's financial circumstances are therefore relevant. Sometimes, however, the member's misconduct may be so serious that an order with adverse consequences must be made in any event.

(7.4.3) Assignment of Costs.

The discipline committee can order either the association or the member to pay costs to the other although the criteria are different for each party.

a. Costs Payable by Association to Practitioner

Where the discipline committee is of the opinion that the commencement of the proceeding was unwarranted, the committee shall order that the association reimburse the member for his or her costs or such portion thereof as the committee fixes. This provision enables the member to recover some or all of his or her legal fees if the committee feels the discipline process was being abused. The committee should consider the reasonableness of the decision to refer the matter to the committee. Even if the allegations turn out to be unfounded, that does not mean that costs will necessarily be avoided, particularly if the investigation raised valid concerns about the member's practice. Reasons should be given for the decision to grant or refuse costs.

b. Costs Payable by Practitioner to Association

The discipline committee has the power to make an order "fixing costs and expenses to be paid by the member." Factors that the committee may take into account in making such an order include the nature of the misconduct/**incompetence** found to have been committed, the conduct of the member during the hearing and the relative degree of success of the parties. ~~The provision enabling the committee to make a decision on costs seems to be broad enough to cover more than just legal costs.~~⁷⁸

By policy, costs of the actual hearing and Discipline Committee are typically assigned with finding of misconduct or incompetence and include the room and meeting costs, court reporter, expenses, travel and lodgings (not wages) for the discipline committee, and discipline committee legal counsel.

The Association's Hearing costs that may be assigned include:

- The Professional conducts committees, costs, in preparing for and during the hearing associated with any legal assistance, legal representation, and expert witnesses.**
- Associated travel and lodgings costs (not wages) of the Professional Conduct Committee**

The Associations Investigation costs may be assigned and include:

- The Professional conducts committee's associated travel and lodgings costs (not wages) during the investigation.
- Any costs associated with the gathering and the analysis of information.
- Any costs associated with obtaining expert opinion, or legal advice.

c. **Procedure for Ordering Payment of Costs**

~~The issue of costs should be argued after the penalty has been decided, in order to avoid potential conflicts regarding the impact of the member's conduct during the hearing. The amount of costs should be based on records, not conjecture and the committee's power to award costs must be exercised reasonably. A cost award can be enforced by filing it with the court and using the court's enforcement methods.⁷⁹~~

When assigning costs and penalties, the order should be very specific which cost have been assigned, and include the time frame for payment.

7.5 *Written Decision and Reasons*

The decisions of the ASFP Discipline Committee will be in writing and must be able to withstand any possible appeal. The following is general discussion about providing reasons and determining creditability.

Should we add some legal stuff about, the legality and authority of the decision making and that a legal test has been met as part of the written decisions?

~~The discipline committee is required to serve its decision, with reasons, on the parties and the complainant. If the hearing was closed, the decision can be served on the complainant without reasons, at the discretion of the committee.⁸⁰ Where privacy rights of witnesses is a concern, pseudonyms may be used in the reasons. The decision and reasons can be combined in one document. One advantage to providing them separately is that the decision can be delivered before the reasons have been finalized.⁸¹~~

Reasons must both state the conclusions and why those conclusions were reached. Normally this would include responding to the evidence or defences raised by the unsuccessful party. Adequate reasons should demonstrate that a party's case has been heard and understood, explain the basis for the decision, and negate perceptions of arbitrariness or unfairness. In reviewing a decision for adequacy, a court will consider the statutory context, the nature of the case, the issue involved and the nature of the tribunal.

Witness credibility is often the basis of the committee's decision. Credibility involves the honesty of the witness and his or ability to give accurate testimony. Phrased as a formula:

Credibility = Honesty + Ability (to tell the truth)

The committee, which an appellate body will consider as being in the best position to determine credibility, must explain why it found a witness to be credible or not. A finding of credibility can be made on one or more of the following:

1. **Appearance or demeanor.** The tone and body language of a witness may affect his or her credibility. For example, confusion, partisanship, sarcasm or arrogance can indicate much as to a witness's credibility.
2. **Ability to perceive.** Was the witness in a position to make a certain observation? Was the witness concentrating on the event when it was observed? Is the witness an observant person?
3. **Ability to recall.** Does the witness have a good memory? How much time has passed since the observation? Has the witness had reason to review the memory since it was registered? Is the witness able to refresh his or her memory from notes?
4. **Motivation.** Witnesses sometimes have a reason to remember a matter in a particular way. Having something to gain or lose from the hearing or liking or disliking a party to the hearing can influence a witness's recollection or testimony.
5. **Probability or plausibility.** A powerful indicator of the truth of a fact is its probability or plausibility. A discipline committee should apply its collective common sense to the evidence of a witness when assessing probability. Plausibility is particularly important when a witness is giving an explanation or excuse for his or her questionable behavior.
6. **Internal consistency.** A common attack on the testimony of a witness is whether it is consistent throughout. Sometimes a statement made on cross-examination is inconsistent with that made in chief. Sometimes the witness is inconsistent with a prior statement which he or she has made. Where there is inconsistency, the discipline committee should look at the reason for the inconsistency when deciding its significance.
7. **External consistency.** The testimony of the witness should also be compared with externally proven facts. For example, does the testimony contradict what was said by another witness who was found to be credible by the discipline committee? Does the evidence contradict a document filed as an exhibit? Of course, one always has to accept the possibility that the other witness or the document is in error.

The committee should explain why any of these factors are applicable and must ensure its reasons are supported by the evidence.

Committee members should take careful and detailed notes during the hearing to ensure facts and evidence are accurate. Care should also be exercised in making inferences against witnesses where the issue was not put to the witness in cross examination. The committee need not review all aspects of the evidence in its reasons, so long as the reasons make it clear that the important aspects were considered.

8.0 Appeals

Section 34 of the Forestry Professionals, Act Appeals to Council

(1) A member may appeal the decision or any order of the discipline committee to the council by serving the registrar with a notice of appeal within 30 days after the decision or order if:

- (a) the member has been found guilty of professional misconduct or professional incompetence by the discipline committee; or
- (b) the member is subject to an order made pursuant to section 30.

(2) An appellant shall set out the grounds of appeal in a notice of appeal mentioned in subsection (1).

(5) On hearing an appeal, the council may:

- (a) dismiss the appeal;
- (b) quash the finding of guilt;
- (c) direct a new hearing or further inquiries by the discipline committee;
- (d) vary the order of the discipline committee; or
- (e) substitute its own decision for the decision appealed from.

(6) The council may make any order as to costs that it considers appropriate.

Most Forest Professionals Associations in Canada have only one avenue for appeal that is to the provincial appeals court. These appeal courts have the inheritance authority to review the exercise of power and the decisions made by those implementing legislation. Courts traditionally exercise their authority in terms of three prerogative writs (mandamus, prohibition and certiorari)

- Compel the public official or public body to fulfil a public duty. (*mandamus*)
- Intervene or prevent a public official or public body from doing something illegal or improper. (*prohibition*)
- Power to review the legality of a decisions made by public official or public body and to invalidate or quash that decision if found to be defective (*certiorari*).

In other words Court Appeals focus on the “legal pedigree” and not so much if the decision was “right”, in other words the “legality” of the decision and the exercise of powers.

Court appeals will seldom be a forum for debating forest management. Interested will be on the requirements and fulfilment of the statutory requirements and concerns about the evidentiary base used to make the decision or if new evidence has come to light.

In this immediately step between the Discipline Committee Hearing results and Appeal to The Court of Queens Bench, the ASFP Council can serve an important role. But by policy the ASFP Council can it may chose to narrow the scope or “natural of appeals” it is prepared to adjudicate. For example restricting all Appeals to Council to the topic of rightness and fairness of decisions, and not to accept any legality challenges as Council members are not legally trained and qualified to adjudicate. (would need a bylaw to set scope).

Procedural Guidance:

- 1.0 Following receipt of request for an Appeal, The registrar acknowledges the recipient of the request and informs council.
- 2.0 If the appeal is within scope (only the member can appeal, not a third party) the Chair of Discipline Committee working with the Registrar ensures:
 - Official notice of the hearing before council (similar to section 29) is made
 - Arranges for meeting room, and court reporter
 - Copies of Discipline Hearing transcripts, original evidence, Discipline Hearing written Decisions and orders are distributed to all parties.
- 3.0 Prior to hearing
 - 3.1 In addition to the above, a new round of disclosure is required including
 - Notice of appeal,
 - The appeal book, which contains the transcript and exhibits from the proceedings before the trial court,
 - Factums/ Briefs from the member that more completely outlines the nature and ground of the appeal.
 - Any new evidence either party intends to produce.
 - 3.2 Ensure sufficient time is allowed to both parties review the material
- 4.0 ASFP Council holds a special single purpose hearing meeting for the Appeal (i.e. not agenda item of a regular council meeting).
 - Quorum will consist of 2/3 of the active Council Members (at the time of filing the appeal), after have excluding the Chair of the Discipline Committee and Chair of Professional Conduct, and any members of Council who participated in the Hearing or Investigation panels, this may include the appointed public member.
 - At minimum at least 3 Council members are required.
 - Should Counsel Elections occur before the Appeal to Council is concluded, those active council members at the time of filing the appeal, remain the council in effect for the appeal. (by-law needed).
 - ASPF Council may obtain its own legal counsel and other experts, not for decisions making, but rather to provide advice. They may also assist in writing Council's Decision for legal clarity.
- 5.0 At the Appeal hearing of Council
 - 5.1 This is not re-trial of the Discipline Committee Hearing.
 - 5.2 Appeal to ASFP Council is similar to an Appeal to Court and is about hearing "legality" arguments associated with:
 - The implementation of authority provided in the legislation
 - The process used to reach the decision, in term of administrative law.
 - The evident base for that decision.

- 5.3 Unlike Appeal Court, ASFP Council with its expertise in forestry is in a much better position to evaluate the “rightness” of the decisions and orders of the Discipline Committee Hearing. Council in reviewing “rightness and fairness” can
- Review existing evidence and make its own conclusion
 - Accept new evidence and make its own conclusion, or return the case to the discipline committee for a new hearing
 - Accept arguments/briefs for its Council consideration.

6.0 Hearing Process includes:

- Presentations made by the member.
- Presentation made by from the Discipline Committee.
- Examination of existing and new evidence,
- Review of documentation
- In an orderly fashion, the questioning of the presenters, by the other party and by Council.
- Generally, witnesses will not be called.
- Before concluding the hearing Council may also request that arguments to a specific question be prepared by either party and provide to Council within specified (reasonable) time.

Cost Assignments

Cost of filing appeal - \$ 500.00 (refundable)

The general principle is 50/50 split of all costs will be used which includes:

- Cost of the hearing room, court reporter, and transcription of the discipline hearing, and of Appeal to Council when concluded
- Cost of Council’s Legal Counsel and experts.
- Cost of Council Members for transportation, room and lodging but not wages.

It is assume that only legitimate and complex cases will be appealed. The \$500 fee discourages frivolous appeals and a portion of this money will be used by the Association to produce the appeals book.

The 50/50 rule is use to remove bias from the system.

Appeal to Court

Section 35 A member whose conduct is the subject of an order of the council pursuant to Section 34 and may appeal that order to a judge of the court within 30 days after the date of the order of the council,

Further information can be found on the provincial court website.

9.0 Publication & Commenting on cases

Should a complaint of professional misconduct or professional incompetency was unproven there is a real risk the members reputation could still be significantly tarnished. Therefore it is important that a high level of confidentiality and discretion be used. Likewise, any active compliant file should not be openly discuss as it may influence and introduce bias into the Discipline Hearings and Appeals to Council process.

Conversely reporting of completed decisions, or at least a summary of its reasons behind the decisions and outcome helps educate the profession and the public regarding the types of conduct considered appropriate by the association

Internal Restrictions:

- When a complaint first received all information is kept confidential and is known only to the Registrar, and key members Professional Conduct Committee, during the course of their investigation.
- Council and Members the Discipline Committee are only informed that a compliant of misconduct or incompetence has been received and is under investigation. Names and particulars are not discussed.
- Should the Investigation report recommend a hearing, Council at that time, may learn of
 - The name of member.
 - Name of complainant or source of the complaint
 - The allegation as described in the “official charge”
 - The investigation report submitted to council is held in trust by the registrar until the appeal to council period is expired.
- Should a mediated settlement be reached, or complaint found to be unfounded (no investigation started). Council at that time may learn of all the particulars of the complaint/case.

Public Commenting Active File:

- The association will not comment on matters that may be the subject of a complaints resolution processes, whether as a matter of investigation or alternative dispute resolution mechanisms such as (by way of example): negotiation; arbitration; or mediation.
- Once a matter has passed through the investigation stage, and a notice for a Discipline Hearing has been issued the matter is considered to be “public”
 - The association will not take any extra steps to publicize the issuance of a notice of a Discipline Hearing.
 - The association will respond to public/media inquires by providing only the basic information such as the date of discipline hearing, the charge and the member’s name. Particulars of the case or the investigation report are not discussed.
 - The investigation report is not available for released till after the opening of the Discipline Hearing, other than to those parties listed in the legislation.

Exception: The Registrar in consultation with the appropriate committee members may decide that in a particular case, the risk of harm to the public interest and/or profession by remaining silent outweighs the potential for harm to the individual(s) involved by commenting on the matter. The Registrar will issue, or cause to be issued, a statement about that case.

The statement will give due regard to the protection of reputation of all person(s) involved and upholding the presumption of innocence. Ideally the complainant and the member will be provided with advance notice of the intention to issue a statement.

It is assume that cases of this important would be appealed to Council, and therefore members of Council can not be involved in the release of the statement.

- Discipline Hearings and Appeals to Council. These Hearings and Appeals meeting are open to the public.

Publication of Discipline Outcomes.

The ASFP will produce individual summary digests for publication on the Associations Website for each complaint received and concluded.

Where the discipline process finds a member guilty of professional misconduct or professional incompetence the name of the member involved will be included in the digest except when.

- the penalty imposed does not include suspending or rescinding a member's enrolment, and
- publication will cause grievous harm to the subject member or another identifiable individual that outweighs the interest of the public and the association in full publication.
- Where the harm is more than damage to the member's reputation or simple embarrassment that normally stems from a guilty finding.

In complaints resolved though mediation or other processes, the choice to publish or not to publish the members name will be included in the settlement documentation.