

# **Information and Evidence in the Complaints and Discipline Processes**

**By**

**David Jacobs**

*Evidence is the material that is presented to a decision-maker to establish the facts on which the decision-maker is to found his or her decision. If the thing in question is not aimed at establishing a fact – then it is not evidence. It is something else.<sup>1</sup>*

In this paper I shall present a brief overview of the complaints and discipline processes in the self-governing professions. This discussion will use as its template the regime governing the regulated health professions. The discussion will focus on some aspects of the use of evidence in each of the complaints and discipline processes. It is hoped that the elucidation of the considerations applicable to the health professions complaints and discipline regimes will provide instruction which can be generalised to other professional regulatory schemes. This paper will not provide an exhaustive compendium of the rules of evidence or of the applicable procedural rules. What follows instead is a sketch which will review and highlight some of the evidentiary rules in order to provide the reader with a flavour of the issues in the complaints and discipline processes and to raise some questions.

## **The Complaints and Discipline Processes in the Health Professions**

The complaints and review processes for the twenty one regulated health professions are governed by statutory codes having their bases in the *Regulated Health*

---

<sup>1</sup> Macaulay and Sprague, *Practice and Procedure Before Administrative Tribunals* (Scarborough: Carswell, 2001) paragraph 17.1(a)

*Professions Act, 1991*<sup>2</sup> and in related statutes, including the various profession-specific Acts, such as the *Medicine Act*<sup>3</sup> and the *Nursing Act*<sup>4</sup>. These processes are codified in Schedule 2 to the *Regulated Health Professions Act, 1991*, the *Health Professions Procedural Code* (the “Code”). The regulator’s receipt of a “complaint” (“filed with the Registrar”) triggers the complaints process. The term “complaint” is not defined in the statute and is qualified by the words “regarding the conduct or actions of a member”.<sup>5</sup> The Divisional Court has adopted the informal definition of a complaint adumbrated by the Schwartz Review<sup>6</sup>, as follows:

*(a) an expression of concern about the care provided or other aspects of the professional relationship, (b) which identifies a registrant of the governing body in question.*<sup>7</sup>

The *Code* mandates the existence of a Complaints Committee of a College of a regulated health profession (called, variously, the “Complaints Committee” or the “Committee” hereafter).<sup>8</sup> The role of the Complaints Committee is to investigate, consider and screen a complaint concerning the conduct or actions of a member which has been filed with the registrar of the College.<sup>9</sup> The result of the deliberations of the Complaints Committee may be one or more of the following: the referral of “specified allegations” of misconduct or incompetence to the Discipline Committee; the referral of the member to the Executive Committee for incapacity proceedings; the requirement that the member to appear before the panel or another panel of the Complaints Committee to be cautioned; the imposition of another non-punitive remedial response (the taking of “*action it considers appropriate that is not inconsistent with the health profession Act, this Code, the regulations or by-laws*”); or the rendering of a decision to take no action in

---

<sup>2</sup> S.O. 1991, c. 18, as amended.

<sup>3</sup> S.O. 1991, c. 30, as amended.

<sup>4</sup> S.O. 1991, c. 32, as amended. Veterinarians are governed by a parallel system. See the *Veterinarians Act* R.S.O. 1990, c. V.3.

<sup>5</sup> The *Code*, subsection 25(1).

<sup>6</sup> Health Professions Legislation Review, *Striking a New Balance: A Blueprint for the Regulation of Ontario's Health Professions: (Government of Ontario, 1989)* [the “Schwartz Review”]

<sup>7</sup> *McIntosh v. College of Physicians and Surgeons of Ontario* [1998] O.J. No. 5222, at paragraph 20.

<sup>8</sup> *Ibid.* section 10.

<sup>9</sup> *Ibid.* sections 25, 26..

relation to the complaint.<sup>10</sup> The resulting decision of the Complaints Committee is subject to review, on request, by the Health Professions Appeal and Review Board, unless the decision was to refer an allegation of professional misconduct or incompetence to a discipline committee of a college, or to refer the member to the Executive Committee of a college for incapacity proceedings.<sup>11</sup>

The Complaints Committee is charged with interlinked screening and remedial functions. As a screening body it investigates the complaint with a view to determining whether there is sufficient information to satisfy itself that (1) there is evidence which, if unanswered, could give rise to a finding of professional misconduct; and (2) the case is an appropriate one in all circumstances for the committee to refer specified allegations of a member's professional or incompetence to the Discipline Committee.<sup>12</sup> As a remedial body the Complaints Committee is informed by the provisions of the *Code*, which permit it to:

*Require the member to appear before the panel or another panel of the Complaints Committee to be cautioned, and/or*

*Take action it considers appropriate<sup>13</sup> that is not inconsistent with the health profession Act, this Code, the regulations or by-laws.<sup>14</sup>*

The Divisional Court has underscored the remedial role of the Complaints Committee by reminding it as follows:

*Perhaps the College of Nurses should consider relying more upon its complaints committee to dispose of complaints rather than referring them on to its Discipline Committee. It seems to us that the complaints committee,*

---

<sup>10</sup> *Ibid.* subsection 26(2).

<sup>11</sup> *Ibid.* section 29.

<sup>12</sup> See, *inter alia*, *Brett v. Board of Directors of Physiotherapy* (1992) 9 O.R. (3d) 613, and Richard Steinecke, *A Complete Guide to the Regulated of Health Professions Act* (Aurora:Canada Law Book, 2001) at paragraph 4.360.

<sup>13</sup> Including the referral to the Quality Assurance Committee except in respect of complaints of sexual abuse involving allegations of touching or sexual relations.

<sup>14</sup> The *Code*, subsection 26(2) 3 and 4

*under s. 8 of the Act and under s. 82(2)(c), where it is said that the committee may*

*(c) take such action as it considers appropriate in the circumstances and that is not inconsistent with this Part or the regulations or by-laws*

*might consider taking a more active part in supervising conduct that may fall short of professional misconduct or incompetence. The complaints committee may well have powers other than the dismissal of the complaint and other than referring the matter to the Discipline Committee. It should consider being more flexible in its approach to its function. It seems to us that the purpose of the creation of the complaints committee is to perform as a kind of screening agency. Its power to refer should be used only sparingly, where it feels a serious case is involved. Our view is that the Discipline Committee has rather restricted functions, either to find someone guilty of professional misconduct or incompetence, both being very grave conclusions. Even though the sanctions that it may employ include relatively minor ones, the mere fact that a nurse comes before the Discipline Committee is a serious sanction in itself. The finding that a member is guilty of professional misconduct or of incompetence is, by itself, an extremely serious finding, even though only a reprimand or a suspension may be administered as a penalty.<sup>15</sup>*

The Complaints Committee's mandate is to investigate. It is clear that it is not required to hold a hearing. The *Statutory Powers Procedure Act* does not govern the Committee's investigation.<sup>16</sup> There is no specific procedure prescribed for the conduct of the Committee's investigation and determinations beyond the statute's provision that the investigating panel of the Committee must, after investigating the complaint, consider the submissions of the member who is the subject of the complaint and consider or make reasonable efforts to consider all records and documents it considers relevant to the

---

<sup>15</sup> *Matheson v. College of Nurses of Ontario* (1979), 27 O.R. (2d) 632 at pp. 638-39, 107 D.L.R. (3d) 430 (Div. Ct.), affirmed 28 O.R. (2d) 611n, 111 D.L.R. (3d) 179n (C.A.). The statutory reference is to the *Health Disciplines Act*, R.S.O. 1990, c. H.4, the predecessor to the *Regulated Health Professions Act, 1991*.

<sup>16</sup> R.S.O. 1990, Chap.S. 22. Subsections 1(2) of the *Regulated Health Professions Act, 1991* and 1(2) of the *Code* provide that nothing in the *Act* or in the *Code* requires a "hearing" within the meaning of the *SPPA* unless there is a specific requirement to hold a "hearing". The Complaints Committee is not required to hold a hearing.

complaint.<sup>17</sup> It is also clear that the rules of evidence ordinarily applicable to civil proceedings do not apply to the investigation conducted by the Complaints Committee. Indeed the Health Professions Appeal and Review Board tends to carefully define the record of investigation and the documents and things on which the Committee's decision is based as "information" rather than "evidence" in order to underscore that such "information" is not subject to forensic testing by means of examination and cross-examination and is not generally subject to the rules on admissibility and exclusion which form the basis of the law of evidence.

In making its determination as to the result of the investigation, the Complaints Committee thus considers a variety of documents and things (including oral information) which may be inadmissible in a "hearing", whether or not governed by the *Statutory Powers Procedure Act*. While this gives the Committee great leeway to inquire into the complaint, it also means that in determining whether or not to refer specified allegations to the Discipline Committee for a hearing, it must be mindful of the rules of evidence which would obtain at such a hearing and of the probability of the admission or exclusion of information/evidence which it may have found to have been nevertheless persuasive. In other words, if the Committee is inclined to order a referral to discipline, but finds that the dispositive evidence would be inadmissible at the discipline hearing, this has to affect its decision as to whether to refer.

The record of investigation and the documents and things on which the Committee is entitled to base its decision may include investigators' notes of witness interviews, committee members' notes of witness interviews, the files, notes, records and writings of the member, the member's employer and others, professional opinions, the opinions of the complainant, the member and others (some expert, some not), insurance documents, billing records, *inter alia*. The Committee may request that the Registrar appoint an investigator, who has powers of search and seizure and can summon and

---

<sup>17</sup> The *Code*, subsection 26(2). The Registrar must provide the member with notice of the complaint and the member has thirty days from receipt of notice to provide his or her submissions. [See the *Code*, subsections 25(5) and 26(1)].

question witnesses.<sup>18</sup> It is clear from the foregoing list that the matters considered by the Committee are not constrained by the rules of evidence, except possibly to the extent that the investigation itself should be limited to matters relevant to the complaint. Beyond that, the Committee may well have in its possession and should indeed consider hearsay, opinion, otherwise privileged and other material in the investigation record which would not be admitted at a hearing.

The jurisdiction of the Committee and its statutory functions make it clear that it is without authority to render “punitive” or “penal” rulings. It cannot make findings that members are “guilty” of professional misconduct, nor can it “reprimand” the member, “sanction” the member, suspend the member, rescind the member’s licence or otherwise discipline a member. On judicial review, a court will look beyond the formal structure of determinations made by the Committee in order to ascertain whether the Committee has in fact reprimanded a member and made a finding of professional misconduct or incompetence under the cloak of providing a (remedial) caution to a member.<sup>19</sup> Similarly the Committee cannot hold out the threat of reconsidering a decision with possible consequences of referral to discipline if the member fails to comply with a remedial order, in circumstances where the Committee has determined that the complaint does not warrant any such referral in the first instance.<sup>20</sup> Nor can the Committee order damages.

These statutory and common law limitations on the remedial jurisdiction of the Committee (and on the Health Professions Appeal and Review Board when it acts as a complaint review board) fit the scheme of the *Code* which contemplates an investigative, quasi-inquisitorial screening model, without the safeguards of evidentiary rules, and the tools of examination and cross-examination. There are simply insufficient safeguards to permit such a process to affect critical interests such as professional licensing, careers and reputations, without the crucial mediation of a full hearing respecting procedural and substantive evidentiary safeguards.

---

<sup>18</sup> The *Code*, sections 75, 76, 77, 78.

<sup>19</sup> *Miao v. College of Nurses of Ontario* [1999] O.J. 1306 (Divisional Court). The Health Professions Appeal and Review Board may perform the same supervisory function on a complaint review.

<sup>20</sup> *Modi v. Ontario (Health Professions Board)* (1996) 27 O.R. (3d) 762 (Divisional Court)

## **Discipline**

The Complaints Committee's referral to discipline therefore presupposes the existence of a process which is more strictly adversarial and not investigative/inquisitorial, and which is bound by rules of evidence commensurate with the gravity of its task and the seriousness of the potential results. The starting point for consideration of the role of evidence at a disciplinary hearing is an appreciation of the rules of evidence in a modern adversarial system.

Modern rules of evidence in Canada derive from a number of sources, the most important being the adversarial system of justice and the development of the jury system. The adversarial system requires the parties to a case to adduce, before the decision-maker, the facts which tend to support their opposing positions. The decision-maker sits as a neutral evaluator of the facts presented before him or her. The fact-finding process in an adversarial system is thus quite distinct from the Complaints Committee's investigation, a scientific inquiry or the inquisitorial processes which obtain in the European and other systems based on the civil code of law. The adjudicator in an adversarial system does not 'investigate' the case before him or her, but rather weighs the quantum of proof put forward by the parties in order to determine on which side of the scales the balance falls. While an adversarial system is a powerful engine for determining the truth, it is more accurate to describe it as a vehicle for the provision of a just result as between opposing parties.

*Our mode of trial procedure is based on the adversary system in which the contestants seek to establish through relevant supporting evidence, before an impartial trier of fact, those events or happenings which form the bases of their allegations. This procedure assumes that the litigants, assisted by their counsel, will fully and diligently present all the material facts which have evidentiary value in support of their respective positions and that these disputed facts will receive from a trial Judge a dispassionate and impartial consideration in order to arrive at the truth of the matter in controversy. A trial is not intended to be a scientific exploration with the*

*presiding judge assuming the role of a research director; it is a forum established for providing justice to the litigants.*<sup>21</sup>

In a trial before a jury there are two different adjudicators: “Judge and jury” – the trier of law (the Judge) and the trier of fact (the jury). Rules of evidence have been developed over the centuries with this bifurcated adjudicative model in mind. Thus the trier of law is concerned to enforce a consistent set of rules as to what evidence can be admitted to the jury, and conversely, as to what evidence should to be excluded. For various reasons, including fairness, overarching social goals and efficiency, certain types of evidence must be excluded from the consideration of the triers of fact. This is because: some types of evidence may be inherently unreliable, not easily amenable to testing in the adversarial process and thus too frail and dangerous to factor into the considerations of the decision-maker; it may be socially desirable to maintain the confidentiality of certain types of evidence; some evidence may be too remote from or irrelevant to the matters at issue; *inter alia*.

A classic example of potentially unreliable evidence is hearsay. Hearsay evidence is evidence of a statement offered for the truth of its content by a witness who does not personally know of the truth of the statement but has heard it said. For instance: “*I know that the accused person did what he is accused of because I heard it said that he did it*”. The hearsay evidence in this instance is frail, as the witness cannot be easily questioned as to the truth of the observation of the person who the witness “heard” from (and particularly where, as in this example, the source of the hearsay is unidentified). Courts, and later governments, elaborated complex rules as to the admissibility and exclusion of evidence. Even though the majority of hearings today before courts and administrative tribunals do not involve juries, the rules as to the admission and exclusion of evidence still derive from the Judge and jury model as the essential source from which flows consideration of the protection of the process from frail, unreliable, dangerous and irrelevant evidence.

---

<sup>21</sup> *Phillips v. Ford Motor Company* (1971) 18 D.L.R. (3d) 641 at 661 (Ontario Court of Appeal)

Given the origins of the evidentiary rules in jury trials and the modern development of such rules, there is now a range of application of the rules from strict to relaxed depending on the tribunal and the nature of the proceedings. At the one end, there is generally a strict application of the rules of evidence in a criminal jury trial. At the other end, the rules are considerably relaxed before most administrative tribunals. The legislature of Ontario, for example, has enacted the *Statutory Powers Procedure Act*<sup>22</sup>, which permits administrative tribunals to admit into evidence any oral testimony, document or thing “*whether or not...admissible as evidence in court*”.<sup>23</sup> Within the range, though, proceedings before professional disciplinary tribunals are held to stricter rules of evidence than most other administrative tribunals, whether by reason of law and practice or statutory enactment. In fact some professional discipline committees are expressly not permitted, by statute, to use the less-strict rules of evidence allowed under the *Statutory Powers Procedure Act*. The *Architects Act* provides that:

---

<sup>22</sup> R.S.O. 1990, c. S-22. See, for example, the following:

*What is admissible in evidence at a hearing*

**15.** (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

*What is inadmissible in evidence at a hearing*

**(2)** Nothing is admissible in evidence at a hearing,

- (a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or
- (b) that is inadmissible by the statute under which the proceeding arises or any other statute.

Conflicts

**(3)** Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence in any proceeding.

<sup>23</sup> *Ibid.*

*Despite the Statutory Powers Procedure Act, nothing is admissible in evidence before the Discipline Committee that would be inadmissible in a court in a civil case and the findings of the Discipline Committee shall be based exclusively on evidence admitted before it.*<sup>24</sup>

Similarly, section 49 of Schedule 2 to the *Regulated Health Professions Act, 1991*, the *Health Professions Procedural Code* ( the “Code”), provides, with respect to hearings before the Discipline Committee of a college of a regulated health profession:

*Despite the Statutory Powers Procedure Act, nothing is admissible at a hearing that would be inadmissible in a court in a civil action and the findings of a panel shall be based exclusively on evidence admitted before it.*<sup>25</sup>

As a final example, the Rules of Practice and Procedure under the *Law Society Act*<sup>26</sup> applicable to disciplinary proceedings for lawyers, provide that “*The rules of evidence applicable in civil proceedings apply in proceedings under the Act*”.<sup>27</sup> The reasoning behind the application of stricter standards to the admission of evidence before discipline committees than those applicable before most other administrative tribunals is related to the serious consequences which attach to a finding of guilt before a professional discipline committee. The result of the disciplinary process for the individual professional may be the deprivation of his or her livelihood and career, and his or her discrediting before his or her peers and the public. Such potentially devastating results necessitate that findings of fact at discipline be based only on evidence which is subject to the more rigorous testing of the rules of evidence in civil courts, rather than such rules in bodies governed by the *Statutory Powers Procedure Act*.

### **Rules of Evidence: Admissibility and Exclusion**

Macaulay and Sprague have described the purposes of evidentiary rules as follows:

---

<sup>24</sup> R.S.O. 1990, c. A-26, subsection 35(6).

<sup>25</sup> S.O. 1991, c. 18

<sup>26</sup> R.S.O. 1990, c. L-8

<sup>27</sup> Subrule 11.01(1).

1. to establish a sound basis for decisions;
2. To ensure a proper balance between the harm in accepting evidence and the value in doing so; and
3. To maintain a fair and effective process.<sup>28</sup>

## Hearsay

The enforcement of the more stringent civil rules of evidence (as opposed to the more relaxed evidentiary rules followed by many administrative tribunals and legislated in the *Statutory Powers Procedure Act*) means that hearsay evidence rule will be applied and hearsay will generally be inadmissible at a discipline hearing. There are a large and confusing number of exceptions to the hearsay rule, which have been subjected to much critical comment, and these exceptions will not all be adverted to in this paper. Suffice it for present purposes to state that such exceptions include admissions against interest by a party, dying declarations, business records, *res gestae* (this term includes declarations coincident with relevant acts and spontaneous declarations), and previous testimony. In addition, the Supreme Court of Canada has ruled that hearsay may be admissible if it meets the indicia of necessity and reliability together with fairness to the accused.<sup>29</sup> In that particular case the Supreme Court found that a child's evidence of sexual abuse provided through the mother, which would be otherwise inadmissible or which would cause the child trauma if the child was forced to testify, and which appeared to be reliable based on various indicia including the nature of the child's allegations, should be admitted.

¶ 29 *The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.*

---

<sup>28</sup> See *supra*, footnote 2 at paragraph 17.1(d)

<sup>29</sup> *R. v. Khan* [1990] 2 S.C.R. 531

¶ 30 *The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.*

¶ 31 *In determining the admissibility of the evidence, the judge must have regard to the need to safeguard the interests of the accused. In most cases a right of cross-examination, such as that alluded to in *Ares v. Venner*, would not be available. If the child's direct evidence in chief is not admissible, it follows that his or her cross-examination would not be admissible either. Where trauma to the child is at issue, there would be little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination. While there may be cases where, as a condition of admission, the trial judge thinks it possible and fair in all the circumstances to permit cross-examination of the child as the condition of the reception of a hearsay statement, in most cases the concerns of the accused as to credibility will remain to be addressed by submissions as to the weight to be accorded to the evidence, and submissions as to the quality of any corroborating evidence.<sup>30</sup>*

## **Opinion Evidence**

Similarly, opinion evidence is generally inadmissible, except the opinion evidence of an expert. This 'rule' has also been roundly criticized especially insofar as it is not always clear as to how to draw a bright line separating 'fact' and 'opinion' evidence. A witness' observation of what happened may in part consist of his or her opinion as to the meaning of an event or sequence of events. Some matters of opinion based on observations within the experience of a lay witness may be admissible where it may be too subtle or complicated to require the provision of pure 'fact' evidence. An example of

---

<sup>30</sup> *Ibid.* at 546, 547.

such admissible opinion evidence would be the opinion of a lay witness as to the speed at which a car was travelling.<sup>31</sup> A witness' opinion that a car was traveling "very fast" should be admissible without the necessity of qualifying the witness as an expert in automobile velocity calculations.

In any event, while the rule against the admission of lay opinion evidence may not always be strictly applied, courts will generally exercise discretion to exclude evidence which provides an opinion on a pure question of law (for example: "I think that the member was negligent"). This has sometimes been expressed as the "ultimate issue" rule - a witness (lay or expert) must not express an opinion as to the ultimate issue which the trier must adjudicate on. The rule stated this broadly is no longer strictly applicable. The rule seems to be restricted now to the aforementioned prohibition on evidence of opinions on purely legal questions, and to a prohibition on the evidence of opinions as to whether a particular witness is telling the truth.

As has been adverted to above, an exception to the rule against opinion evidence is made in the case of the evidence of expert witnesses. The *Regulated Health Professions Act, 1991* provides something of a code (albeit an incomplete code) of rules for determining the admissibility of expert evidence. The *Code* provides that expert evidence is admissible at discipline if the opposite party is given the identity of the expert and a copy of the expert's written report or, if there is no written report, a written summary of the evidence at least 10 days before the discipline hearing.<sup>32</sup> Additionally,

---

<sup>31</sup> See *R. v. Graat* (1982) 31 C.R. 289 (S.C.C.)

<sup>32</sup> The *Code*, sections 42, 42.1. See also section 66, which provides:

***Reports of health professionals***

*(1) A report prepared and signed by a health professional containing his or her findings and the facts upon which they are based is admissible as evidence at a hearing without proof of its making or of the health professional's signature if the party introducing the report gives the other parties a copy of the report at least ten days before the hearing.*

***Testimony of health professionals***

*(2) A health professional may not give evidence in his or her professional capacity at a hearing unless a report, prepared and signed by the health professional containing his or her findings and the facts upon which they are based, is introduced as evidence.*

***Cross-examination***

*(3) If a report described in subsection (1) is introduced by a party, the other parties may summon and cross-examine the person who prepared the report.*

the disciplinary body should permit an inquiry into the expert's expertise before permitting the expert to provide opinion testimony. It has been suggested that such an inquiry depends on the variable application of four criteria:

*...relevance, necessity in assisting the trier of fact, the absence of an exclusionary rule and a properly qualified expert.*<sup>33</sup>

## Privilege

Privileged evidence may not be admissible at the discipline hearing. The categories of privilege include solicitor-client privilege, materials obtained and prepared in anticipation of litigation, "without prejudice" communications, and more. Statutes may form the basis for a claim akin to privilege. For instance, Children's Aid Society records and certain psychiatric records may be immune from disclosure. It has been suggested that there exist counselling and informant's privileges.<sup>34</sup> The categories of privilege are not closed. Dean Wigmore suggested a broad fourfold test to determine whether a claim of privilege should be sustained in respect of communications:

- (1) *The communication must originate in a **confidence** that they will not be disclosed.*
- (2) *The element of **confidentiality must be essential** to the full and satisfactory maintenance of the relation between the parties.*
- (3) *The **relation** must be one which in the opinion of the community ought to be sedulously **fostered**.*
- (4) *The **injury** that would inure to the relation by reason of the disclosure of the communications must be **greater than the benefit** thereby gained for the correct disposal of the litigation.<sup>35</sup>*

---

### *Exception*

*(4) A panel may, in its discretion, allow a party to introduce evidence that is inadmissible under this section and may make directions it considers necessary to ensure that the other parties are not prejudiced.*

<sup>33</sup> David M. Paciocco and Lee Stuesser, *The Law of Evidence* (Toronto: Irwin Law; 1996), at 119, citing *R. v. Mohan* (1994) 29 C.R. (4<sup>th</sup>) 243 at 251-252 (S.C.C.)

<sup>34</sup> Richard Steinecke, *supra*, footnote 13 at paragraph 6.380.

<sup>35</sup> Wigmore, cited in David M. Paciocco et al., *supra*, footnote 34 at 133.

## Statutory Limitations

The *Regulated Health Professions Act, 1991* provides some statutory bars to the admission of evidence. For example, written or documentary evidence against a member is not admissible at a discipline hearing unless the member is given an opportunity to review such evidence at least 10 days before the hearing. Similarly, the evidence of a witness is not admissible against a member unless the identity of the witness is disclosed to the member at least 10 days before the hearing. The discipline panel can exercise discretion to admit evidence inadmissible by reason of failure to disclose in a timely fashion, in which case the panel may make directions it considers necessary to ensure that the member is not prejudiced.<sup>36</sup> The courts have further imposed broad disclosure obligations on the prosecution, mandating production to the defence of witness statements, exculpatory evidence and even, in appropriate circumstances, psychiatric reports and other matters.<sup>37</sup>

## The Burden and Standard of Proof

The presentation of evidence in the discipline hearing will be in the main through the examination and cross-examination of witnesses. The parties will be subject to the normal rules of examination, including the prohibition against leading witnesses in direct evidence, and against asking irrelevant questions. The Prosecution will generally proceed first (“assume the procedural onus”) as it bears the burden of proving its case against the member. There are two elements of the burden of proof:

*To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof. The standard differs in criminal and civil cases.*<sup>38</sup>

---

<sup>36</sup> The *Code*, section 42. See section 42.1 which applies to disclosure by the member.

<sup>37</sup> See, for example, *Markandey v. Board of Ophthalmic Dispensers* (1994), 46 A.C.W.S (3d) 75 (Ont. Ct. Gen. Div.), *R. v. O'Connor* (1995), 130 D.L.R. (4<sup>th</sup>) 235 (S.C.C.), *Solicitor v. Law Society of British Columbia* (1995), 128 D.L.R. (4<sup>th</sup>) 562 (B.C.S.C.)

<sup>38</sup> *Halsbury's Laws of England*, vol. 17, 4th ed. (London: Butterworths, 1976) at p. 16, para. 19, cited in *P.L. v. College of Physicians and Surgeons of the Province of Alberta* [1999] A.J. No. 442 at paragraph 63, (Alta. Ct. App.)

While the criminal standard of proof is “beyond a reasonable doubt”, the civil standard, which is applicable in administrative hearings, is “on a balance of probabilities”. However, the civil standard is not inflexible and differs between different types of civil or administrative hearings. In the leading case of *Re Bernstein and College of Physicians and Surgeons of Ontario*<sup>39</sup>, it was held that:

*In my view discipline committees whose powers are such that their decisions can destroy a man's or woman's professional life are entitled to more guidance from the Courts than the simple expression that "they are entitled to act on the balance of probabilities". By referring to the decisions of several distinguished jurists I hope I have made it easier for them to understand the kind of proof required before a conviction can be entered in a particular case.*

*The important thing to remember is that in civil cases there is no precise formula as to the standard of proof required to establish a fact.*

*In all cases, before reaching a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred, and whether the tribunal is so satisfied will depend on the totality of the circumstances including the nature and consequences of the fact or facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding.*

*The grave charge against Dr. Bernstein could not be established to the reasonable satisfaction of the Committee by fragile or suspect testimony. The evidence to establish the charge had to be of such quality and quantity as to lead the Committee acting with care and caution to the fair and reasonable conclusion that he was guilty of the charge. In this case where Dr. Bernstein, a man of good reputation swore that no impropriety occurred between himself and Jo-Anne Johnston it would take very strong evidence to destroy his defence of his reputation.*

*In my view the evidence in support of the charge was not sufficiently cogent to permit the Discipline Committee to make the finding it did and that finding must be set aside.<sup>40</sup>*

---

<sup>39</sup> (1977), 76 D.L.R. (3d) 38 (Divisional Court.)

<sup>40</sup> *Ibid.* at 61.

It has been suggested that the standard of proof for conviction at discipline should be “clear and convincing and based upon cogent evidence which is accepted by the tribunal”.<sup>41</sup> In this context it is worth remarking on the conduct of the disciplinary panel during the presentation of the evidence. The discipline process demands a relatively high civil standard of proof and adherence to the civil rules of evidence. While they may occasionally be tempted to “descend into the arena”, question witnesses and elicit “cogent evidence”, members of the hearing panel would be well advised to judiciously limit their questions and interventions to the clarification of confusing testimony. The admonitions in the *Phillips v. Ford Motor Company* decision cited earlier<sup>42</sup> are worthy of rehearsing: tribunal members are not engaged on an inquiry, they sit as impartial adjudicators. They are impartial adjudicators on a process with potentially devastating consequences for the member who is subject to discipline. Particularly in a discipline hearing, the attempts of tribunal members to elicit proof of facts is likely to appear as prosecutorial, as will any attempt to ask questions of witnesses in areas which the parties have not explored. The danger lies in the creation of an appearance that the tribunal is using its office on the side of the prosecution and relieving the prosecution of its obligation to discharge its burden of proof.

### **In lieu of a conclusion**

Finally, the tribunal is entitled retain independent legal counsel<sup>43</sup> to advise as to how to navigate the maze of common law, statute, regulation and rule and in the final analysis, so as that the tribunal can more easily comply with the direction of the law embodied in the *Code*: “*the findings of a panel shall be based exclusively on evidence admitted before it*”.<sup>44</sup>

The Discipline and Complaints Committees perform crucial and complementary functions. It is the heavy responsibility of members of both committees to comprehend the scheme of the law and legislation which describes and circumscribes their roles in the provision of fairness to the professional under investigation and discipline, in insuring

---

<sup>41</sup> *Ibid.* at 76.

<sup>42</sup> *Supra*, footnote 22.

<sup>43</sup> See the *Code*, section 44.

that the public interest is served and protected and in maintaining and upholding the standards of the profession.

---

<sup>44</sup> The *Code*, section 49.