COMPLAINTS INVESTIGATION COMMITTEE
Interim Suspension/Restrictions Guideline

A. Introduction

S. 68 of *The Legal Profession Act*, S.M. 2002, c. 44 (the "**Act**") empowers the Complaints Investigation Committee (the ("**Committee**") pending the resolution of a disciplinary proceeding against the member, to suspend a member from the practice of law or impose restrictions on a member's practice.

As this power can be exercised before the member fully knows the charges he/she is facing and before he/she has exercised his/her right to defend the charges of professional misconduct, it is regarded as a draconian power to be used sparingly. The test to be met will be more fully articulated below.

A member who is suspended by the Committee on an interim basis has a right of appeal to the Court of Queen's Bench pursuant to s. 75(1) of the Act.

B. Procedural Matters

Legal Counsel (and other Law Society employees) have a restricted role at urgent meetings because, unlike most of our meetings, a person's right to practice and livelihood may be at stake. While we will attend the meeting at the same time that the member is in attendance, the principles of natural justice also require that we absent ourselves at the same time as the member.

In *McIntyre v. College of Physicians and Surgeons of Manitoba (1991), 72 Man. R. (2d) 264 (Q.B.)*. DeGraves, J. found generally that the presence of an investigator at a hearing without the other side being present and entitled to be heard could vitiate the proceedings if the investigator's presence would lead to an apprehension of bias to a reasonable person or to actual bias.

DeGraves, J. further stated that in a *certiorari* review, the court must be scrupulously careful in determining whether the fundamental criteria of a fair hearing were not only observed, but seen to be observed. He found that it is no answer to say that the party whose presence has been challenged, did not participate as the presence of the investigators gives moral validity to their findings and recommendations, influencing the adjudication.

See also *Braemar Bakery Ltd. v. Manitoba (Liquor control Commission) (1991), 127 Man. R. (2d) 257 (C.A.)* where Monnin, J.A. approved of the notion that the presence of an investigator during the Committee's deliberations creates a reasonable apprehension of bias which renders the decision void.

A typical urgent meeting will unfold in the following fashion:

1. The Law Society learns of facts which cause us sufficient concern that the public may be at risk.

2. We contact the Chairperson of CIC who will direct that we convene an urgent meeting and invite the member to appear. [(Rule 5-72(5)]

3. We will canvass CIC members as to their availability to attend an urgent meeting in order that we can meet our quorum requirements (three Committee members, one of whom must be an elected bencher).

4. A letter is immediately served upon the member advising of the date and time of the meeting and the need for his/her appearance to address the concerns (generally outlined). The member is advised in the letter that he/she may be charged and may be suspended on an interim basis if the Committee members determine that the public is at risk. The member is encouraged to retain counsel and is asked to confirm his/her attendance at the meeting and, if available, the name of his/her counsel.

5. To the extent possible and time permitting, written materials are prepared and copies are provided to all members of the Committee as well as to the member.

6. The Committee will convene, in the absence of Law Society staff members, one-half hour before the appearance to discuss the concerns and issues.

7. The member will appear with counsel and Law Society staff members will join the meeting at the same time.

8. Law Society counsel will provide any relevant updates to the Committee in the presence of the member.

9. The member will be invited to make a submission.

10. The Chairperson will invite the Committee members to ask questions of the member.

11. The member will be invited to make a concluding submission.

12. The member and all Law Society staff members will absent themselves from the meeting while the Committee members deliberate on whether charges ought to be authorized against the member.

13. If the Committee authorizes charges against the member and if considered necessary, the Committee will then deliberate on whether or not the public is at risk by the member's ongoing practice of law and what, if any, restrictions, including suspension, are required to protect the public.

14. The Committee will invite the member and the Law Society staff members to return to the meeting to either:

    a) advise of its decision; or

    b) request submissions on the need to interim suspend, impose restrictions or seek an undertaking from the member.

15. If submissions are made, the Committee will again excuse the member, his/her counsel and Law Society staff to deliberate.

16. The Committee will invite the member and Law Society staff to return to the meeting to advise of its decision.

17. If the Committee has authorized charges of professional misconduct and has directed that an interim suspension is required in order to protect the public, the Chairperson of the meeting will issue brief written reasons. While Complaints Resolution Counsel can assist in the drafting of the reasons, the reasons themselves must be at the direction of the Chair.

Please refer to **Tab 3**, for the Chairperson's checklist which may be referred to on any personal appearance before the Committee.

C. The Test

1. After determining that a charge ought to be laid and if the Committee is then considering whether or not to interim suspend the member or impose restrictions on the member's practice, the Committee must find that it is necessary to do so to protect the public.

2. In *Chen v. The Law Society of Manitoba 1999 CanLII 14541 (Mb. Q.B.)*, Schulman, J. stated

> *The proper question to be addressed is whether there is significant risk that members of the public would be harmed if the Committee permitted Ms Chen to practice until the trial of the citation.*

3. Gavin MacKenzie wrote in his book *Lawyers and Ethics: Professional Responsibility and Discipline*, Carswell 1993, at p. 26-36.1:

> *The courts have held that where statutes expressly empower governing bodies to issue interim suspension orders, such orders should be used sparingly. An interim suspension order may be made when it is necessary to protect the public or when a practitioner has flouted the authority of the governing body.*

D. Practical Considerations: Interim Suspensions, Restrictions & Undertakings

While the test is easy to articulate, experience has shown that Committees struggle with balancing the need to protect the public with the member's right to pursue his/her livelihood until he/she receives a full hearing on the merits.

1. Interim Suspensions

Generally, interim suspensions are imposed where undertakings and restrictions are not sufficient to protect the public. Circumstances in which members have been interim suspended include where there has been significant and far reaching breaches of integrity, where the member is ungovernable and where the member has engaged in further deceptive conduct during the course of the investigation.

Specific examples:

1. Member A acknowledged in the course of the meeting that he had misappropriated funds exceeding $200,000.00 and had shredded all of his client files after receiving notice from the Law Society that he had to appear before the Committee. The Committee concluded that the only means by which to protect the public was to issue an interim suspension.

2. The Committee had *prima facie* evidence that Member B had misappropriated funds in small amounts from numerous clients. Initially, the Committee imposed restrictions on the member's practice. However, the member did not comply and further investigation revealed a more significant misappropriation and breach of an undertaking to the Court. Given the member's lack of cooperation and the further evidence of the breaches of integrity the Committee concluded that an interim suspension was the only appropriate alternative.

3. Member C was arrested and incarcerated on serious *Criminal Code* charges, including numerous counts of sexual assault of minor clients. Interim suspension was the only option as the member was denied judicial interim release. Even had the member been released, interim suspension would have been appropriate given the vulnerability of and the risk to the clients.

4. Member D was facing serious criminal charges, some in relation to her immigration practice. Member D had also misappropriated a retainer from one client. The member had also only recently left her firm and was practising out of her home. In the course of the meeting, the member refused to respond to questions from the Committee, on the advice of counsel. Supervision would have been entirely inadequate and the member was suspended.

5. Member E, a sole practitioner, appeared to be suffering from the effects of alcoholism and was charged with misappropriating cash retainers (i.e. not depositing into trust). Member E was also not servicing his clients. While in the throes of his addiction, there would be no restrictions, such as supervision, that would protect the public and the member was suspended pending the resolution of the charges.

2. Restrictions

Restrictions can be an effective means of protecting the public where the Committee is of the view that they will prevent the conduct that is the subject of the charges and because the restrictions would be disclosable to the public should any public inquiry be made of the Society.

Specific examples:

1. Member F had a lengthy troubling history of trust accounting rule breaches. The history was so extensive that it called into question the member's governability. The member genuinely appeared to want to comply and

accordingly, the Committee first accepted an undertaking from the member to do certain things. However, the member failed to comply (at all) with the undertaking, appeared back before the Committee, was charged with breaching the undertaking and restrictions were imposed. They included that the member was required to practice under supervision and was required to relinquish all control over his trust account.

Notably, the supervision turned out to be ineffective as the Society determined that the member was misappropriating cash retainers. The member withdrew pending the resolution of new charges. He has since been disbarred.

2. Member G had misappropriated funds form one estate and had acted in a conflict of interest – borrowing funds from the estate without providing proper security. The member was not cooperating with our investigation and acknowledged in the course of the meeting an alcohol addiction. The member was placed under strict supervision (weekly file review) and was required to have a co-signor on trust accounts. In addition, he had to provide written confirmation of his twice weekly attendance at AA meetings.

3. Member H displayed evidence of some mental health problems. The Committee asked Member H if she would provide an undertaking to practise under supervision, to cooperate with a psychological assessment and follow the recommendations of the assessment. The member refused to provide such undertaking and the Committee imposed supervision and a psychological assessment as a condition of practice.

3. Undertakings

An undertaking is an attractive alternative to the member because there is no publication and if someone were to make an inquiry of the Society about the member's status, the undertaking would not be disclosed.

An undertaking, genuinely offered, is an attractive alternative to the Law Society because there is certainty and the member is cooperative.

As an undertaking is a promise by the member, it is generally not considered to be an effective measure of protecting the public when the member has been charged with a breach of integrity, unless the undertaking is to immediately withdraw from practice.

Undertakings have been accepted in a number of different scenarios. In five separate matters, the Society accepted an undertaking from the member to withdraw from practice pending the resolution of the charges. By doing so, the member avoided publication in a newspaper as is mandated by the Act where a suspension is imposed and the Society was satisfied that the member would not appeal an order of interim suspension.

In other cases where the public was at risk, not because of a fundamental breach of integrity but due to other significant concerns such as incompetence,

governability or seriously deficient trust accounting records, undertakings were accepted to practice under supervision and/or to close all trust accounts.

In two further cases, the member was charged with misappropriating funds from his firm although no client funds had been misappropriated. In both cases, the member had lost his employment and had acknowledged the conduct. The Committee determined to accept an undertaking that the member could only practice in a firm setting, had to practice under supervision and could have no signing authority on a trust account.

Summary – Facts to Consider

Although each case turns on its own facts, and keeping in mind that the ultimate test is whether or not the public requires protection while the charges are pending, we will outline some factors which tend to suggest a particular resolution.

Factor	Interim Suspension	Restriction	Undertaking
Inability to prevent the conduct through other means	X		
Egregious breaches of integrity, with an element of planning and forethought	X		
Efforts to conceal the conduct in question during the investigation	X		
Protection of the public requires publication of the member's cessation of practice	X		
Conduct can be prevented through other means		X	X
Conduct includes breaches of integrity		X	
Protection of the public would include advising persons who inquire of the Law Society		X	
No breach of integrity, but public requires protection			X
Genuine offer of undertaking as opposed to extracting an undertaking from the member			X

An example where the imposition of restrictions would be ineffective in preventing the conduct at issue would be where a member has misappropriated cash retainers. Supervision and a restriction on a trust account could not prevent such conduct.

Another example would be where a member engaged in fraudulent conduct (forging documents, etc) so as to misappropriate funds. We would argue that it is

impossible to supervise a person who has demonstrated an ability and willingness to go to great lengths to commit theft.

Where there has been:

a) misappropriation;
b) an element of dishonesty with respect to funds (e.g. theft from firm or transferring funds from trust on account of fees without the clients' knowledge);
c) repeated trust accounting rule breaches;

we would suggest that, at minimum, the member should be restricted from being the sole signing authority on a trust account. Depending on the conduct, the Committee may remove the member from the trust account entirely or require a co-signatory.

Additionally, where the member's conduct could be prevented by a third party reviewing the files prior to the issuance of funds or by ensuring that the member is being responsive to clients or the Law Society, the requirement of a supervisor is appropriate.

E. Reasons

1. A member whose right to practice law has been suspended under s. 68 may appeal the suspension to the Court of Queen's Bench. (s. 75(1))

2. *Except perhaps in cases involving urgency where it is impractical to provide reasons . . . when the Committee suspends a lawyer from practice under s. 50(1)* [now s. 68] *it ought to give meaningful reasons in order to permit the lawyer to know the basis upon which he or she has been suspended and to enable the lawyer to consider whether to appeal.*

   Chen v. Law Society of Manitoba 1999 CanLII 14541
   (Man. Q.B. per Schulman, J.)

3. It is permissible for Law Society discipline counsel to assist in the drafting of the reasons, *as long as it is the complete and uninfluenced reasons of the committee and the contribution from counsel [is] solely writing advice, and not legal advice.*

   Bovbel v. Canada (Minister of Employment and Immigration)
   F.C.J. No. 190,5 and 6.

4. The aim is to ensure that there is no apprehension of bias.

5. At **Tab 4**, you will find samples of Reasons for Decision issued by former Committee Chairpersons. In each case, the reasons are brief and essentially set out a brief recitation of the facts, the charges that have been authorized and why the facts give rise to the Committee's findings that the public would be at risk if the member continued to practice law until a determination on the charges.