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1. How did you get to the stage where a Discipline Hearing is necessary?

- Considerations prior to moving forward toward a citation:
 - Is the investigation complete?
 - Under many/most statutory regimes the decision to issue the citation terminates the investigation and often the powers of the investigative committee
 - If you think that that there is more that you need to know - best to do it now
 - Eg. Investigative techniques such as practice inspections/audits - often much more difficult if not impossible to do in the context of a disciplinary proceeding.
- The decision maker (usually a committee) decides to issue a citation which is the first step in initiating an inquiry

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2. THE DISCIPLINE HEARING PROCESS

A. Commencing the Discipline Process

- Decision to initiate an inquiry marks the termination of the investigative stage and the commencement of an adjudicative phase
 - Distinguishing features of a the inquiry process:
 - Adversarial process - the issuance of citation means in effect that there is a dispute between the regulator and the registrant/member
 - Level of natural justice and fairness increases

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2. THE DISCIPLINE HEARING PROCESS

A. Commencing the Discipline Process

- Objective - a hearing which is:
 - FAIR
 - TIMELY
 - COST EFFECTIVE

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2. THE DISCIPLINE HEARING PROCESS
B. The Citation/Notice of Hearing
- what you need to know

- The citation is the “charging” document and its drafting has significant implications for the proceedings:
 - Determines relevancy for disclosure purpose
 - Determines length of hearing
- Content of the Citation:
 - Case law is clear that the language of a citation does not have to be as precise as a criminal charge
 - In my experience many allegations of inappropriate conduct are dismissed because of the wording in the citation

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2. THE DISCIPLINE HEARING PROCESS
B. The Citation/Notice of Hearing
- what you need to know

- General Considerations and recommendations:
 - More is not necessarily better - consider the true nature of the conduct you want reviewed and do not “pile on”
 - Best to get it right at the beginning rather than need to amend

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2. THE DISCIPLINE HEARING PROCESS
C. The Participants

- The parties - the regulator (“prosecutor”) and the regulated (“respondent”, member, registrant)
- Non-party participants (as permitted by statute/panel)
- Complainants
 - Unless provided for in the governing legislation (Act, Bylaws) complainants have no status at the hearing stage other than being witnesses.
 - Withdrawal of a complaint does not result in the discipline process concluding

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2. THE DISCIPLINE HEARING PROCESS
C. The Participants

- The Regulatory Body staff
 - 2 areas:
 - “Registry function”
 - Setting of hearing date
 - Managing facilities
 - Registrar/deputy registrar
 - Certain statutory duties such as amending citation, directing prehearing conference
 - Instructing the “prosecution”

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2. THE DISCIPLINE HEARING PROCESS
C. The Participants

- The Adjudicators
 - Pre-hearing Chair
 - Chair of the Discipline Committee (motions brought prior to the hearing)
 - Hearing Panel member(s)
- Independent Legal Counsel (counsel to the hearing panel)

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2. THE DISCIPLINE HEARING PROCESS
D. Role of the “Prosecutor” on behalf of the Regulator

- Philosophy 101
- **R. v. Boucher** [1954] S.C.J. No. 54
- *It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly.*

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2. THE DISCIPLINE HEARING PROCESS
D. Role of the "Prosecutor" on behalf of the Regulator

- *The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.*

-Rand, J.

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2. THE DISCIPLINE HEARING PROCESS
D. Role of the "Prosecutor" on behalf of the Regulator



* I'm hoping this big stick will give me a **mandate**.*

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2. THE DISCIPLINE HEARING PROCESS
D. Role of the "Prosecutor" on behalf of the Regulator

- Philosophy 102
- "The Big Stick"
- Power of the regulator vs the individual
 - Financial
 - Resources (human and otherwise)
- Seriousness of an accusation
 - Reputation
 - Financial
 - Psychological
- Potential ramifications of a finding
 - Livelihood and career

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2. THE DISCIPLINE HEARING PROCESS
D. Role of the "Prosecutor" on behalf of the Regulator



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2. THE DISCIPLINE HEARING PROCESS
D. Role of the "Prosecutor" on behalf of the Regulator

- Philosophy 103 - Natural Justice
- AKA: Procedural fairness, fundamental justice, fair play
- Three main components:
 - Notice
 - Opportunity to be heard
 - Have response heard and determined by an impartial decision-maker
- Content of duty varies depending on context and what's at stake
- Recommend developing a culture of fairness and transparency

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2. THE DISCIPLINE HEARING PROCESS
E. Disclosure Obligations

- Statutory (governing statute/bylaws/rules)
 - Often establishes minimum timelines
 - Preferable to do as soon as possible to facilitate possible settlement and facilitate hearing hearing
 - Evergreen
- Fairness
 - Common law - *R. v. Stinchcombe* [1991] 3 S.C.R. 326
 - Purpose is to ensure fairness
 - Both inculpatory and exculpatory evidence must be disclosed
 - Evergreen

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2. THE DISCIPLINE HEARING PROCESS
E. Disclosure Obligations

- *Markandey v. Ontario (Board of Ophthalmic Dispensers) [1994] O.J. No. 484 (O.C.G.D.)*

... tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a (member's) position, in a timely manner unless it is privileged as a matter of law...

The absence of a request for disclosure...is of no significance. The obligation to make disclosure is a continuing one.

-Trafford J.

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2. THE DISCIPLINE HEARING PROCESS
E. Disclosure Obligations

- There is no disclosure obligation on the defence (except with respect to expert reports) in the absence of statute/bylaw/rule

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2. THE DISCIPLINE HEARING PROCESS
F. Pre-hearing Conferences

- Voluntary vs. mandatory - will depend on statutory framework
- The earlier the better
- Very effective mechanism to facilitating hearing and enhancing potential for settlement
- Encourages dialogue between the parties (or their counsel)
- Can result in a narrowing of issues, identification of non-contention
- Courts have moved to a case-management model which regulators should consider in respect of complex/lengthy cases

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3. HEARING PREPARATION
A. How to enhance settlement potential

- Relationship building/dialogue between the parties counsel
- Timeliness
- Application of the philosophy described above - a culture of transparency and fairness
- Avoid adversarial behaviour/positioning

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3. HEARING PREPARATION
B. Determining what you need to prove the allegations

- The onus is on the regulator to prove each allegation in the citation (as it appears in the citation)
- The standard or level of proof is the civil standard of “balance of probabilities”
- *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 SCR 41

- Methods of proof:
 - Admissions or agreement as to facts
 - Witness testimony
 - Documents

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3. HEARING PREPARATION
C. Witnesses

- Philosophy 104
- Few people want to come and give evidence
- Recognize and manage their reluctance
 - They must confront a professional or a colleague in foreign place (a hearing room)
 - They will lose wages
 - They might get sued
 - They might embarrass themselves
 - They can't remember
- All witnesses are apprehensive - some terrified
- Issue Notices to Appear

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3. HEARING PREPARATION
C. Witnesses

- Early notification and content of notification letter
- Social media warning
- Interview early
 - Explain their role in the hearing process (Cf; Philosophy 101)
 - Explain the mechanics of the hearing
- Prepare a summary of evidence/ could be as a “will-say” statement
- After witnesses are interviewed re-evaluate the allegations in the citation
- Witness hearing preparation document/sheet to give to them after interview

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3. HEARING PREPARATION
D. Documents

- Non-contentious documents should be identified for a joint brief
- Document agreement between the parties

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3. HEARING PREPARATION
E. Don't forget the other side

- Once the required disclosure has been done it is productive to attempt settlement discussions
 - Everyone has a better sense of what will be proved
 - Essential component of fruitful settlement discussion is knowing what penalty the regulator will seek

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3. HEARING PREPARATION F. The Hearing Panel

- Mechanics of panel selection and composition are usually legislated
- Early panel selection permits:
 - Notification of the parties who then have an opportunity to raise issues of bias/conflict in a timely way
 - Panel members to assess their individual conflict/bias and to get legal assistance if necessary
 - Training, if necessary

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3. HEARING PREPARATION G. Hearing Panel Training

- Why provide training:
 - To give the panel the basic tools it needs to do a difficult job
 - To demonstrate to the public that the subject matter of the hearing is being dealt with in fair/balanced manner
 - Respect for the respondent who has a lot at stake
 - To facilitate the hearing
 - To avoid appeal/judicial review which is expensive
 - No place for "on the job training"

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3. HEARING PREPARATION G. Hearing Panel Training



"It's OK, this is a teaching hospital. Some people just have to learn that the hard way."

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3. HEARING PREPARATION
G. Hearing Panel Training

- Types of training:
 - General - conferences
 - Specific - private/focus on rules and issues specific to the regulator
 - Self-directed - attend a hearing of your or another regulatory body; attend court
- Do not have counsel who appears before the tribunal participate in the training of tribunal members

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3. HEARING PREPARATION
G. Unrepresented Parties

- Unrepresented parties in the investigative and discipline stages are the norm for many regulators
- Reasons:
 - Cost of legal representation
 - Belief that they can “handle it”
- Issues from the regulator’s perspective:
 - self-regulated professionals:
 - by definition not objective
 - tend not to know the process

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3. HEARING PREPARATION
G. Unrepresented Parties

- are wary of the regulators lawyers
 - difficult to get settlement
 - difficult to get document agreement or agreed statement of fact
- additional COST

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3. HEARING PREPARATION
G. Unrepresented Parties

- Chief Justice Bauman has said that it is the obligation of the court to “throw self-regulated persons a life preserver”
- That means that hearing panels will have to be trained in respect to dealing with people without legal counsel
- My approach - try to build trust through dialogue/meeting

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3. HEARING PREPARATION
H. Independent Legal Counsel

- Need can be determined on a case by case basis
- Pros:
 - Ensure that the legal requirements of a fair hearing are met
 - Facilitate the application of appropriate procedures
 - Takes pressure off of panel members, especially the Chair
 - Facilitate panel decision making during the hearing (objections to evidence, documents; disclosure complaints; jurisdictional issues)
 - Assist in decision writing

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3. HEARING PREPARATION
H. Independent Legal Counsel

- Cons:
 - Cost
- Models of Independent Legal Counsel:
 - “On call” - confirmed available to take telephone call (or attend) as required.
 - Pre and post hearing attendance (pre-hearing preparation and post-hearing assistance with decision writing)
 - Full time attendance

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4. Decision Writing

- Well-reasoned, well written - “sufficient” reasons are an essential part of the hearing process and of natural justice
- *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board) 2011 SCC 62*
- The failure to provide reasons that meet the legal standards/requirement is a fruitful area for appeal/judicial review
- Well reasoned, well written, adequate reasons permit the unsuccessful party to assess the merits of appeal/judicial review

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4. Decision Writing

- Well-reasoned, adequate decisions enhance the integrity of the process to the parties and to the public
- Well-reasoned, adequate decisions provide a useful resource to the regulator for future cases

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