

**SOLICITORS' DISCIPLINARY TRIBUNAL FOR NORTHERN
IRELAND**

GUIDANCE ON SANCTIONS

November 2019

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INTRODUCTION

This Guidance Note consists of a distillation of current sanctioning principles adopted by the Solicitors' Disciplinary Tribunal of Northern Ireland ("the Tribunal") brought together in one document. Every case is fact-specific, and this Guidance Note consists of guidelines only; it is not intended in any way to fetter the discretion of the Tribunal when deciding sanction. The exercise of its powers and the imposition of sanctions are matters solely for determination by the Tribunal. The purpose of this Guidance Note is to assist the parties, the public and the legal profession in understanding the Tribunal's decision-making process.

The Tribunal is the statutory tribunal responsible for adjudicating upon applications and complaints made under the provisions of the Solicitors (Northern Ireland) Order 1976 (as amended) ("the Order"). It is entirely independent of the regulator, the Law Society of Northern Ireland ("the Law Society").

It is the function of the Tribunal to protect the public from harm, and to maintain public confidence in the reputation of the legal profession (and those that provide legal services) for honesty, probity, trustworthiness, independence and integrity. The public must be able to expect to receive a high standard of service from a competent and capable solicitor.

The Tribunal deals with an infinite variety of cases. Prescriptive, detailed guidelines for sanctions in individual cases are neither practicable nor appropriate. The Tribunal adopts broad guidance. Its focus is to establish the seriousness of the misconduct and, from that, to determine a fair and proportionate sanction.

Mark Jackson

Secretary to the Tribunal

1 November 2019

SECTION A: PRINCIPLES AND PROCEDURE

SANCTIONS AND ORDERS AVAILABLE TO THE TRIBUNAL

Solicitors

1. The Tribunal's jurisdiction and powers on an application are set out in Article 51 of the Order and include:
 - the dismissal of the application or complaint.
 - the admonishing of the solicitor.
 - the imposition of a fine not exceeding £3,000.
 - the imposition of restrictions upon the way in which a solicitor can practise – not explicitly listed but including restriction from practising on his own account, whether in partnership or otherwise.
 - suspension from practice indefinitely or for a specified period.
 - striking off the Roll of Solicitors.
2. The Tribunal is not restricted as to the number or combination of sanctions which it may impose.
3. Other orders which the Tribunal can make in respect of solicitors or former solicitors include:
 - no order.
 - termination of a period of suspension or restriction.
 - restoration to the Roll following strike off.
 - costs.

Solicitors' non-lawyer employees

4. The Tribunal has jurisdiction to deal with misconduct by those who are not admitted to the Roll but are employed or remunerated by solicitors and others. The powers which the Tribunal may exercise in respect of such individuals are:
 - no order.
 - to make an order prohibiting, save with the prior consent of the Law Society, any solicitor from employing or remunerating the person to whom the order relates.

PURPOSE OF SANCTIONS

5. In the case of **Re: A Solicitor (2005) NIQB 51**, Kerr LCJ, at paragraph 8, adopted and endorsed the principles set out in **Bolton v The Law Society [1994] 1 WLR 512**, which set out the fundamental principles and purposes of the imposition of sanctions by the Tribunal:

“Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal.”

“... a penalty may be visited on a solicitor ... in order to punish him for what he has done and to deter any other solicitor tempted to behave in the same way ...”

“... to be sure that the offender does not have the opportunity to repeat the offence”

“... the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth.”

“... a member of the public... is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires.”

TRIBUNAL'S APPROACH TO SANCTION

6. The Tribunal follows the approach to sanction as set out in **Fuglers and Others v Solicitors Regulation Authority [2014] EWHC 179** (per Popplewell J), namely:

“28. There are three stages to the approach... The first stage is to assess the

seriousness of the misconduct. The second stage is to keep in mind the purpose for which sanctions are imposed by such a tribunal. The third stage is to choose the sanction which most appropriately fulfils that purpose for the seriousness of the conduct in question.”

HUMAN RIGHTS, EQUALITY, DIVERSITY AND INCLUSION

7. The Tribunal is a “public authority” for the purposes of the Human Rights Act 1998, and it seeks to uphold and promote the principles of the European Convention on Human Rights in accordance with the Act. In deciding what sanction, if any, to impose the Tribunal should have regard to the principle of proportionality, weighing the interests of the public with those of the practitioner. The interference with the solicitor’s right to practise must be no more than necessary to achieve the Tribunal's purpose in imposing sanctions.
8. The Tribunal is aware of and committed to the promotion of equality, diversity and inclusion in carrying out all its functions. It aims to ensure that its processes and procedures are fair, objective and transparent and free from unlawful discrimination. Tribunal Members and everyone acting for the Tribunal are expected to adhere to the spirit and letter of this legislation.

COMMON PROCEDURAL ISSUES AFFECTING SANCTION

Admission, but dispute as to facts

9. A respondent may admit the alleged misconduct, but dispute particular details. The Tribunal will hear from the parties to determine whether in its view the disputed evidence would materially affect its sanction. If not, the Tribunal will proceed to determine sanction on the respondent’s version of events. Where the dispute is such that it would materially affect sanction the Tribunal shall decide, having heard all the evidence, the factual basis upon which sanction will be based.
10. The Tribunal adopts the principle established in **R v Newton [1983] Crim LR 198** and will only impose sanction upon a respondent where the particular misconduct is either admitted by, or proved against the respondent.

11. If at a hearing to establish the facts on which sanction is to be based (a “Newton hearing”), the respondent fails to adduce evidence in support of facts exclusively within his knowledge, this will entitle the Tribunal to draw such inference from that failure as it might see fit – **R v Underwood [2005] 1 Cr. App. R. 13.**
12. Once the factual basis has been established, the respondent will have the opportunity to make representations as to the level of sanction to be imposed before the Tribunal makes its final decision.

Multiple/Alternative allegations

13. Multiple allegations involving essentially the same wrongdoing committed concurrently and drafted in the alternative, or numerous similar examples of wrongdoing committed over a period of time, sometimes come before the Tribunal. When some or all of such allegations are found proven, it may be disproportionate and unjust to impose a sanction for each matter. In such a situation the Tribunal may in respect of matters found proven:
 - impose a sanction, determined by the totality of the misconduct, which is specified as being in respect of all those matters; or
 - impose a sanction on the more serious allegation/s, and make no separate order (or sanction) in respect of other more minor matters.

Sanction for each separate and distinct allegation

14. Where distinct and separate allegations are either admitted or proven, the Tribunal may:
 - impose a particular sanction (determined by the totality of the misconduct) specified as being in respect of all matters; or
 - determine the individual seriousness of each separate and distinct proven allegation, and the appropriate sanction in respect of each. Sanctions imposed will be proportionate to the totality of the misconduct.

SECTION B: DETERMINING SANCTION

The starting point in determining sanction is to establish the seriousness of the allegation proven. The Tribunal will determine which of the sanction thresholds have been crossed, working from the lowest sanction upwards.

In determining seriousness the Tribunal must consider the respondent's culpability for their conduct and the harm caused or the harm that was intended or might reasonably be foreseen to have been caused by their actions.

When the Tribunal has identified the starting point it can add to or reduce this to reflect any aggravating or mitigating features which impact on the culpability of the respondent and harm caused to reach a provisional sanction.

On reaching a provisional sanction the Tribunal should take appropriate account of personal mitigation of the respondent before coming to a final decision.

The following list of factors is not exhaustive. Each case must be determined on its own facts and merits. Where a factor is considered to reach a decision on seriousness, it should not be considered again in deciding aggravating factors.

ASSESSING SERIOUSNESS

15. The Tribunal will assess the seriousness of the misconduct in order to determine which sanction to impose. Seriousness is determined by a combination of factors, including:
- the respondent's **level of culpability** for their misconduct.
 - the **harm** caused by the respondent's misconduct.
 - the existence of any **aggravating** factors.
 - the existence of any **mitigating** factors.

Culpability

16. The level of culpability ("responsibility for fault or wrong") will be influenced by such factors as (but not limited to):

- the respondent's motivation for the misconduct.
- whether the misconduct arose from actions which were planned or spontaneous.
- the extent to which the respondent acted in breach of a position of trust.
- the extent to which the respondent had direct control of or responsibility for the circumstances giving rise to the misconduct.
- the respondent's level of experience.
- the harm caused by the misconduct.
- whether the respondent deliberately misled the Law Society (as regulator).

Harm

17. In determining the harm caused by the misconduct, the Tribunal will assess:

- the impact of the respondent's misconduct upon those directly or indirectly affected by the misconduct, the public and the reputation of the legal profession. The greater the extent of the respondent's departure from the "complete integrity, probity and trustworthiness" expected of a solicitor, the greater the harm to the reputation of the solicitors' profession.
- the extent of the harm that was intended or might reasonably have been foreseen to be caused by the respondent's misconduct.

Aggravating Factors

18. Factors that aggravate the seriousness of the misconduct include (but are not limited to):

- dishonesty, where alleged and proved.
- misconduct involving the commission of a criminal offence, not limited to dishonesty.
- misconduct which was deliberate and calculated or repeated.
- misconduct continuing over a period of time.
- taking advantage of a vulnerable person.
- concealment of wrongdoing.
- misconduct where the respondent knew or ought reasonably to have known that the conduct complained of was in material breach of obligations to protect the public and the reputation of the legal

profession.

- previous disciplinary matter(s) before the Tribunal where allegations were found proven.
- the extent of the impact on those affected by the misconduct.

Mitigating Factors

19. Factors that mitigate the seriousness of the misconduct itself include (but are not limited to):
- misconduct resulting from deception or otherwise by a third party (including the client).
 - the timing of and extent to which any loss arising from the misconduct is made good by the respondent.
 - whether the respondent voluntarily notified the Law Society (as regulator) of the facts and circumstances giving rise to misconduct.
 - whether the misconduct was either a single episode, or one of very brief duration in a previously unblemished career.
 - genuine insight assessed by the Tribunal on the basis of facts found proven and the respondent's evidence.
 - open and frank admissions at an early stage and/or degree of co-operation with the Law Society.

NOTE: Matters of purely personal mitigation are of no relevance in determining the seriousness of the misconduct. However, they will be considered by the Tribunal when determining the fair and proportionate sanction.

PARTICULAR SANCTIONS

20. Having determined the seriousness of the misconduct, the Tribunal will assess whether to make an order, and if so, which sanction to impose. The Tribunal, in making this assessment, will start from the least serious option.

No Order

21. The Tribunal may conclude that, having regard to all the circumstances, and where the Tribunal has concluded that the level of seriousness of the misconduct or culpability of the respondent is low, that it would be unfair or disproportionate to impose a sanction. In such circumstances, the Tribunal may

decide not to impose a sanction, save for an order for costs.

Admonishment

22. An admonishment will be imposed where the Tribunal has determined that the seriousness of the respondent's misconduct justifies a sanction at the lowest level and that the protection of the public and the reputation of the legal profession does not require a greater sanction.
23. Relevant factors may include:
- the respondent's culpability is low.
 - there is no identifiable harm caused to any individual.
 - the risk of any such harm was negligible.
 - the likelihood of future misconduct of a similar nature or any misconduct is very low.
 - evidence of genuine insight assessed by the Tribunal on the basis of facts found proven and the respondent's evidence.
 - minor breaches of regulation not dealt with under the Law Society's own disciplinary jurisdiction.

Fine

24. A Fine will be imposed where the Tribunal has determined that the seriousness of the misconduct is such that an admonishment will not be a sufficient sanction, but neither the protection of the public nor the protection of the reputation of the legal profession justifies Suspension or Strike Off.

Level of Fine

25. The Tribunal will consider the following guidance in determining the appropriate level of Fine or combination of Fines to be imposed upon an individual:
- in deciding the level of Fine, the Tribunal will consider all the circumstances of the case, including aggravating and mitigating factors. The Tribunal will fix the Fine at a level which reflects the seriousness of and is proportionate to the misconduct.
 - the respondent shall be expected to adduce evidence if their ability to

pay a Fine is limited by their means.

- the factors to be considered include those outlined by Popplewell J at paragraph 35 of **Fuglers and Others v Solicitors Regulation Authority** (above).

Factors to be considered include: (1) whether the seriousness of the misconduct, and giving effect to the purpose of the sanction, puts the case at or near the top, middle or bottom of the category (2) the level of fines imposed by other disciplinary tribunals or the High Court in analogous cases (3) the size or standing of the solicitor or firm in question (4) the means available to an individual. In considering means it is relevant to take into account the total financial detriment which is suffered, including any costs order, and any adverse financial impact of the decision itself.

26. In the absence of evidence of limited means, the Tribunal is entitled to assume that the respondent's means are such that they can pay the Fine which the Tribunal decides is appropriate.
27. Fines are payable to the Law Society, which is responsible for enforcing payment. The Tribunal may grant a respondent time to pay.

Restriction

28. A Restriction may be combined with any other sanction made by the Tribunal.
29. The Tribunal, exercising its wide power to "make such order as it may think fit", may if it deems it necessary to protect the public, impose restrictions in the form of conditions upon the way in which a solicitor continues to practise. If the conditions are for an indefinite period it must be part of the order that the solicitor subject to the condition(s) has liberty to apply to the Tribunal to vary or discharge the conditions (see 32 below). Any breach of conditions imposed by the Tribunal would be a disciplinary offence which would generally merit a separate penalty.
30. Restricted practice will only be ordered if it is necessary to ensure the protection of the public and the reputation of the legal profession from future harm by the respondent.

31. A Restriction may be for either a finite or an indefinite period.
32. If the Tribunal makes an order for an indefinite period, it will specify as part of the order that the respondent may apply to the Tribunal to vary or rescind the restrictions either at any time or after the lapse of a defined period.
33. Examples of restrictions that may be imposed are as follows: The respondent may not:
- practise as a sole practitioner.
 - be a partner or member of a Limited Liability Partnership (LLP) or other authorised or recognised body.
 - be a partner or practise on his or her own account unless in partnership with another solicitor or solicitors of a certain period of standing – e.g. not less than 10 years qualification.
 - hold client money.
 - be a signatory on any client account.
 - work as a solicitor other than in employment approved by the Law Society.

Suspension

34. Suspension from the Roll will be the appropriate penalty where the Tribunal has determined that:
- the seriousness of the misconduct is such that neither a Restriction, Admonishment nor a Fine is a sufficient sanction or in all the circumstances appropriate.
 - there is a need to protect both the public and the reputation of the legal profession from future harm from the respondent by removing their ability to practise, but
 - neither the protection of the public nor the protection of the reputation of the legal profession justifies striking off the Roll.
 - public confidence in the legal profession demands no lesser sanction.
 - professional performance, including a lack of sufficient insight by the respondent (judged by the Tribunal on the basis of facts found proven and the respondent's evidence), is such as to call into question the continued ability to practise appropriately.

35. Suspension from the Roll, and thereby from practice, reflects serious misconduct.
36. Suspension can be for a fixed term or for an indefinite period. A term of suspension can itself be temporarily suspended.

Suspended Term of Suspension

37. Where the Tribunal concludes that the seriousness of the misconduct justifies suspension from the Roll, but it is satisfied that:
 - by imposing a Restriction, the risk of harm to the public and the public's confidence in the reputation of the legal profession is proportionately constrained; and
 - the combination of such an Order with a period of pending Suspension provides adequate protection

the Tribunal may suspend that period of suspension for so long as the Restriction remains in force.

38. If the Restriction referred to at paragraph 37 above is breached, activation by the Tribunal of the term of suspension may follow.
39. If the period under restriction is successfully completed and the Restriction lifted, the pending suspension will cease to have effect.

Fixed Term of Suspension

40. Having concluded that the respondent should be immediately removed from practice, but that the protection of the public and the protection of the reputation of the legal profession do not require that they be struck off the Roll, the Tribunal will fix a term of suspension of such length both to punish and deter whilst being proportionate to the seriousness of the misconduct.
41. The Tribunal can also impose a staged order with a fixed term of suspension followed by a period of restricted practice under a Restriction.

Indefinite Suspension

42. Indefinite Suspension marks the highest level of misconduct that can appropriately be dealt with short of striking off the Roll. In deciding that an indefinite period of suspension is the fair and proportionate sanction, the Tribunal will have formed the view that:

- the seriousness of the misconduct is so high that striking off is the most appropriate sanction;
but
- the presence of truly compelling and exceptional personal mitigation makes that course of action unjust; **and/or**
- there is a realistic prospect that the respondent will recover from, for example, illness, addiction, relevant medical condition, etc or respond to retraining so that they no longer represent a material risk of harm to the public or to the reputation of the profession.

Striking Off the Roll

43. Where the Tribunal has determined that:

- the seriousness of the misconduct is at the highest level, such that a lesser sanction is inappropriate; and
- the protection of the public and/or the protection of the reputation of the solicitors' profession requires it

the Tribunal will strike a solicitor's name off the Roll.

SECTION C: DISHONESTY

44. The most serious misconduct involves dishonesty, whether or not leading to criminal proceedings and criminal penalties. A finding that an allegation of dishonesty has been proven will almost invariably lead to striking off, save in exceptional circumstances.

Absence of Dishonesty

45. Striking off can be appropriate in the absence of dishonesty where, amongst other things:
- the seriousness of the misconduct is itself very high; and
 - the departure by the respondent from the required standards of integrity, probity and trustworthiness is very serious.
46. In such cases, the Tribunal will have regard to the overall facts of the misconduct, and in particular the effect that allowing the respondent's name to remain on the Roll will have upon the public's confidence in the reputation of the legal profession.

Misappropriation of client money falling short of Dishonesty

47. The Tribunal regards the breach of the heavy obligation to safeguard client money, which is quite distinct from the solicitor's duty to act honestly, as extremely serious.
48. The dishonest misappropriation of client money will invariably lead to strike off.
49. Strike off can be appropriate in the absence of dishonesty. Where a respondent's failure properly to monitor client money leads to its misappropriation or misuse by others, such a serious breach of the obligation could warrant striking off.

"...the tribunal had been at pains to make the point, which was a good one, that the solicitors' accounts rules existed to afford the public maximum protection against the improper and unauthorised use of their money and that, because of the importance attached to affording that protection and assuring the public that such protection was afforded, an onerous obligation was placed on solicitors to ensure that those rules were observed" per Bingham LCJ in **Weston v Law Society [1998] The Times, 15th July 1998.**

SECTION D: PERSONAL MITIGATION

50. Before finalising sanction, consideration will be given to any particular personal mitigation advanced by or on behalf of the respondent. The Tribunal will have regard to the following principles:

“Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again.

*.... All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears, likely to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.” (per **Bolton** above).*

51. Particular matters of personal mitigation that **may** be relevant and **may** serve to reduce the nature of the sanction, and/or its severity include that:
- the misconduct arose at a time when the respondent was affected by physical or mental ill-health that affected his ability to conduct himself to the standards of the reasonable solicitor. Such mitigation must be supported by medical evidence from a suitably qualified practitioner.
 - the respondent was an inexperienced practitioner and was inadequately supervised by his employer.

- the respondent made prompt admissions and demonstrated full co-operation with the Law Society.

SECTION E: COSTS

52. The Tribunal has the power to make such order as to costs as it thinks fit, including the payment by any party of costs or a contribution towards costs of such amount (if any) as the Tribunal may consider reasonable. Such costs are those arising from or ancillary to proceedings before the Tribunal.
53. The Tribunal may make an order for the payment of a fixed amount of costs. This will be the usual order of the Tribunal where the parties are in agreement as to the liability for, and the amount of, those costs. Otherwise, the Tribunal will determine liability for costs, and summarily assess those costs.

Costs against Respondent: allegations admitted/proved - general considerations

54. The Tribunal, in considering the respondent's liability for the costs of the applicant, will have regard to the following principles, drawn from **R v Northallerton Magistrates Court, ex parte Dove (1999) 163 JP 894**:
- it is not the purpose of an order for costs to serve as an additional punishment for the respondent, but to compensate the applicant for the costs incurred by it in bringing the proceedings; and
 - any order imposed must never exceed the costs actually and reasonably incurred by the applicant.
55. Before making any order as to costs, the Tribunal will give the respondent the opportunity to adduce financial information and make submissions. A respondent is not entitled as of right to an adjournment to produce evidence of means and the granting of an adjournment, which is in the Tribunal's discretion, may increase the overall costs awarded against the respondent.
56. A respondent will be expected to adduce evidence that their ability to pay costs is limited by their means.
57. Where the Tribunal decides that the respondent is, notwithstanding their limited

means, properly liable for the applicant's costs (either in full or in part) and is satisfied that there is a reasonable prospect that, at some time in the future, their ability to pay those costs will improve, it may order the respondent to meet those costs but direct that such order is not to be enforced without leave of the Tribunal. Such orders will not be granted as a matter of course.

Costs against Respondent: some allegations not proved

58. Where the respondent is partially successful in defending the allegations pursued by the applicant, in considering the respondent's liability for costs the Tribunal will have regard to the following factors:
- the reasonableness of the applicant in pursuing an allegation on which it was unsuccessful.
 - the manner in which the applicant pursued the allegation on which it was unsuccessful and its case generally.
 - the reasonableness of the allegation, that is, was it reasonable for the applicant to pursue the allegation in all the circumstances.
 - the extra costs in terms of preparation for trial, witness statements and documents and so on, taken up by pursuing the allegation upon which the applicant was unsuccessful.
 - the extra Tribunal time taken in considering the unsuccessful allegation.
 - the extent to which the allegation was inter-related in terms of evidence and argument with those allegations in respect of which the applicant was successful.
 - the extra costs borne by the respondent in defending an allegation which was not found to be proven (please also refer to paragraph 62 below).
59. The Tribunal may award costs against a respondent even if it makes **no** finding of misconduct.

Costs against Applicant

60. The starting point adopted by the Tribunal in considering whether costs should be awarded against the Law Society (where it is the applicant in a particular case) is:

"In respect of costs, the exercise of its regulatory function placed the Law

Society in a wholly different position from that of a party to ordinary civil litigation. Unless a complaint was improperly brought or, for example, had proceeded as a "shambles from start to finish", when the Law Society was discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be made against it on the basis that costs followed the event" (per Laws LJ, **Baxendale-Walker v The Law Society [2007] EWCA Civ 233**).

61. Where a respondent seeks to pursue an application for costs against the Law Society, the Tribunal will have regard to the following principles:
- an order that the applicant pay a successful respondent's costs on the grounds that costs follow the event should not ordinarily be made on that basis alone.
 - there is no assumption that such an order will automatically follow.
 - *"to expose a regulator to the risk of an adverse costs order simply because it properly brought proceedings which were unsuccessful might have a chilling effect upon its regulatory function"* (per **Baxendale-Walker** above).
62. The Tribunal will consider the balance to be struck between:
- the financial prejudice to the successful respondent in the particular circumstances if an order for costs is not made in their favour; and
 - *"the need for a regulator to make and stand by honest, reasonable and apparently sound decisions made in the public interest without fear of exposure to undue financial prejudice if unsuccessful"* (per Bingham LCJ, **Bradford MDC v Booth (2000) 164 JP 485 DC**).
63. The Tribunal will receive submissions from the parties at the substantive hearing, and will adjourn the hearing insofar as it relates solely to costs, for that purpose only if it deems it necessary.