

FACULTY OF ADVOCATES DISCIPLINARY RULES 2005

PART I**DISCIPLINARY PROCEDURE****Application of rules**

1. (1) These rules shall apply -
 - (a) where any complaint is made in writing and signed by the complainer to the Dean, or
 - (b) where the Dean of his own accord initiates disciplinary proceedings,

in respect of the conduct of an identified member of Faculty (hereafter in these rules referred to as "the member").
- (2) The initiation of disciplinary proceedings by the Dean under paragraph (1)(b) above shall, for the purposes of these rules, be treated as if it were a complaint made to him under paragraph (1)(a) above; and these rules shall, with any necessary modifications, apply to such initiation as they apply to such complaint.
- (3) At his discretion, the Dean may direct that the Vice-Dean or another Faculty Officebearer shall handle any complaint or complaints in his place and exercise all relevant powers; and in a case or cases in which such a direction has been made, all references hereinafter to the Dean shall be to such Faculty Officebearer.
- (4) The Dean may delegate the administration of a particular complaint, or of complaints generally, to another person or persons who may or may not be a member of Faculty.
- (5) At any stage in the administration of a complaint, the Dean may refer the complaint to the Complaints Committee, for determination and disposal.
- (6) No complaint shall be entertained if it is received more than six months after the last of the events giving rise to the complaint, unless the Complaints Committee is satisfied that exceptional circumstances exist which justify the making of the complaint outwith that time.
- (7) A complainer may withdraw in writing his or her complaint at any time, in which event the Complaints Committee may deem that no further steps will be taken in respect of the complaint.
- (8) A complainer is presumed to have waived any right to confidentiality or privilege in respect of the member complained against and the member is

entitled to rely upon and to disclose all information and any documents which he or she judges to be necessary to answer the complaint.

Interim suspension from membership

2. (1) The Dean may, if he thinks fit, suspend the member ad interim from membership of Faculty pending the determination and disposal of the complaint.
- (2) As soon as may be practicable the Dean shall invite the member to make written or oral representations on the matter of his suspension and shall thereafter review the position.
- (3) In the event of the Dean determining that a member should be suspended in terms of rule 2(1) above, he shall, on the application of the member, further review the position at intervals of not less than six months, and report to the member the result of any such review.
- (4) The member may appeal the matter of his suspension to the Disciplinary Tribunal within a reasonable time of any review under paragraph (2) or (3) above.

Intimation of complaint

3. (1) The Dean shall as soon as may be practicable inform the member in writing as to the nature of the complaint, and shall afford to the member an opportunity to provide a written response to the complainer's allegations.
- (2) The Dean shall have power to make such further enquiry as he may think fit with a view to (i) identifying the issues to be addressed, and (ii) ascertaining whether or not any material facts bearing on those issues are substantially in dispute between the parties.

Action where facts not disputed

4. (1) Where the material facts bearing on the issues identified under rule 3 (2) above are not substantially in dispute between the parties, the Complaints Committee may do one or more of the following:
 - (a) deem that no further action is appropriate;
 - (b) make such further enquiries as it deems to be appropriate;
 - (c) dismiss the complaint where it considers it to be unjustified, unreasonable or vexatious;

- (d) uphold the complaint in whole or in part and impose, if it thinks fit, one or more of the penalties set out in rule 6 below;
 - (e) with the consent of the member, uphold the complaint in whole or in part and remit it to the Disciplinary Tribunal for the imposition of one or more of the penalties set out in rule 12 below; or
 - (f) remit the complaint to the Disciplinary Tribunal for determination and disposal.
- (2) Before giving any consent under paragraph (1)(e) above, the member shall be informed by the Complaints Committee that it intends to act in accordance with that paragraph and shall be notified of the basis on which the Committee intends to uphold the complaint, in whole or in part.

Action where facts disputed

5. (1) Where the material facts bearing on the issues identified under rules 3(2) above are substantially in dispute between the parties, the Complaints Committee may do one or more of the following:
- (a) deem that no further action is appropriate;
 - (b) make such further enquiries as it deems to be appropriate;
 - (c) subject to such directions as it may specify, remit the matter to the Investigating Committee to ingather evidence or further evidence bearing upon the facts of the case;
 - (d) dismiss the complaint where it considers it to be unjustified, unreasonable or vexatious;
 - (e) uphold the complaint in whole or in part and impose, if it thinks fit, one or more of the penalties set out in rule 6 below;
 - (f) with the consent of the member, uphold the complaint in whole or in part and remit it to the Disciplinary Tribunal for the imposition of one or more of the penalties set out in rule 12 below; or
 - (g) remit the complaint to the Disciplinary Tribunal for determination and disposal.
- (2) The member shall be informed as to -
- (a) any remit of the complaint to the Investigating Committee under paragraph (1) above; and

(b) the membership of the Investigating Committee;

and the Investigating Committee and the member shall be provided with such information as is in the Faculty's possession in relation to the complaint.

- (3) Subject to any directions given by the Complaints Committee, the Investigating Committee shall -
 - (a) invite the member at his or her discretion to make written or oral representations as to the complaint;
 - (b) make such other investigations as they think fit.
- (4) Without prejudice to the generality of paragraph (3) above, the Investigating Committee may at their discretion interview or take statements from such witnesses (including the complainer, the member and any third party), and ingather such documents or other evidence, as they consider may bear upon the facts of the case.
- (5) On completion of their investigations the Investigating Committee shall report in writing on such evidence as they have ingathered to the Complaints Committee. In so doing, the Investigating Committee may, if they think fit, comment on the credibility and reliability of any such evidence, and shall set out the facts which they find admitted or proved.
- (6) Thereupon the Complaints Committee shall afford to the complainer and the member an opportunity to comment on the substance of the Investigating Committee's report.
- (7) Having considered the facts found, the evidence obtained by the Investigating Committee and any comment thereon, the Complaints Committee may:
 - (a) deem that no further action is appropriate;
 - (b) dismiss the complaint where it considers it to be unjustified;
 - (c) uphold the complaint in whole or in part and impose, if it thinks fit, one or more of the penalties set out in rule 6 below;
 - (d) with the consent of the member, uphold the complaint in whole or in part and remit it to the Disciplinary Tribunal for the imposition of one or more of the penalties set out in rule 11 below; or
 - (e) remit the complaint to the Disciplinary Tribunal for determination and disposal.

- (8) Before giving any consent under paragraph (1)(f) or (7)(d) above, the member shall be informed by the Complaints Committee that it intends to act in accordance with that paragraph and shall be notified of the basis on which the Committee intends to uphold the Complaint, in whole or in part.
- (9) Notwithstanding any remit to the Investigating Committee under this Rule, the Complaints Committee may at any stage, at its discretion, revert to dealing with the complaint in terms of rule 4 if the facts bearing on the issues identified under rule 3(2) above cease to be substantially in dispute between the parties.

Imposition of penalties by Complaints Committee

- 6. (1) Subject to paragraph (2) below, the penalties which may be imposed on the member by the Complaints Committee under rule 4 or 5 above are as follows -
 - (a) a written direction to the member, with or without conditions;
 - (b) verbal admonition;
 - (c) formal written reprimand;
 - (d) severe written censure;
 - (e) order for cancellation or repayment in whole or in part of any fees exigible in respect of the work which has given rise to the complaint;
 - (f) an order for compensation to be paid to the complainer not exceeding £5,000;
 - (g) a fine not exceeding £7,500;
 - (h) suspension from practice, with or without conditions, for a specified period not exceeding one year.
- (2) Before imposing any penalty referred to in paragraph (1) above, the Complaints Committee, shall invite the member at his discretion to make written or oral representations as to such imposition.
- (3) In deciding on the appropriate penalty, the Complaints Committee may take into account any period of interim suspension imposed under rule 2 above.

Decision Making

7. (1) Any decision of the Complaints Committee under rule 1, 4, 5 or 6 above may be unanimous or by a majority.
- (2) For the purposes of any such decision, each member of the Complaints Committee shall have an equal vote and in the case of a tied vote, the complaint shall be deemed not to have been proven beyond a reasonable doubt in accordance with rule 13(2), and the complaint shall be dismissed.

Right of Appeal

8. (1) With leave of the Complaints Committee, which shall only be granted on cause shown, the complainer or the member may appeal to the Disciplinary Tribunal against the dismissal or final disposal (including determination) of the complaint.
- (2) Any application for leave, specifying the grounds on which it is sought, shall be made in writing to the Dean within fourteen days of intimation of the dismissal or final disposal (including determination) of the complaint as the case may be.
- (3) On an application for leave being received, the other party or parties shall be afforded an opportunity to make written representations as to why leave should not be granted, and they shall be provided with a copy of the application for leave which has been made by the member.
- (4) The decision of the Committee to grant the application shall be final.
- (5) The decision of the Committee to refuse the application shall be final, unless, within seven days, the member indicates to the Dean that he or she is seeking to appeal to the Disciplinary Tribunal to hear the matter on review.
- (6) A review hearing under paragraph (5) above shall be heard by a Committee of the Tribunal, comprising one Senior and one Junior Counsel, and two lay persons appointed by the Chairman from the panel maintained under rule 19 below.
- (7) The procedure to be followed in an appeal where leave is granted will be mutatis mutandis that set out in rule 11(4) – (14).
- (8) The Tribunal shall not allow an appeal unless it is satisfied that the decision of the Complaints Committee was not in accordance with the particular requirements of the Disciplinary Rules or that the Committee proceeded on a basis of fact contrary to the weight of the evidence.

Remit to Disciplinary Tribunal

9. Where the Complaints Committee remits the complaint to the Disciplinary Tribunal, the member shall be informed by the Clerk to the Tribunal of:
 - (a) the remit; and
 - (b) the membership of the Tribunal.

Remit for imposition of Penalties

10. In the case of a remit to the Tribunal for the imposition of penalties -
 - (1) The Dean shall -
 - (a) provide the member with such information as is in the Faculty's possession in relation to the complaint;
 - (b) instruct a solicitor to pursue the complaint, and the solicitor shall in turn instruct counsel from a panel of three counsel of at least 10 years standing approved by the Faculty for the purpose. The solicitor and counsel may arrange for such assistance to be engaged in relation to the complaint as they think appropriate.
 - (2) The procedure to be followed will be that mutatis mutandis that set out in rule 11(4) - (14) below.
 - (3) The Tribunal shall give their decision, together with the reasons therefor, in writing and such decision shall be notified to the Dean.

Remit for determination and disposal

11. (1) In the case of a remit to the Tribunal for determination and disposal, the Dean shall instruct a solicitor to pursue the complaint, and the solicitor shall in turn instruct counsel from a panel of three counsel of at least 10 years standing approved by the Faculty for the purpose. The solicitor and counsel may engage such assistance in relation to the investigation and prosecution of the complaint as they think appropriate.
- (2) The Dean shall provide the solicitor with such information as is in the Faculty's possession in relation to the complaint.
- (3) The solicitor shall instruct counsel to draft a formal Complaint which shall be intimated to the member who shall be entitled to lodge answers thereto. Such formal Complaint shall set out the specific charges being made against the member and may on cause shown be amended at any time prior to the determination of the complaint.

- (4) The procedure to be followed in the course of a remit to the Tribunal, and the conduct of any hearing, shall be at the discretion of the Chairman but the Tribunal shall act in accordance with the principles of natural justice and observe the particular requirements set forth in the succeeding paragraphs of this rule.
- (5) The Chairman may, at any time after the remit of the complaint to the Tribunal, hold such preliminary hearing or hearings as he thinks fit in order to address any procedural or other issues that may arise. For the purposes of any such preliminary hearing, the Chairman may, at his discretion, sit alone or convene a full or partial Tribunal.
- (6) The parties to the case shall be given due notice of the date, time and place of any hearing before the Tribunal and the membership of the Tribunal by the Clerk to the Tribunal
- (7) In respect of a hearing, at which evidence is to be led or considered, the parties to the case shall, where ordered by the Tribunal -
 - (a) exchange lists of witnesses;
 - (b) lodge productions with the Clerk to the Tribunal; and
 - (c) exchange precognitions of witnesses.
- (8) At any hearing, the case against the member shall be conducted by counsel referred to in paragraph (1) above, and the member may conduct his own case or have it conducted on his behalf by counsel or a solicitor.
- (9) Any hearing shall be held in public unless ex proprio motu or on the application of the complainer, the Dean or the member, the Tribunal considers that it would be appropriate for it to be held in private.
- (10) At any hearing, witnesses may be required to give evidence on oath or under affirmation.
- (11) Any incidental question of law arising in the course of the proceedings before the Tribunal shall be decided by the Chairman of the Tribunal.
- (12) The Tribunal may determine the formal Complaint by dismissing it or by upholding it in whole or in part.
- (13) Subject to paragraphs 5 and 11 above, each member of the Tribunal shall have an equal vote and in the case of a tied vote, the complaint shall be deemed not to have been proven beyond a reasonable doubt in accordance with rule 13(2), and the complaint shall be dismissed.
- (14) The Tribunal shall give in writing their decision as to the determination and disposal of the Complaint, together with the reasons therefor, and such decision shall be notified to the Dean.

Imposition of penalties by Disciplinary Tribunal

12. (1) Where the complaint has been remitted by the Complaints Committee to the Disciplinary Tribunal -
 - (a) for the imposition of penalties, or
 - (b) for determination and disposal, and the Tribunal have upheld the complaint in whole or in part,

The Disciplinary Tribunal may impose on the member, if they think fit, one or more of the penalties set out in paragraph (2) below.
- (2) Subject to paragraph (4) below, the penalties which may be imposed under paragraph (1) above are as follows -
 - (a) any penalty mentioned in rule 6(1) above;
 - (b) a fine not exceeding £15,000;
 - (c) suspension from practice, with or without conditions, for a specified period not exceeding five years;
 - (d) suspension from membership of Faculty, with or without conditions, for a period not exceeding five years;
 - (e) expulsion from such membership.
- (3) Before imposing any penalty under this rule, the Tribunal shall invite the member at his discretion to make written or oral representations as to such imposition.
- (4) In deciding on the appropriate penalty, the tribunal may take into account any period of interim suspension imposed under rule 2 above.
- (5) The penalty of a fine under paragraph (2)(b) above shall not be combined with the penalty of suspension or expulsion from membership of Faculty under paragraph (2)(c) or (d) above.

Miscellaneous

13. (1) Where, in response to an invitation under these rules, the member chooses to make oral representations, he shall be entitled to be accompanied or represented for that purpose by counsel or a solicitor.
- (2) In the determination of any complaint the member shall be given the benefit of any reasonable doubt.

Intimation of decisions, etc.

14. The Dean or the Complaints Committee as the case may be shall, as soon as may be after the relevant event, intimate to the member and to the complainer-
- (a) any interim suspension of the member under rule 2 above;
 - (b) any dismissal, determination or disposal of the complaint under these rules; or any action which has been or is proposed to be taken in the matter.

Publication of decisions

15. (1) Where the Complaints Committee or the Tribunal –
- (a) upholds a complaint of professional misconduct, details of the relevant determination and of any penalty imposed, shall normally be published.
 - (b) upholds a complaint of inadequate professional service, unless the member so requests, publicity shall not normally be given to the determination or dismissal of the complaint.
 - (c) dismisses any complaint, whether of professional misconduct or of inadequate professional service, unless the member so requests, publicity shall not normally be given to that decision.
- (2) Any publication under paragraph (1) above shall be made in register kept by the Faculty for that purpose, which shall be available for inspection.
- (3) Additional publicity in any form may be ordered at the discretion of the Committee or Tribunal if in their judgment the circumstances of the case so require, or the Committee or Tribunal, as the case may be considers that there are special circumstances justifying that course.

Petition for removal

16. In the event of -
- (a) the interim suspension of the member from membership of the Faculty under rule 2 above, or
 - (b) the suspension or expulsion of the member under rule 6 or 12 above, the Dean shall on behalf of the Faculty petition the Court of Session to remove the member from the public office of advocate.

PART II

CONSTITUTION OF COMMITTEES AND TRIBUNAL, ETC.

Complaints Committee

17. (1) The Complaints Committee in a particular case shall consist of four persons drawn from the Dean; the Vice-Dean; eight other senior members of Faculty nominated by the Dean; and two persons from the panel of lay persons nominated by the Scottish Ministers for the purposes of these procedures.
- (2) The Dean shall have power to nominate a senior member of Faculty to serve on a Complaints Committee on an ad hoc basis.
- (3) The Chairman of the Complaints Committee shall be the member who is most senior as counsel.

Investigating Committee

18. (1) The Investigating Committee in a particular case shall consist of one senior and two junior counsel selected by the Chairman of the Complaints Committee in that case from a panel of ten senior and twenty junior counsel approved by the Faculty for the purpose.
- (2) The Chairman of the Investigating Committee shall be the member of the Committee who is most senior as counsel, and the Clerk to the Committee shall be the member of the Investigating Committee who is most junior as counsel.
- (3) Where the member on cause shown objects within a reasonable time to any member of the Investigating Committee, or where any member of the Investigating Committee declines to serve on it, the Chairman of the Complaints Committee shall select another member of the panel to serve in his or her place.
- (4) Two members of the Investigating Committee in a particular case may act to complete the investigation into a complaint and to report notwithstanding that the other member has become unable to do so for whatever reason.

Disciplinary Tribunal

19. (1) Subject to paragraph (3) below, the Disciplinary Tribunal shall consist of a Chairman and five other persons appointed as follows-

- (a) the Chairman, who shall be one of a panel of three each of whom shall be a retired member of the Judicial Committee of the House of Lords, or a retired Senator of the College of Justice or a retired Sheriff Principal or other appropriate person, and shall be appointed by the Lord President of the Court of Session for a period of three years and, in relation to a case remitted to the Tribunal within that period, for such further period as may be necessary to bring it to a conclusion.
 - (b) two counsel (including at least one senior counsel) shall be selected by the Chairman from a panel of ten counsel (including at least six senior counsel) approved by the Faculty for the purpose;
 - (c) three lay persons shall be selected by the Chairman from the panel of lay persons nominated by the Scottish Ministers for the purposes of these procedures.
- (2) The clerk to the Tribunal shall be the Clerk of Faculty or such other counsel as the Dean may appoint.
 - (3) Where, in any particular case, the Chairman is of the opinion that it is appropriate that a solicitor should serve on the Tribunal, he shall select one solicitor from a panel of three solicitors of at least 10 years' standing nominated by the President of the Law Society of Scotland for the purpose and, in that case, paragraph (1) above shall apply in relation to the appointment of the Tribunal with the modification that, in subparagraph (b), for the word "two" there shall be substituted the word "one".
 - (4) Where the member on cause shown objects within a reasonable time to any member of the Tribunal, or where any member of the Tribunal declines to serve on it, the Chairman shall select another member of the same panel to serve in his or her place on the Tribunal or, in the case of the Chairman of the Tribunal, the Lord President of the Court of Session may appoint another Chairman for the purposes of the particular case.

Further provisions as to panels

- 20. (1) Without prejudice to the continued service of panel members selected for particular cases, one-third of each of the panels referred to in these rules shall retire by rotation each year.
- (2) A person may be eligible for re-nomination to any of the said panels or, as the case may be, of completing a case requiring continued service beyond normal retirement date.

PART III

MISCELLANEOUS

Expenses

21. (1) Subject to the following paragraphs of this rule, all expenses reasonably incurred in connection with the handling of a complaint under these rules shall be paid by the Faculty.
- (2) Where a complaint is upheld, expenses shall not be recoverable by the member unless, in exceptional circumstances, the Committee or the Tribunal so direct.
- (3) The Complaints Committee or Disciplinary Tribunal may at their discretion limit or inhibit the recovery of expenses by any party whose conduct in relation to the complaint proceedings is held to be unreasonable.
- (4) Where the conduct of any party in relation to complaint proceedings is held to be vexatious, obstructive or dishonest, the Complaints Committee or the Disciplinary Tribunal may at their discretion find that person liable to meet the expenses reasonably incurred by any other party, or by the Faculty, in connection with the handling of the complaint.
- (5) A lay member shall be entitled to recovery from the Faculty of reasonable travelling expenses in relation to any function performed in accordance with these rules.
- (6) Any dispute as to the reasonableness of any expenses payable under paragraph (1) or (4) above shall be remitted to the Auditor of the Court of Session whose decision shall be final.

Interpretation

22. In these rules, the following expressions shall, unless the context otherwise requires, have the following meanings respectively assigned to them -

"complaint" means a complaint such as is referred to in rule 1 above.

"Complaints Committee" has the meaning assigned to it in rule 17 above;

"counsel" includes counsel not in practice as such;

"Dean" means, subject to rule 1(3), the Dean of Faculty;

"Disciplinary Tribunal" has the meaning assigned to it in rule 19 above, and references to "the Tribunal" are references to the Disciplinary Tribunal;

"disposal", in relation to a complaint, means the final disposal of the complaint and includes the imposition of any penalty under these rules;

"Faculty" means the Faculty of Advocates;

"Faculty Officebearer" means the Dean, Vice-Dean, Treasurer, Clerk, Keeper of the Library and Chairman of Faculty Services Limited;

"Investigating Committee" has the meaning assigned to it in rule 18 above;

Citation and commencement

23. (1) These rules may be cited as the Faculty of Advocates Disciplinary Rules 2005.
- (2) These rules shall apply to all complaints made on or after 1st January 2005, with the exception of rule 20(2), which shall apply to all complaints which are considered or determined by a Complaints Committee or a Disciplinary Tribunal on or after that date.