

DISCIPLINE COMMITTEE RULES

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Preamble

Throughout these Rules, commentary is provided to assist counsel, College staff, Committee members and College members in interpreting and applying these Rules.

The intent of these Rules is to bring formality, certainty and clarity to the hearing process while allowing Discipline Panels to retain flexibility in the process.

The Rules are meant to be understood by lay persons and apply to all Discipline proceedings.

RULE 1 - INTERPRETATION AND APPLICATION

1.01 Definitions

- (1) In these Rules, unless the context requires otherwise, words that are not defined in sub-rule 1.01(2) have the meaning defined in the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 and the *Statutory Powers Procedure Act*, R.S.O 1990 c. S.22.

- (2) In these Rules,

"Code" means the *Health Professions Procedural Code*, which is Schedule 2 to the *Regulated Health Professions Act, 1991*.

"College" means the College of Massage Therapists of Ontario.

"Committee" means the Discipline Committee of the College.

"Committee or Panel Chair" means the chair of the Committee or Discipline Panel.

"Discipline Panel" means a panel of Committee members selected by the Committee Chair.

"Electronic Hearing" means a Hearing held under Rule 6 by conference telephone call or videoconference or some other form of electronic technology allowing persons to hear and communicate with one another simultaneously, and can include a pre-hearing conference, a motion, a Discipline Hearing, the rendering of an oral reprimand and a Hearing for reinstatement.

"Hearing"	means the process before a Discipline Panel constituted under either section 38 of the <i>Code</i> (in the case of allegations of professional misconduct) or section 72 of the <i>Code</i> (in the case of an application for reinstatement).
"Independent Legal Counsel"	means the lawyer appointed by the Committee to provide advice to the Committee and/or a Discipline Panel.
"Member"	means a member of the College who has been named in a Notice of Hearing. A Member includes a person whose certificate of registration has been suspended; a person who has had their certificate of registration revoked or who allowed it to expire; and a person who has resigned from the College.
"Notice of Hearing"	means a document issued by the College under the <i>Code</i> which contains one or more allegations of professional misconduct and/or incompetence against a Member.
"Oral Hearing"	means a Hearing in which the parties attend before a Discipline Panel in person.
"Presiding Officer"	means the person designated by the Committee Chair to preside over the pre-hearing conference.
"Proceeding"	means any step in the discipline hearing process, and includes a motion, a prehearing conference, a hearing to set a Hearing date, and a Hearing.
"Record"	means a copy of all exhibits from a proceeding and all written Reasons for Decision, Decision and Orders, and includes any transcripts of the Hearing.
"Vulnerable Witness"	means a witness who, in the opinion of a Discipline Panel, will have difficulty testifying or will have difficulty testifying in the presence of a party for appropriate reasons related to age, disability, illness, trauma, emotional state or similar cause of vulnerability.
"Written Hearing"	means a hearing under Rule 6 held by a Discipline Panel by means of the exchange of written documents. A Written Hearing can include a pre-hearing conference, a motion, or the rendering of a written reprimand but does not include a Hearing to

determine whether a Member has committed an act(s) of professional misconduct or a Hearing for reinstatement.

1.02 Interpretation of Rules

- (1) These Rules should be interpreted fairly and, where justice for the Member would not be compromised, in a way that protects the public interest and the interests of witnesses.
- (2) Where matters are not specifically provided for in these Rules, the *Regulated Health Professions Act, 1991* or the *Statutory Powers Procedure Act*, the practice will be determined by analogy to them.
- (3) Where there is an inconsistency between these Rules and the *Regulated Health Professions Act, 1991* or the *Statutory Powers Procedure Act*, the provisions of those statutes will govern.
- (4) Where a Member is not represented by a lawyer, anything these Rules require or permit a lawyer to do can be done by the Member and/or his or her representative.
- (5) The College may issue practice directions or guidelines to explain or clarify these Rules.

1.03 Application of Rules

- (1) These Rules apply to all proceedings before the Discipline Committee of the College including, with all necessary modifications, applications for reinstatement made under sections 72 and 73 of the *Code*.

1.04 Time

- (1) A Discipline Panel may extend or shorten any time required by these Rules on such terms as are just, either before or after the expiration of the time.

1.05 Substantial Compliance

- (1) Substantial compliance with a form or notice required by or under these Rules is sufficient.
- (2) No proceeding is invalid only because of a defect or other irregularity in form.

1.06 Waiving a Rule

- (1) A Rule may be waived if all parties consent or by order of a Discipline Panel.

- (2) A motion to waive a Rule may be made at any time. However, a Discipline Panel may refuse to waive a Rule where a person does not bring the motion promptly.

1.07 Power to Control Process

- (1) Despite anything in these Rules, the Discipline Committee can make any order that is necessary to control its process. In making such an order the Discipline Committee must take into consideration the public interest, the interests of witnesses and the Member's right to make full answer and defence to the allegations.

RULE 2 - PROCEDURES PRIOR TO HEARING

2.01 Notice of Hearing

- (1) A Notice of Hearing must be in Form 1 and must include:
 - (a) the time and place on which the parties must appear before a Discipline Panel to set a date for the Hearing;
 - (b) the statutory authority under which the Hearing will be held;
 - (c) the purpose of the Hearing, including details about the allegations of professional misconduct and/or incompetence;
 - (d) a statement that if the Member does not attend at the Hearing, the Discipline Panel may proceed in the Member's absence and the Member will not be entitled to any further notice in the proceeding; and
 - (e) a statement that a copy of these Rules will be provided to the Member upon request.
- (2) Subject to sub-rule 2.01(3), a Notice of Hearing must be served upon the Member personally or by sending a copy by registered mail addressed to the Member at the Member's last known residence or business address as shown in the records of the College.
- (3) Where a Member has retained counsel or a representative before the Notice of Hearing is issued, the Notice of Hearing may be served on the Member's counsel or representative.
- (4) A Discipline Panel may at any time permit a Notice of Hearing to be amended to correct minor errors or omissions if it is of the opinion that it is fair to do so, and the Discipline Panel may make any order it considers necessary to prevent prejudice to the Member.

2.02 Setting Hearing Dates

- (1) Where the College and the Member are not able to agree in advance on a Hearing date, they must attend before a Discipline Panel on the date indicated in the Notice of Hearing (Form 1) to set a date for a Hearing.

2.03 Adjournments

- (1) Where a party requests an adjournment, a Discipline Panel will, in making its decision on whether or not to grant it (and, if so, on what terms), attempt to balance the right of the parties to a fair hearing against the desirability of an expeditious hearing. In so doing, the panel should take into account the following considerations:
 - (a) prejudice to a person;
 - (b) how long the requesting party had to prepare for the Hearing;
 - (c) whether the request for an adjournment was made promptly;
 - (d) the efforts made to avoid the adjournment;
 - (e) the number or prior requests for an adjournment;
 - (f) whether the public is at risk if an adjournment is granted;
 - (g) the proposed length of the adjournment;
 - (h) the costs of an adjournment;
 - (i) the public interest; and
 - (j) any other factor it deems relevant to determine whether it should adjourn the Hearing
- (2) A Discipline Panel may impose reasonable conditions on the party requesting the adjournment as a condition of granting the adjournment.

2.04 Location of Hearings

- (1) All Hearings will be held at the offices of the College at 810-1867 Yonge Street in Toronto, unless otherwise ordered by the Committee.

2.05 Serving or Delivering Documents

- (1) A document is deemed to be served or delivered if it is sent:
 - (a) by regular or registered mail on the 5th day after being mailed;
 - (b) by e-mail on the same day the e-mail was sent, if receipt of the e-mail is confirmed by the recipient (and every recipient has a duty to confirm receipt of all e-mail messages in proceedings covered by these Rules);
 - (c) by courier on the 2nd day after the document was given to the courier; or
 - (d) as directed by the Committee;

unless the person to whom the notice is to be given establishes that he or she, acting in good faith and through absence, accident, illness or other causes beyond his or her or its control, failed to receive the notice in a timely way.
- (2) Subject to sub-rule 2.05(1), documents served or delivered after 5:00 p.m. will be deemed to have been received on the next day that is not a holiday.

2.06 Filing of Documents

- (1) Any document may be filed with the Committee by:
 - (a) leaving it with the receptionist at the College;
 - (b) sending it by courier to the College;
 - (c) if it is less than 20 pages, by faxing it to the College at (416) 489-2625; or
 - (d) sending it by email to the College at professionalconduct@cmto.com.
- (2) A document to be filed with the Committee must be clearly marked, "Attention: Discipline Committee".

RULE 3 - PRE-HEARING CONFERENCES

3.01 Attendance is Mandatory

- (1) This Rule applies to all pre-hearing conferences. If there is more than one pre-hearing conference, this Rule applies to subsequent pre-hearing conferences with necessary modifications.
- (2) College Staff will assign the Presiding Officer for the pre-hearing conference. The Presiding Officer must not be a member of the Discipline Panel presiding over the Hearing.

- (3) Unless the Presiding Officer agrees otherwise, the College's prosecutor, a member of the College staff, the Member and, if applicable, the Member's representative, must participate in the pre-hearing conference. The pre-hearing conference may be conducted either electronically or in person.
- (4) The Presiding Officer may request that Independent Legal Counsel attend a pre-hearing conference.

3.02 Pre-Hearing Conference Memorandum

- (1) Not less than 20 days before the pre-hearing conference, the College will prepare a pre-hearing conference memorandum, which must be in Form 4, and provide a copy to the Member and to the Presiding Officer. The pre-hearing conference memorandum must identify the factual and legal issues in dispute, and briefly set out the College's position.
- (2) The Member is not required to prepare a responding pre-hearing conference memorandum. However, if he or she wishes to do so, the Member may deliver a pre-hearing conference memorandum to the College and to the Presiding Officer not less than 10 days before the pre-hearing conference. The Member may use Form 4 but is not required to do so.

3.03 Confidentiality and Use of Presiding Officer's Report

- (1) The pre-hearing conference will not be open to the public. Unless both parties consent, all communications at a pre-hearing conference must be kept confidential and constitute without prejudice settlement discussions. This includes any pre-hearing conference memoranda and the Presiding Officer's notes and records.

Commentary: Pre-Hearing Conferences

Pre-hearing conferences are a valuable and important stage in the proceedings. They are convened for the purposes of:

- (a) ensuring that the Member has received sufficient disclosure of evidence;
- (b) determining whether any facts or evidence can be agreed upon;
- (c) simplifying or narrowing issues;
- (d) exploring the possibility of obtaining admissions which may facilitate the hearing;
- (e) identifying procedural and legal issues that may arise at the hearing;
- (f) exploring the possibility of other forms of resolving of the matter; and
- (g) any other matter that may assist in the just, most expeditious and least expensive

disposition of the proceeding.

Because of the value and importance of pre-hearing conferences, the Discipline Committee has passed a Rule requiring all parties, along with their representatives, to attend a pre-hearing conference. Where it is impracticable for a party to appear in person, the Committee endorses the use of telephone conference calls.

The College is required to provide a pre-hearing conference memorandum, but the Member is not required to provide a responding pre-hearing conference memorandum. It is expected that the College's pre-hearing conference memorandum will assist both parties to prepare for the pre-hearing conference and for the Hearing, and will assist the Member to understand the case against him or her.

The Committee expects that all parties will take steps to fully inform themselves about the facts of the case and the issues to be discussed at the pre-hearing conference.

The parties are entitled to the candid, non-binding view of the Presiding Officer conducting the pre-hearing conference regarding:

- (a) the strength of the College's case;
- (b) the Member's likelihood of being found guilty of professional misconduct and/or incompetence; and
- (c) the appropriate penalty if the Member is found guilty of professional misconduct and/or incompetence.

The Committee expects that the parties and their counsel will have their calendars with them at the pre-hearing conference to facilitate the scheduling of the hearing or any pre-hearing motions.

The Presiding Officer may give guidance or give directions about any matter that may assist with the just and expeditious disposition of the Hearing, including:

- (a) a timeline for taking any steps in the proceeding;
- (b) scheduling of motions;
- (c) delivery and form of documents, written arguments, and books of authorities that will be used at the Hearing, and whether the Discipline Committee will review them before the Hearing;
- (d) estimated length and scheduling of the Hearing; and
- (e) when witnesses must be available to testify.

RULE 4 - MOTIONS

4.01 Process for Bringing a Motion

- (1) Motions brought in advance of the Hearing must be brought by way of a notice of motion. If the motion is brought at any other time, a notice of motion should be used when practicable.
- (2) Where the College is bringing a motion, it should provide notice by using Form 2. The Member may also use Form 2 but is not required to do so. Any notice of motion must set out the grounds for the motion and the relief requested, and include copies of any evidence that the person wishes to rely on.

4.02 Limitations on Bringing a Motion in Advance of the Hearing

- (1) Subject to sub-rule 4.02(2), only motions which are procedural or temporary may be brought by a person in advance of the Hearing. This may include motions for:
 - (a) the exchange of documents;
 - (b) the oral or written examination of a party;
 - (c) the exchange of witness statements and reports of expert witnesses;
 - (d) the provision of additional details about the allegations;
 - (e) a party to provide a list disclosing all relevant documents and things in the possession or control of the party;
 - (f) the ability of a party to view documents;
 - (g) any other form of disclosure;
 - (h) adjourning the Hearing; and/or
 - (i) waiving a Rule.
- (2) A motion with respect to the following matters must be heard at the Hearing:
 - (a) the exclusion of the public from all or part of a Hearing;
 - (b) whether two or more matters directed or referred to the Committee, whether or not involving the same member, should be heard together;
 - (c) the exclusion of witnesses from the Hearing;
 - (d) constitutional issues;
 - (e) orders respecting the accommodation of witnesses;

- (f) orders relating to the production of documents from third parties; and
- (g) any matter that a panel hearing a motion adjourns to the Discipline Panel presiding over the Hearing.

4.03 Scheduling a Motion Before the Hearing

- (1) Where the parties are able to agree in advance to the date and time to be scheduled for the hearing of the motion, the hearing of the motion will proceed on the date and time agreed to by the parties.
- (2) If the person bringing the motion cannot, after reasonable efforts, obtain agreement for the date and time for the hearing of the motion, the person must contact the Director, Professional Conduct, of the College. The Director will fix a date and time for a telephone conference with the Committee Chair for the purpose of fixing the date and time for the hearing of the motion.
- (3) All pre-hearing motions will be heard not less than 15 days before the Hearing unless the motion must be heard during the Hearing.
- (4) A person bringing a pre-hearing motion must provide to all parties a copy of the Notice of Motion and materials in support of the motion not less than 15 days before the motion is to be heard.
- (5) The parties responding to the motion must provide their materials not less than 7 days before the motion is to be heard.

4.04 Assigning a Motion Panel for Pre-Hearing Motions

- (1) The Committee Chair must assign a Discipline Panel to hear each pre-hearing motion.
- (2) A request to have a motion heard by a person who will not sit on the Discipline Panel presiding over the Hearing must be brought to the attention of the College at the time the party files his or her Notice of Motion.

4.05 Notice of Constitutional Question

- (1) A party who intends to raise a constitutional issue or question at a Hearing must formally give notice of such to the Attorney General of Canada and the Attorney General of Ontario. Notice must be given not less than 15 days before the issue or question is to be argued before a Discipline Panel.
- (2) The Attorney General of Canada and/or the Attorney General of Ontario may give evidence and make submissions to the Discipline Panel regarding the constitutional issue or question.

4.06 Limits on Submissions on Motions

- (1) The Discipline Panel may set reasonable limits on oral and written submissions by the parties.

4.07 Orders on Motions

- (1) An Order made by the Discipline Panel in advance of the Hearing must be in Form 3. If the Discipline Panel makes an order at any other time, this form should be used when practicable.

RULE 5 - DISCLOSURE AND PRODUCTION OF DOCUMENTS

5.01 Permissible Use of Disclosure

- (1) The College must provide the Member with complete disclosure not less than 10 days before the Hearing. This must include disclosure of the identity of any witnesses the College intends to rely upon, and the opportunity to examine any documentary evidence.
- (2) Any person who receives disclosure must only use the information for the purposes of the proceedings, and must not use it for any other reason. The person must also ensure that any other person to whom he or she gives the information undertakes to similarly restrict the use of the information.
- (3) Where a patient's medical or clinical records form part of disclosure of the College's case and/or where production of a patient's medical or clinical records is ordered by a Discipline Panel, the Member must return those documents to the College after the conclusion of the proceedings, including the disposition of any appeal.
- (4) Where the Discipline Panel orders additional disclosure or production of documents in the possession of a third party, it may, to protect the privacy of any person, impose terms or conditions upon the extent and method of disclosure or the use of the information.
- (5) This Rule does not prevent the College from using the information obtained for other regulatory purposes.

Commentary: Disclosure by College

The timely disclosure of all relevant information in the College's possession is important to the fairness of proceedings before Discipline Panels. The College's disclosure obligation is a continuing one. After initial disclosure has been made, the College must provide timely disclosure of information subsequently coming into its possession and information previously considered irrelevant but whose relevance has subsequently come to light. There are, however,

circumstances where the College is not required to disclose information because it is privileged.

These principles have been described by the Ontario Court of Justice (General Division) in *Markandey v. Board of Ophthalmic Dispensers*, [1994] O.J. No. 484. In that case, the Court stated, "the importance of full disclosure to the fairness of...disciplinary proceedings...cannot be overstated". The Court went on to explain that:

...tribunals should disclose all information relevant to the conduct of the case, whether it be damaging to or supportive of a respondent's position in a timely manner unless it is privileged as a matter of law. Minimally, this should include copies of all witness statements and notes of the investigators. The disclosure should be made by counsel to the Board after a diligent review of the course of the investigation. Where information is withheld on the basis of its irrelevance or a claim of legal privilege, counsel should facilitate [a] review of these decisions, if necessary. The absence of a request for disclosure, whether it be for additional disclosure or otherwise, is of no significance. The obligation to make disclosure is a continuing one. The Board has a positive obligation to ensure the fairness of its own processes. The failure to make proper disclosure impacts significantly on the appearance of justice and the fairness of the hearing itself. Seldom will relief not be granted for a failure to make proper disclosure.

In recognizing the importance of these principles to the fairness of proceedings before it, the College considers that, barring exceptional circumstances, disclosure should take place no later than 30 days prior to the pre-hearing conference and, in the case of documents that subsequently come into the College's possession, on a timely basis.

5.02 Motions for Production of Documents from a Third Party

- (1) A motion by a party relating to the production of documents in the possession of a third party cannot be brought before the Hearing begins. The Notice of Motion relating to the production of documents must be provided to the person possessing the documents and to any other person having a significant interest, including a privacy interest, in the documents.
- (2) In considering such a motion, the Discipline Panel must take into account:
 - (a) the relevance of the document to a significant issue in the Hearing;
 - (b) whether it would be unfair to require the party bringing the motion to proceed to the Hearing without the document;
 - (c) any claim that the document is privileged; and
 - (d) whether any person has a significant interest in the document, including a privacy interest.

RULE 6 - WRITTEN AND ELECTRONIC HEARINGS

6.01 Ability to Conduct a Hearing in Writing or Electronically

- (1) Discipline and reinstatement Hearings cannot be heard in writing but may be heard electronically.
- (2) Subject to sub-rule 6.01(1), a Discipline Panel may allow all or part of a Hearing to be heard in writing and/or electronically if:
 - (a) the parties consent; or
 - (b) the parties do not consent, and the Discipline Panel, after hearing submissions from the parties, makes an order that the Hearing should be heard in this way.

6.02 Electronic Hearings

- (1) A party must be served with a Notice of Hearing indicating that all or part of the Hearing is going to be heard electronically.
- (2) Unless otherwise provided in these Rules, every person participating in the Electronic Hearing must deliver every document, in sequentially numbered pages, that he or she intends to rely upon not less than 3 days before the Hearing.
- (3) Not less than 48 hours before an Electronic Hearing is scheduled to begin, every person participating in the Hearing must give notice to the Director, Professional Conduct, of the College of the telephone number and location where he or she can be reached for the Hearing.
- (4) Every person participating in the Electronic Hearing must ensure that he or she can be reached at the telephone number provided to the Director, Professional Conduct, of the College not less than 5 minutes before the beginning of the Hearing.

6.03 Written Hearings

- (1) If all or part of a Hearing is to be held in writing, a party must be served with a Notice of Hearing indicating this.
- (2) Where a Written Hearing is held, the Discipline Panel must fix the dates and times by which submissions and/or evidence must be exchanged by the parties, and provided to the panel.

RULE 7 - HEARING PANEL

7.01 Appointment of Hearing Panel by Committee Chair

- (1) The Committee Chair will select a Discipline Panel to preside over a Hearing.

7.02 Composition of Hearing Panel

- (1) A Discipline Panel presiding over the Hearing must be composed of between 3 and 5 persons. Not less than two must be persons appointed to the Council by the Lieutenant Governor in Council.
- (2) At least one of the members of the Discipline Panel must be both a member of the College and a member of the College's Council.
- (3) No person may be selected for a Discipline Panel who has taken part in the investigation of what is to be the subject-matter of the Hearing.
- (4) Three members of a Discipline Panel, at least one of whom must be a member who was appointed to the Council by the Lieutenant Governor in Council, constitute a quorum.
- (5) A member of a Discipline Panel who ceases to be a member of the Committee after a Hearing has started will be deemed, for the purposes of dealing with that matter, to remain a member of the Discipline Panel until the final disposition of the matter.
- (6) Only the members of a Discipline Panel who were present throughout the Hearing may participate in the panel's decision.

7.03 Conduct of Panel Members

- (1) No member of a Discipline Panel presiding over a Hearing may communicate outside the Hearing about the subject-matter of the Hearing with a party or the party's representative unless the other party has been given notice of the subject-matter of the communication and an opportunity to be present during the communication.

RULE 8 - PROCEDURE DURING THE HEARING

Commentary: Procedure at Discipline Hearing

A Discipline Hearing is a formal proceeding. It is an adversarial process in which two competing parties, the College and the Member, present their sides of the case. The role of the Discipline Panel is:

- (a) to ensure that both parties present their cases fairly;
- (b) to listen impartially to the evidence and arguments; and,
- (c) after the parties have completed their presentations, to decide the issues.

The Hearing is usually conducted in the same order used in the civil courts. This means that, generally, the party initiating a segment of the Hearing goes both first and last in that segment. Thus, at the beginning of a Hearing, the College's prosecutor (who initiated the Hearing) will lead evidence first, the Member will call his or her evidence second, and the prosecutor will then call any reply witnesses.

The party who calls a witness leads that witness's evidence first, the other party cross-examines as the second step, and then the party calling the witness re-examines.

In closing argument, the prosecutor usually goes first, the practitioner goes second and the prosecutor may reply third.

When a party brings a motion, that party (whether the College's prosecutor or the Member) goes first, the responder second, then the party who brought the motion replies.

8.01 Public Access to Hearing

- (2) Subject to sub-rule 8.01(2), a Hearing must be open to the public.
- (3) A Discipline Panel may make an order that the public be excluded from all or part of a Hearing if the panel is satisfied that,
 - (a) a witness or party may disclose matters involving public security;
 - (b) a witness or party may disclose financial or personal or other matters of such a nature that the harm created by disclosure would outweigh the benefits of an open hearing;
 - (c) a person involved in a criminal, civil or other proceeding may be prejudiced; or
 - (d) the safety of a person may be jeopardized.

- (4) In situations where the Discipline Panel makes an order excluding the public from the Hearing, it may make other orders that it considers necessary to prevent the matters disclosed at the hearing from being disclosed to the public, if harm created by disclosure would outweigh the benefits of an open hearing. This may include orders banning the publication or broadcasting of those matters. However, the Discipline Panel cannot make an order that prevents the publication of anything that is contained in the register and already available to the public.
- (5) A Discipline Panel may make an order that the public be excluded from the part of a Hearing dealing with a motion for an order under sub-rule 8.01(2) It may also make other orders it considers necessary to prevent the public disclosure of matters disclosed in the submissions relating to such any motion, including prohibiting the publication or broadcasting of those matters.
- (6) Before the Discipline Panel makes an order under sub-rule 8.01(2), the panel may allow a person to whom the order relates and his or her representative to attend the Hearing and to make submissions. The Discipline Panel also has the discretion to allow another person to attend if, in the opinion of the Discipline Panel, to do so does not undermine the reasons for making the order and does not cause undue prejudice to a party.
- (7) The Discipline Panel must ensure that any order it makes under this Rule, and its reasons, are available to the public in writing.

Commentary: Review of Transcripts by Non-Parties

A person other than the parties to the proceeding may purchase a copy of a transcript of any part of a Hearing that is not the subject of an order prohibiting publication by contacting the College's Director, Professional Conduct, and paying in advance the prescribed fee to the court reporter responsible for transcribing that portion of the Hearing. This is permitted under section 48(1)(c) of the *Code*. No order of the Discipline Panel is necessary.

8.02 Electronic Devices and Publication of Proceedings

- (1) No person may:
 - (a) take or attempt to take a photograph, audio or video recording or other record by any means at a proceeding; or
 - (b) publish, broadcast, reproduce or otherwise disseminate a photograph, audio or video recording or other record taken in contravention of this sub-rule.
- (2) Sub-rule 8.02(1) does not apply to:

- (a) a person unobtrusively making handwritten or typed notes, or sketches at a proceeding;
- (b) a party or a party's representative unobtrusively making an audio recording at a proceeding that is used only as a substitute for handwritten or typed notes for the purposes of the proceeding;
- (c) a person taking a photograph, audio or video recording or other record with the prior written authorization of the Discipline Panel; or
- (d) a disabled person using a device to compensate for a disability.

8.03 Information Relating to Member's Capacity

- (1) If there is information in a proceeding to suggest that the Member may be incapacitated, the Discipline Committee may:
 - (a) ask the parties if they have had an opportunity to consider the information and whether all or part of the conduct at issue in the allegations relates to the Member's capacity;
 - (b) ask the parties whether or not there are parallel incapacity proceedings;
 - (c) grant an adjournment to permit the parties to consider whether to initiate incapacity proceedings to deal with all or part of the conduct in issue;
 - (d) if a finding has been made by the Discipline Committee and if there are parallel incapacity proceedings, ask the parties for details of the status of the incapacity proceedings and any order made by the Fitness to Practise Committee;
 - (e) ask the parties if they would like to make submissions about whether the public should be excluded from all or part of the Hearing; and/or
 - (f) do anything else relevant that may assist the Discipline Panel in the circumstances.

8.04 Oral and Written Arguments

- (1) A Discipline Panel may place reasonable limits on the length of oral and/or written submissions.
- (2) A Discipline Panel may, after hearing submissions, order the parties to submit written arguments on some or all of the issues at the Hearing, and may give directions as to the form and timing of such written arguments.

8.05 Use of Evidence by Hearing Panel

- (1) Nothing is admissible in evidence at a Hearing that would be inadmissible in a court in a civil action.
- (2) The findings of a Discipline Panel must be based exclusively on evidence it has admitted.

8.06 Evidence of Registrar of the College

- (1) The Registrar of the College may provide evidence to a Discipline Panel by giving a statement certifying information obtained from the records kept by the Registrar in the course of his or her duties.

8.07 Independent Legal Advice

- (1) If a Discipline Panel obtains legal advice with respect to a Hearing, Independent Legal Counsel must advise the parties of the nature of the advice. The parties may then make submissions with respect to the advice.

Commentary: Independent Legal Advice

A Discipline Panel is entitled to obtain independent legal advice on issues of law, procedure and evidence but not on the merits of the allegations or on the appropriate sanction. The panel, after inviting the parties to comment on the advice they have received from its counsel during the hearing, has the right to choose not to follow the advice.

8.08 Obtaining a Summons to Compel the Attendance of a Witness

- (1) A party wishing to obtain a summons to compel a witness to attend the Hearing must provide the name of the witness to the Chair of the Discipline Committee.
- (2) The summons may require the person summonsed to produce at the Hearing, documents and things specified in the summons.
- (3) The summons must be served personally on the person to be summonsed.

- (4) The person summonsed is entitled to receive the same fees or allowances for attending or participating in the hearing as are paid to a person summonsed to attend before the Superior Court of Justice. The party obtaining the summons must pay the fees or allowances.

Commentary: Summonses

Under section 12 of the *Statutory Powers Procedure Act*, the Chair of the Discipline Committee can issue a summons requiring a person to attend a Hearing, and to produce documents and other things at the Hearing.

8.09 Vulnerable Witnesses

- (1) A Discipline Panel may order that a support person be permitted to be present and to sit near a vulnerable witness while testifying, and may issue directions regarding the conduct of the support person during the testimony of the witness.
- (2) A Discipline Panel may order that a vulnerable witness testify outside the hearing room or behind a screen or other device that would allow the vulnerable witness not to see the Member if the Discipline Panel is of the opinion that this is necessary to obtain a full and candid account of the matter. Before making such an order, the Discipline Panel must make arrangements for the parties and, if applicable, their representatives, and the Discipline Panel to watch the testimony of the vulnerable witness by means of closed-circuit television or otherwise. The Discipline Panel can only make such an order if the Member is permitted to communicate with his or her representative while watching the testimony.

8.10 Non-Publication of Identity of Sexual Misconduct Witnesses

- (1) A witness who is testifying regarding allegations of a Member's misconduct of a sexual nature involving that witness may request that the Discipline Panel to, order that no person shall publish the identity of that witness or any information that could disclose his or her identity. The Discipline Panel must grant such an order if requested.

8.11 Victim Impact Statement

- (1) If a Discipline Panel finds that a Member has committed an act or acts of professional misconduct by sexually abusing a patient, the Discipline Panel must consider any written statement that has been filed, and any oral statement that has been made to the panel, describing the impact of the sexual abuse on the patient. The statement may be made by the patient or by his or her representative.
- (2) When a written statement is filed, the Discipline Panel must, as soon as possible, provide copies of it to the Member.

8.12 Expert Witnesses and Reports

- (1) A party who intends to call an expert witness at a Hearing must, not less than 10 days before the Hearing, serve an expert report on the other party. The expert report must be signed by the expert, and must set out his or her name, address and qualifications, and the substance of his or her proposed testimony; or, if the expert has not prepared a written report, a written summary of the expert's evidence.
- (2) Each party must inform any prospective expert witness that it is the duty of an expert to assist the Discipline Panel on matters within his or her expertise, and that this duty overrides any obligation to the person from whom he or she has received instructions or payment. The expert must certify, in his or her written report (or, if there is no written report, during his or her testimony) that he or she is aware of and understands this duty.
- (3) Where the Discipline Panel hears testimony of an expert witness, it may also admit the expert witness' report as an exhibit at the Hearing.
- (4) A Discipline Panel may, in its discretion, allow a party to introduce expert evidence that is inadmissible under this Rule, and may make directions it considers necessary to ensure that the other parties are not prejudiced.

Commentary: Conduct of Hearings

The College expects that proceedings taking place before Discipline Panels will be conducted with civility and courtesy. All submissions should be directed to the Chair and members of the Discipline Panel.

To facilitate the orderly flow of proceedings, the Committee expects that parties will have available ten (10) copies of any exhibit they wish to enter or authorities to which they wish to refer.

The College encourages the use of agreed statements of fact, joint document books and joint books of authorities, where there are difficult or complex legal issues to be determined.

From time to time, members of the Discipline Panel may participate in Hearings by asking questions of witnesses. In so doing, however, panel members will be careful not to usurp the role of the parties and their representatives. The College adopts the principles expressed by the Ontario Court of Appeal in *R. v. Stucky*, [2009] O.J. No. 600 and, specifically, the following passages when determining when and under what circumstances a Discipline Panel member may ask questions of a witness:

...a trial judge may intervene to ask questions, and, where necessary, he or she has a duty to ask questions where justice requires it. ... [There are] three situations in which questions... may be justified, namely: to clear up ambiguities and call a witness to order to explore some matter which the witnesses' answers have left vague; or, to put questions which should have

been asked by counsel in order to bring out some relevant matter, but which were nonetheless omitted. ...The third situation... is not an open-ended invitation to the trial judge to usurp the role of Crown counsel. The judge cannot leave his or her position of neutrality as a fact-finder and become the cross-examiner.

And later:

[Questions] to a witness should generally be put after counsel has completed his or her examination of the witness and, further, that the witness should not be cross-examined by the trial judge during examination-in-chief.

Should a member of the Discipline Panel ask a witness a question, he or she should then provide the College's prosecutor, the Member or his or her representative an opportunity to ask further or follow-up questions that may arise out of the panel's queries.

8.13 Non-party Participation in Hearing

- (1) On application by a person who is not a party to the proceedings, a Discipline Panel may allow a non-party to participate in a Hearing if,
 - (a) the good character, propriety of conduct or competence of the non-party is an issue at the Hearing; or
 - (b) the participation of the non-party would, in the opinion of the Discipline Panel, be of assistance to the panel.
- (2) The Discipline Panel must determine the extent to which a non-party who is allowed to participate may do so, including the ability of the person to make oral or written submissions, to lead evidence and to cross-examine witnesses.

8.14 Public Access to Hearing Record

- (1) A member of the public has a right to access the Notice of Hearing, the transcript of evidence, any Agreed Statement of Fact, and any Joint Submission as to Penalty, without having to bring a motion.
- (2) If a member of the public wishes to have access to any other part of the Hearing Record, the person must bring a motion before the Discipline Panel or Committee, and must give notice to the parties and any other interested person. The Notice of Motion must set out the purpose, scope of the access and the intended use being sought and, if the person is requesting permission to duplicate an exhibit, sufficient details that would allow the Committee or Discipline Panel to consider whether or not duplication would adversely affect the integrity of the exhibit.

- (3) Prior to making its decision on a motion for access to all or part of the Hearing Record, the Committee or Discipline Panel must consider the submissions of the person seeking access, the parties and any other persons having an interest. The Committee or Discipline Panel may consider the following factors:
 - (a) the general principle that hearings be open to the public;
 - (b) the intended use of the exhibit;
 - (c) proprietary or privacy interests in the exhibit;
 - (d) the timing of the request and, specifically, whether it was made during or after the Hearing;
 - (e) interference with the proper and orderly conduct of the Hearing;
 - (f) interference with the Member's right to a fair hearing; and
 - (g) any other factor that may be relevant to the Committee's or Discipline Panel's decision.
- (4) In the event that the Committee or Discipline Panel decides to grant access to all or part of the Hearing Record, it may decide to limit who may access the Hearing Record and how it may be used. The Committee or Discipline Panel must be satisfied that the security of any exhibit will be protected, and may provide for supervision and control of any exhibit by a person designated by it.
- (5) Before granting a member of the public access to any part of the Hearing Record, the College may redact the document(s) to prevent disclosure of the names and any other identifying personal information of any complainants, patients, or witnesses, and the names of any institutions.

RULE 9 - AWARDS OF COSTS

9.01 Costs for Non-compliance with Rules

- (1) Where a Discipline Panel is entitled to order the payment of costs and/or expenses by a party, the Discipline Panel may consider the failure of a party to comply with these Rules.

9.02 Frivolous or Vexatious Proceedings

- (1) A Discipline Panel may at any stage of the proceeding order a party to pay costs where the conduct of the party has been unreasonable, frivolous or vexatious or a party has acted in bad faith.

9.03 Costs for a Late Request for Adjournment

Commentary: Late Requests for Adjournments

It is in the public interest to ensure that the Committee impartially hears and determines allegations of professional misconduct and/or incompetence, or applications for reinstatement, in a fair and prompt manner. Accordingly, late requests for an adjournment of the hearing without good reason may attract costs sanctions.

- (1) In this Rule, a late request for adjournment means an adjournment that is requested within 10 business days of the beginning of the Hearing.
- (2) A late request for an adjournment may result in an award of costs and/or expenses against the party requesting the adjournment, if the conduct of the party has been unreasonable, frivolous or vexatious or if the party has acted in bad faith.
- (3) In determining the amount of costs and/or expenses that may be awarded under this Rule, the Discipline Panel must take into account the following factors:
 - (a) whether the lateness of the adjournment request could have been avoided;
 - (b) the number of days on which the Hearing has been scheduled to proceed;
 - (c) the amount of the costs and/or expenses borne by the party seeking costs and/or expenses as a result of the late request for adjournment; and
 - (d) the conduct by the party requesting the adjournment, and whether this has been unreasonable, frivolous or vexatious or the party has acted in bad faith.

Commentary: Costs Against Member or College

A Discipline Panel can order either a Member or the College to pay costs to the other. Although the criteria for ordering the payment of costs is different for each party, the amount of costs awarded should be based on expenses actually incurred.

The Discipline Panel should provide reasons when it grants or refuses to award costs.

9.04 Costs Against Member Following Hearing

- (1) Where a Discipline Panel finds that the Member has committed an act or acts of professional misconduct, or finds the Member to be incompetent, it may make an order requiring the Member to pay all or part of the College's:
 - (a) legal costs and expenses,

- (b) costs and expenses incurred in investigating the matter, and/or
- (c) costs and expenses incurred in conducting the Hearing.

Commentary: Costs Payable by Member

This provision is intended to cover more than just legal costs. It extends to all expenses associated with the College's investigation and holding the hearing.

In *Freedman v. Royal College of Dental Surgeons* (2001), 146 O.A.C. 157 (Div. Ct.) at para. 4, the Court provided the following example of considerations that a Discipline Panel can take into account when ordering a member to pay costs:

It [the Discipline Panel] carefully reviewed the relevant factors including: the conduct of the hearing, the facts of the underlying case, [the member's] failure to recognize that the result achieved was unacceptable to his patient, his refusal throughout to acknowledge any error, thus prolonging the hearing to some 15 days, and his failure to act reasonably and professionally to address the concerns of the patient and avoid a hearing. These were all relevant and we can find no error in principle in the exercise of the discretion of the Committee as to costs.

9.05 Costs Against College Following Hearing

- (1) A Discipline Panel may not make an order requiring the College to pay any portion of the Member's legal costs unless it is of the opinion that the commencement of the proceedings was unwarranted.

Commentary: Costs Payable by College

The Discipline Panel can only order costs of the hearing in favour of a Member where it finds that the proceedings should never have been started. In reaching a decision on whether or not costs are warranted, the Discipline Panel should consider the reasonableness of the College's decision to refer the matter to discipline at the time it was made. The Discipline Panel should not consider whether, in hindsight, the evidence demonstrated that the Member was not guilty. For example, a referral to discipline would be unwarranted if it was done without reasonable justification or was made in bad faith.

The Member can only recover costs relating to his or her legal fees, and not costs for other losses as a result of the Hearing such as time away from his or her practice.

9.06 Procedure for Requesting Costs

- (1) A party requesting an order for costs must provide an explanation and, where practicable, evidence of the costs they have incurred.

RULE 10 - MATTERS ARISING AFTER THE HEARING

10.01 Sending the Decision to the Member

- (1) The Discipline Panel must send each party who participated in the Hearing a copy of its final decision or order, including the reasons if any have been given.

Commentary: Timelines for Issuing Decisions and Reasons

The College encourages Discipline Panels to issue its decisions and reasons in a timely manner. To facilitate this, the College has established the following guidelines:

- (a) where a motion has been made at the pre-hearing stage or at the beginning of the Hearing, the ruling will generally be made within 30 days after the motion;
- (b) decisions and reasons of Discipline Panels regarding findings of professional misconduct and/or incompetence will generally be issued within 60 days of the conclusion of the Hearing; and
- (c) decisions and reasons of Discipline Panels as to penalty will generally be issued within 30 days after hearing submissions.

If the Discipline Panel feels that it is unable to meet any of these timelines, the Chair of the Committee will notify the parties and specify the date by which the decision and reasons will be issued. In specifying the date, the Chair of the Committee will take into account the nature and complexity of the Hearing, the volume of evidence and submissions, and any other relevant factors.

Once issued, decisions and reasons are public.

10.02 Sending the Decision to the Complainant

- (1) Where the matter arose as a result of a complaint, the College must provide the complainant(s) with a copy of its final decision or order, including the reasons if any have been given.

10.03 Release of Evidence to the Parties

- (1) The Discipline Committee must return documents and things put into evidence at a Hearing to the person who produced them, on request. Evidence must be

returned within a reasonable time after the matter in issue has been finally determined.

10.04 Correction of Minor Errors

- (1) The Committee may, at any time, correct a typographical error, error of calculation or other similar minor error made in a finding, a decision, an order or reasons of a Discipline Panel.

RULE 11 - REINSTATEMENT APPLICATIONS

- (1) This Rule applies to applications for reinstatement made under sections 72 and 73 of the *Code*.
- (2) A Member making an application for reinstatement must deliver a Notice of Application specifying:
 - (a) the order sought;
 - (b) the grounds of the application;
 - (c) the evidence that the Member intends to rely on; and
 - (d) the anticipated length of the Hearing.
- (3) A Member making an application for reinstatement must comply with the policies and practices of the College, including those related to credentialing requirements and re-entering practice.
- (4) Unless the Committee directs otherwise, the Member making an application for reinstatement must deliver copies of:
 - (a) the record of the original Hearing;
 - (b) the record of any previous applications for reinstatement (whether or not the transcript has previously been ordered);
 - (c) the transcript of the original Hearing; and
 - (d) any document the Member intends to rely upon.
- (5) The Committee will not schedule a reinstatement application for a Hearing until the Member complies with sub-rules (2), (3) and (4).
- (6) Once a reinstatement application has been scheduled, the Committee must serve a Notice of Reinstatement Hearing on the parties.

SCHEDULE 1 - FORMS

FORM 1: NOTICE OF HEARING

**DISCIPLINE COMMITTEE OF THE
COLLEGE OF MASSAGE THERAPISTS OF ONTARIO**

B E T W E E N:

COLLEGE OF MASSAGE THERAPISTS OF ONTARIO

and

[INSERT NAME OF MEMBER], R.M.T.

NOTICE OF HEARING

THE INQUIRIES, COMPLAINTS AND REPORTS COMMITTEE OF THE COLLEGE OF MASSAGE THERAPISTS OF ONTARIO has referred (an) allegation(s) that you have committed professional misconduct to the Discipline Committee under paragraph(s) [specify paragraphs] of section 26 of Ontario Regulation 544/94 made under the *Massage Therapy Act, 1991*, S.O. 1991, c. 27 (the “*Massage Therapy Regulation*”).

[and/or]

THE INQUIRIES, COMPLAINTS AND REPORTS COMMITTEE OF THE COLLEGE OF MASSAGE THERAPISTS OF ONTARIO has also referred an allegation that you are incompetent as defined by subsection 52(1) of the *Health Professions Procedural Code*, which is Schedule 2 to the *Regulated Health Professions Act, 1991* (the “*Code*”).

Details about the allegation(s) [is/are] contained in Schedule “A” to this Notice of Hearing.

THE DISCIPLINE COMMITTEE WILL HOLD A HEARING, under the authority of sections 38 and following of the *Regulated Health Professions Act, 1991* (the “*Code*”), for the purpose of deciding whether you are guilty of professional misconduct [and/or incompetence]. The hearing will be held before a panel of the Discipline Committee (the “Panel”) on [date] at [time] at the College of Massage Therapists of Ontario, 1867 Yonge Street, Suite 810, Toronto,

Ontario [or other location ordered by the Discipline Committee]. You may have a representative appear on your behalf.

SUBSECTION 51(2) OF THE *CODE* PROVIDES THAT if the Panel finds you guilty of professional misconduct, it may make an order, doing one or more of the following:

1. directing the Registrar to revoke your Certificate of Registration;
2. directing the Registrar to suspend your Certificate of Registration, for a specified period of time;
3. directing the Registrar to impose specified terms, conditions and limitations on your Certificate of Registration, for a specified or indefinite period of time;
4. requiring you to appear before the Panel to be reprimanded; and/or
5. requiring you to pay a fine, of not more than \$35,000.00, to the Minister of Finance.

[and/or, if appropriate:]

SUBSECTION 52(2) OF THE *CODE* PROVIDES THAT if the Panel finds you to be incompetent, it may make an order doing one or more of the following:

1. directing the Registrar to revoke your Certificate of Registration;
2. directing the Registrar to suspend your Certificate of Registration; and/or
3. directing the Registrar to impose specified terms, conditions and limitations on your Certificate of Registration for a specified period of time or indefinite period of time.

PURSUANT TO SECTION 53.1 OF THE *CODE*, in an appropriate case, if the Panel finds that you committed professional misconduct or finds you to be incompetent, the Panel may make an Order requiring you to pay all or part of the following costs and expenses:

1. the College's legal costs and expenses;
2. the College's costs and expenses incurred in investigating the matter; and
3. the College's costs and expenses incurred in conducting the hearing.

You are entitled to know what evidence against you the College has or knows about. To obtain disclosure of this evidence, you or your representative may communicate with the solicitors for the College. They are:

[name, address and telephone number of solicitors]

A copy of the Discipline Committee Rules of Procedure will be provided to you upon request.

If you prefer to communicate with the College in French or would like the hearing of your case to be conducted in French, then you must notify the College as soon as possible so that it can make reasonable attempts to accommodate your request.

IF YOU DO NOT ATTEND THE HEARING in person or if you are not represented by someone at the Hearing, the Panel may proceed in your absence and you will not be entitled to any further notice of the proceedings.

DATED at Toronto, Ontario the [date] day of [month], [year].

COLLEGE OF MASSAGE THERAPISTS
OF ONTARIO
1867 Yonge Street, Suite 810
Toronto, Ontario
M4S 1Y5

[name of registrar], REGISTRAR

To: [name, address and telephone number of member]

FORM 2: NOTICE OF MOTION

**DISCIPLINE COMMITTEE OF THE
COLLEGE OF MASSAGE THERAPISTS OF ONTARIO**

B E T W E E N:

COLLEGE OF MASSAGE THERAPISTS OF ONTARIO

and

[INSERT NAME OF MEMBER], R.M.T.

NOTICE OF MOTION

THE [IDENTIFY MOVING PARTY] WILL make a motion to the Discipline Committee of the College of Massage Therapists of Ontario, on [day], [date], at [time], or as soon after that time as the motion can be heard, at 1867 Yonge Street, Suite 810, Toronto, Ontario.

THE MOTION IS FOR [set out the specific Order that is sought].

THE GROUNDS FOR THE MOTION ARE [specify the grounds to be argued, including a reference to any statutory provision or rule to be relied on].

THE FOLLOWING DOCUMENTARY EVIDENCE WILL be used at the hearing of the motion: [list the affidavits or other documents to be relied on].

[Date] [Name, address, telephone and facsimile number of the moving party or their representative]

TO: [Name, address, telephone and facsimile number of responding party or their representative]

FORM 4: PRE-HEARING CONFERENCE MEMORANDUM

**DISCIPLINE COMMITTEE OF THE
COLLEGE OF MASSAGE THERAPISTS OF ONTARIO**

B E T W E E N:

COLLEGE OF MASSAGE THERAPISTS OF ONTARIO

and

[INSERT NAME OF MEMBER], R.M.T.

**PRE-HEARING CONFERENCE MEMORANDUM OF THE COLLEGE
[OR OF THE MEMBER]**

Date of Pre-hearing Conference:

College Counsel:

Defence Representative (if applicable):

BACKGROUND INFORMATION

1. Please attach a copy of the Notice of Hearing to this memorandum.
2. Set out a brief statement of the College's [Member's] case, including factual disputes and the anticipated evidence of witnesses.
3. Provide a description of the legal issues to be determined at the hearing.
4. Attach a copy of any document that would assist the Presiding Officer at the pre-hearing conference.

ADDITIONAL STEPS BEFORE THE HEARING

5. Motions:
 - Will you be bringing any motions?
 - If so, what order will you seek and on what grounds?
 - When do you intend to bring each motion?

6. Disclosure:

- Are there any issues with respect to disclosure?
- Has the College made full disclosure to the Member?
- Have both parties produced all of the expert reports upon which they intend to rely?
- If disclosure has not yet been completed, can the parties agree on a date by which it will be done?

7. Admissions:

- Are there any facts or allegations that can be admitted?
- Can the admissibility of documents be agreed upon?
- Is it possible to develop an Agreed Statement of Facts?
- Is it possible to develop a Joint Submission on Penalty?

8. Joint Book of Documents:

- Is it a possible to develop a Joint Book of Documents?
- If so, by what date will the Joint Book be delivered?
- Should the Discipline Panel be able to review the Joint Book before the Hearing?

9. Written arguments:

- Are there any issues which should be dealt with through written argument instead of oral argument during the Hearing or during a motion?
- When should written arguments be delivered by?
- Should the Discipline Panel be able to review written arguments before the Hearing?

PLANNING THE HEARING

10. Hearing:

- Are you ready for the Hearing?
- Should the matter be expedited?
- Are there any special considerations affecting the setting of a date (such as the availability of witness)?
- How long will the Hearing last?
- Estimate the length of time it will take to hear any motions you anticipate bringing during the Hearing.
- List your witnesses and estimated length of time you anticipate it will take to hear their evidence.
- Will you be requesting that the Committee issue a summons (to require a person to attend or provide evidence at the Hearing). If so, identify the person(s).
- Do you object to the Committee issuing a summons requested by a party and, if so, on what grounds?

11. Memorandum or Directions

- Should the Presiding Officer provide a signed Memorandum or written directions to the parties to record facts, documents or issues where the parties have reached agreement?
- Are there any matters that should be included in a Memorandum or written directions to be given by the Presiding Officer?

(Date) (Signature of party or representative
who will be attending the hearing)