

# Guidance for disciplinary committee hearings

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## SECTION 1: INTRODUCTION

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1. The purpose of the Guidance for Disciplinary Committee Hearings ('the Guidance') is to assist all parties to proceedings. It is designed to manage regulatory risk, provide transparency of policies and procedures and ensure consistency in approach.
2. The guidance is for use by:
  - The Committee to provide clarification on the relevant procedure and their powers
  - Any relevant person bound by the disciplinary process by virtue of ACCA's bye-laws and regulations ('relevant person') so that they are aware of the relevant procedures and of what the Committee's powers are, prior to pursuing or defending any disciplinary matter.
  - ACCA staff when they are preparing a case on behalf of ACCA.
3. The Guidance is a 'living document' which will be updated and revised when the need arises.
4. Nothing in this document should be treated as a source of legal advice to any user of the guidance. When appropriate, the independent Legal Adviser will advise the Committee on questions of law, including questions about the use of this guidance. Relevant persons are recommended to obtain independent legal advice.

## SECTION 2: THE ROLE AND REGULATORY POWERS OF THE COMMITTEE

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### Introduction

5. The Committee are totally independent of ACCA and are free to exercise their own judgement in making decisions:
  - according to the material and submissions presented;
  - in accordance with the standard of proof, which in regulatory matters is generally accepted to be 'on the balance of probabilities';
  - with regard at all times to the regulatory framework set out in ACCA's Rulebook, and any other relevant guidance;
  - balancing the need to maintain public confidence in the profession with appropriate proportionality.

### The role of the committee

6. The Committee determines whether the relevant person is liable to disciplinary action and, if so, what sanction, if any, should be imposed.
7. In determining whether allegations are 'well founded' a Committee must decide whether ACCA, which has the 'burden of proof' in relation to the facts alleged, has discharged that burden and, in consequence, whether the relevant person's conduct amounts to misconduct. Whether those facts amount to misconduct is not a matter which needs to be 'proved' but is a matter of judgement for the Committee.
8. The Chairman should take an active role in managing the hearing to ensure the most efficient use is made of time to enable the case to be concluded within the scheduled time. An appropriate balance must be struck between the interest and fairness to the parties and the public interest in the expeditious disposal of the case.<sup>1</sup>
9. The Committee alone must make decisions on both facts and on the law. Although a Committee will hear submissions on points of law from the case presenter and relevant person and/or their representatives, and will be given further advice by the legal adviser, it is the Committee that must still make its own decision. This means that a Committee is not bound to accept the legal assessor's advice.
10. Were a Committee to simply accept the legal adviser's advice on a point of law having heard legal arguments from parties concerned, then it would in fact be delegating the decision making to the legal adviser. This could potentially compromise the Committee's role as the arbiters of law. If the Committee does not accept the legal adviser's advice it must give very clear reasons for its decision.

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<sup>1</sup> *R. v Jisil* [2004] EWCA Crim 696

## Purpose of a substantive disciplinary committee hearing

11. A substantive hearing is called to determine whether the relevant person is liable to disciplinary action and, if so, what sanction, if any should be imposed. Subject to the provisions of Bye-law 11, a relevant person is liable to disciplinary action, whether or not he or she was a member at the time of the breach, if the member commits any of the breaches set out in Bye-law 8(a). Relevant firms are liable to disciplinary action for any such breaches committed by persons working in the firm. The breaches can be summarised as follows:
  - (a) Being guilty of misconduct in the course of carrying out professional duties or otherwise;
  - (b) Performing work erroneously, inadequately, inefficiently or incompetently to such an extent, or on such a number of occasions;
  - (c) Breaching any ACCA Bye-law or Regulation;
  - (d) being disciplined by another professional body;
  - (e) becoming insolvent or entering into a voluntary arrangement or similar;
  - (f) failing to satisfy a judgment debt without reasonable excuse for two months;
  - (g) pleading guilty to, being found guilty of, or accepting a caution in relation to any offence discreditable to the Association or the accountancy profession before a court of competent jurisdiction;
  - (h) being found to have acted fraudulently or dishonestly in any civil proceedings before a court of competent jurisdiction.

## Overriding objective

12. Bye-law 7(d) states that:

*'[T]he relationship between the Association and its members, relevant firms, registered students and all other persons to whom the Charter, bye-laws and applicable regulations apply shall be governed by the law of England and Wales, and all disputes shall be subject to the exclusive jurisdiction of the High Court or County Court in London'.*
13. In conducting a hearing it is incumbent upon the Committee to have in mind at all times the need to strike a balance between the interests of justice in achieving a fair outcome in light of the main objective of public protection.

## SECTION 3: PRELIMINARY ISSUES

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### Pre-hearing publicity

14. Pre-hearing publicity setting out the name of the relevant person, schedule of allegations that they face, date and venue of the substantive hearing will be set out on ACCA's website.

### Adjournments

15. Complaints and Disciplinary Regulation (CDR) 10(8)(a) provides that:  
*'The relevant person or the Case Presenter may make a written application to the Disciplinary Committee that the hearing be adjourned to a future date. Such application shall be considered at the outset of the hearing and the Disciplinary Committee may in its absolute discretion agree to the application if it is of the view that it is justified in all the circumstances.'*

#### **Relevant factors when considering adjournments**

16. In considering whether or not to allow an adjournment the Committee should have regard to CDR Regulations 10(8)(b)(i) and (ii) and shall amongst other matters, have regard to all of the following:
  - the public interest in the expeditious disposal of the case;
  - the potential inconvenience caused to a party or any witnesses to be called by that party;
  - the impact of any delay upon the proceedings including the recollection of witnesses;
  - fairness to the parties in being able to properly and sufficiently present their cases.
17. The Committee will be aware that a decision to adjourn a case should take account of the following factors:
  - the main objective of ACCA in exercising its regulatory functions is to safeguard persons using the services of relevant persons;
  - scheduling a new hearing date will need to take account of availability of Committee members and can result in a period of several months before the hearing can be resumed;
  - there is considerable expense involved in facilitating a hearing that is ultimately borne by relevant persons;
  - as well as causing delay to the case at hand, a resumed hearing will cause delay to other cases that might have been heard on the resumed hearing date.

#### **Insufficient notice**

18. For substantive hearings the relevant person is entitled to a minimum notice of 28 days. If that notice period is not complied with and short notice is not accepted (CDR 10(2)), the relevant person may have good grounds for an adjournment.
19. The relevant person may submit that the notice was not reasonable. What amounts to reasonable notice will depend on the individual circumstances of the case at hand. Relevant considerations will include:
20. Has the relevant person engaged with the process so far – for example, has the case management form been completed? If the relevant person has not previously engaged it may be considered less likely that the relevant person would attend on an adjourned date.

21. Has the relevant person been served with all the relevant evidence in the case in good time? It should be the case that all evidence has been served on the relevant person before notice of the hearing is sent so the relevant person should have had ample time to prepare his case and raise any issues with ACCA's case.

***Witnesses are not available***

22. On occasions that witnesses are unable to attend, either for ACCA or for the relevant person the following should be considered when deciding whether or not to adjourn a hearing:
- what is the nature of the witness evidence: what is its relevance? For example, where the hearing is at the fact finding stage, but the evidence to be called is primarily mitigation evidence relevant to sanction.
  - why the witness has not attended and what steps have been taken to secure their attendance;
  - is there an identifiable fault on the part of the party seeking an adjournment and the extent to which that will impact upon the overall fairness of the proceedings?
  - can the evidence of the absent witness be dealt with by way of a witness statement?
  - is it practicable to secure the witness evidence by video-link or telephone conference?
  - can the hearing proceed nevertheless with other witnesses before a final decision needs to be made on adjourning?

***Documentary evidence is not available***

23. In the normal course of events parties will have had sufficient opportunity to obtain and serve any documentary evidence that they rely on. It is not the function of the Committee to engage in an inquiry into the evidence that they may wish to see. The hearing process is adversarial and the evidential burden is on ACCA to prove its case. This means that the case must be decided only on the evidence before the Committee. Exceptionally, it may come to light at a hearing that further documentary evidence may be fair and relevant to consider. In this instance enquiry should be made as to whether it is practical and proportionate for further documentary evidence to be obtained in the course of the scheduled hearing. If not, it is unlikely that an adjournment will be justifiable in light of the factors identified above and the case should be decided on the evidence such as it is.

***Lack of or late disclosure***

24. ACCA must disclose all the evidence that it relies on in good time before the hearing in order that the relevant person can respond to the case against them. If there is an application from the relevant person or case presenter to adjourn on the basis of late disclosure enquiries should be made as to exactly when the evidence was disclosed, what it consists of and whether given the timelines, nature and extent of the evidence there has been any prejudice to the party making the application.
25. In the event that any further material is sought to be relied on by either party, ACCA or the relevant person and/or their representatives should have a fair opportunity to consider further disclosure. In some cases, disclosure from a third party may arrive late. For example, original medical evidence might become available for inspection only at the start of a hearing when produced by a witness. In these circumstances the Committee should aim to progress with the hearing if this can be done without unfairness or prejudice. There are likely to be natural breaks in the hearing when parties can consider late disclosure without causing undue delay.

**Lack of or late representation**

26. Correspondence with relevant persons throughout the investigation and in the notice of hearing will ordinarily have included information and advice regarding the option to secure representation. The Committee should make enquiries as to the previous correspondence sent to the relevant person in considering whether lack of or late representation is a justifiable reason for an adjournment.

**Amendments to the schedule of allegations**

27. The case presenter on behalf of ACCA or the relevant person may make an application to amend the schedule of allegations or to add additional allegations. Typically, an application for amendment is made prior to or at the substantive hearing, however applications can be made at any stage during the course of Disciplinary Committee hearing (prior to any findings of fact). Furthermore, the Committee is entitled of its own motion to amend or add allegations provided the relevant person is not prejudiced in his defence.
28. An application is made pursuant to CDR 10(5) which provides that:
- '(a) Upon the application of either party or upon its own motion, at any stage in the proceedings the Disciplinary Committee or the Chairman may order that:*
- (i) one or more allegations be amended; and/or*
  - (ii) one or more allegations be added; provided that the relevant person is not prejudiced in the conduct of his defence.*
- (b) Any such application made in advance of the hearing shall, if reasonably practicable, be considered by the Chairman in accordance with this regulation. If such application is refused by the Chairman, it shall be reconsidered at the outset of the hearing by the Disciplinary Committee in accordance with regulation 10(5)(a) above. For the avoidance of doubt, the Chairman shall be entitled to participate in the reconsideration of the application, and the Chairman's written reasons for refusing the application shall be provided to the Disciplinary Committee.*
- (c) Before making a decision, the Chairman or the Disciplinary Committee as appropriate shall invite representations from the parties.*
- (d) The Chairman or the Disciplinary Committee shall give written reasons for a decision to refuse or grant an application to amend the allegations'.*
29. In short, any application to amend may be made prior to the hearing on the papers for consideration by the Chairman to the Disciplinary Committee and, if refused, can be reconsidered before the full Disciplinary Committee at the outset of the substantive hearing.
30. The application will be acceded to if the relevant person will not be prejudiced in the conduct of their defence. Prejudice will not arise when the nature of the amendment is such that the material facts of the case remain the same and it is anticipated that such applications to amend will be to remedy technical defects in the schedule of allegations such as correcting a relevant regulation/bye-law.

## Objections on a point of law

31. At any stage of the proceedings objections on a point of law can be raised by either party, the Committee will have to consider the strength of the objection and announce their findings. Objections on a point of law can include:

- allegations;
- admissibility of hearsay evidence;
- admissibility of previous incidents of misconduct;
- inappropriate questioning of witnesses or relevant persons;
- allowing witness statements to stand as evidence in chief.

### **Procedure**

- The Committee must invite representations from the parties; the party raising the objection will first make any submissions followed by the responding party.
  - The Committee must then invite parties to respond to the submissions; again the party raising the objection will first make any submissions followed by the responding party.
  - Invite the legal adviser to give any legal advice relevant to making findings on objections on a point of law.
  - Invite the parties to comment on the advice given by the legal adviser.
32. Considering objections on a point of law is something that the Committee will decide in the exercise of its professional judgment. The Committee must deliberate in private together with the legal assessor. The Committee must return for the Chairman to announce the decision in public, giving reasons. If the legal adviser's advice is not accepted the Committee must specify why.

## Postponing Proceedings

33. It is in the interests of all parties and in the interests of justice that all proceedings are dealt with expeditiously. There may be circumstances in which it is appropriate for proceedings to be postponed when a member is subject to concurrent proceedings. However, postponement should not be regarded as automatic and Committee's should only consider it if it is appropriate in the circumstances.

## Concurrent Criminal or Civil Proceedings

34. It is often submitted that a potential injustice will arise if regulatory, disciplinary or other civil proceedings are conducted at the same time as a criminal trial when they are factually related. This is usually on the basis that, as more restrictive rules of evidence apply in criminal proceedings, there is a risk that evidence which may not be admitted at that trial may enter the public domain in the course of the regulatory proceedings.

35. However, the Court of Appeal held in *Mote v Secretary of State for Works and Pensions*<sup>2</sup> that civil proceedings can often proceed concurrently without any risk to a defendant's rights in a criminal trial. This case identifies that there is a 'real discretion' as to whether or not civil proceedings should be adjourned in these circumstances. The court specifically pointed out that as criminal defendants are required to disclose their defence early, no prejudice arises from the fact that a defendant may disclose his or her defence to the criminal charges in civil proceedings. This decision also clarified that the privilege against self-incrimination and any risk of 'double jeopardy' are not grounds for delaying civil proceedings, as they are principles relevant only to criminal matters.
36. Whilst ACCA's proceedings may be adjourned until any related criminal trial has concluded, there is no automatic obligation to do so and it is a decision that the Committee should make carefully. The courts have repeatedly shown a reluctance to stay a set of concurrent civil proceedings. In *R v Panel on Takeovers and Mergers ex parte Fayed*<sup>3</sup> the court noted that "It is clear that the court has power to intervene to prevent injustice where the continuation of one set of proceedings may prejudice the fairness of other proceedings. But it is a power to be exercised with great care and only where there is a real risk of serious prejudice which may lead to injustice." This is clearly something which could only depend upon the facts of any particular case.

### Conducting hearings in private

37. The 'open justice' principle adopted in the United Kingdom means that, in general, justice should be administered in public. Article 6(1) of the European Convention of Human Rights guarantees the general right to a public hearing, for the purpose of protecting the parties from secret justice without public scrutiny and to maintain confidence in the process. There is no corresponding general right for a person to insist upon a private hearing.
38. There are express exceptions cited in Article 6(1) where a hearing can be heard in private. Essentially, "the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."
39. The CDR reflect this principle, Regulation 11(1) provides that:
- '(1) Private hearings*
- (a) Hearings of the Disciplinary Committee shall be conducted in public unless the Committee is satisfied:*
- (i) having given the parties, and any third party from whom the Disciplinary Committee considers it appropriate to hear, an opportunity to make representations; and*
- (ii) having obtained the advice of the legal adviser,*

*that the particular circumstances of the case outweigh the public interest in holding the hearing in public, which may include but is not limited to prejudice to any of the parties'.*

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<sup>2</sup> [2007] EWCA Civ 1324

<sup>3</sup> [1992] BCC 524

40. Guidance for what may outweigh the public interest can be found within Article 6(1), namely that all or part of a hearing may be held in private, (i) where it is in the interests of justice to do so and (ii) to protect the private life of a member, the complainant, a witness giving evidence, or a service user.
41. The Committee should always consider whether other, more proportionate, measures could be taken to achieve the same aim. For example, anonymising information, redacting documents and concealing identity by referring to individuals as Client A or Firm B etc.
42. Regardless of how the issue arises within proceedings the Committee should give each party the opportunity to address the Committee on the issue before they make their decision.

### **Case Management Meetings**

43. In order to facilitate the efficient adjudication of a complaint levelled against a relevant person, a case management meeting may be convened in order to, amongst other matters, narrow the issues, determine matters of law, witness evidence and any other issue which may prevent the effectiveness of the substantive hearing.
44. A case management meeting may be convened at the request in writing of either party to the disciplinary proceedings provided that at least 14 days' notice is given to the other party (or such lesser period as the parties may agree).
45. The procedure is governed by CDR 10(3):
  - 41.1 *'10(3)(b) Case management meetings are private meetings called for the purpose of addressing procedural matters and attended by the Chairman, the legal adviser and the parties. The parties may attend in person and/or be represented accompanied by their legal representatives, or by their legal representatives alone. If both parties agree, a case management meeting may be considered by the Chairman without the attendance of the parties'.*
  - 41.2 *'10(3)(c) Case management meetings may also be conducted by telephone or via a video link'.*

## SECTION 4: THE SUBSTANTIVE HEARING

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### Proceeding in the absence of the Relevant Person

46. CDR Regulation 10(7) confers discretion upon a committee hearing where the relevant person fails to attend a hearing, the case may be heard in his or her absence. Consideration of this must be a two stage process. Firstly, the Committee must be satisfied that the relevant person has been served with a notice of hearing in accordance with the rules.

CDR Regulation 10(1)(a) provides:

*'On a case being referred to the Disciplinary Committee, the Association shall determine the date the case is to be heard...no later than 28 days before the date set, the relevant person shall be provided with a notice...and a paper summarising the procedure before the Disciplinary Committee and the Association's disciplinary process'.*

47. Notice shall be treated as having been served 72 hours after it was sent, unless left at an address or sent by e-mail, in which case it shall be deemed as having been served on the day on which it was left or sent. The regulation does not require that the papers are received by the relevant person.
48. Secondly, if the Committee is satisfied that the notice has been properly served it must then consider whether to exercise its discretion to proceed in the relevant person's absence.
49. The Committee must demonstrate by the language in its decision that it has gone through the two stages and appreciates that the discretion to proceed in the relevant person's absence is to be exercised with the utmost care and caution.

#### **Case law**

50. The key principles derived from the authorities can be summarised as follows. The relevant person has a right to be present when the case against her is put forward and to be in a position where she can cross examine or challenge the evidence. However a relevant person may also voluntarily and deliberately absent themselves and a hearing may proceed in their absence. Lack of funds to pay a legal representative would not normally justify an adjournment. A relevant person may attend in person.
51. The seminal authority that is often referred to in these circumstances is a criminal case that identifies relevant factors. In *R. v Jones (Anthony William)*, *R. v Purvis (Paul Nigel)*, *R. v Hayward (John Victor)*<sup>4</sup> Lord Bingham of Cornhill stated:
- "The discretion to commence a trial in the absence of a defendant should be exercised with the utmost care and caution. When deciding whether or not to proceed in the defendant's absence the judge should have regard to all the circumstances, including:
- (a) *nature and circumstances of the defendant's behaviour in absenting himself;*
  - (b) *whether an adjournment would resolve the matter;*
  - (c) *the likely length of such an adjournment;*
  - (d) *whether the defendant, though absent wished to be represented or had waived his right to representation;*

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4 (No.2) [2002] UKHL 5

- (e) *whether the defendant's representatives were able to receive instructions from him and the extent to which they could present his defence;*
- (f) *the extent of the disadvantage to the defendant in not being able to present his account of events;*
- (g) *the risk of a jury reaching an improper conclusion about the absence of the defendant;*
- (h) *the general public interest that a trial should take place within a reasonable time;*
- (i) *the effect of the delay on the memories of witnesses;*
- (j) *where there was more than one defendant, and not all had absconded, the undesirability of having separate trials."*

***The relevant person has not attended due to ill health***

52. When a relevant person alleges that he or she cannot attend a hearing due to ill health this should not automatically result in an adjournment. It is essential to exercise care and to give thorough reasons. Relevant considerations include:
- Is the alleged ill health supported by medical evidence?
  - Is the medical evidence credible and reliable?
  - To what extent does the medical evidence assist the Committee in deciding whether the ill
  - Is the issue of health of a nature that would prevent the relevant person from taking part in a hearing?
  - Does the medical evidence address what if any steps could be taken to facilitate the participation of the relevant person in their hearing?
  - Does the medical evidence give any indication to the likely time frame in which the relevant person will be fit to participate?

***Explaining the hearing to the relevant person***

53. All disciplinary hearings will follow a two stage process.

**First:** The facts of the allegations will have to be established and whether those facts engage the disciplinary bye-law referred to in the allegation. This can be done in two ways: the relevant person can admit the facts or the case presenter will call evidence to prove the facts.

**Second:** If the Committee find the allegations proved and the relevant person commits any of the breaches set out in Bye-law 8(a), then the final stage will be to determine what if any sanction is to be imposed.

## **Opening the hearing**

54. Introductions: the Chairman should establish the names and roles of all the active participants – committee members, legal adviser, hearings officer and case presenter.
55. It is not appropriate in a public hearing to ask members of the public to identify themselves or their reasons for attending. Such questions have the potential of appearing to discourage public attendance at a hearing.
56. The Chairman must identify the relevant person – the name and registration number must be confirmed.

## Consideration of the allegation(s)

57. In the event there are preliminary issues to consider, the Chairman may consider whether to deal with those first before asking for the allegation(s) to be read out. If there are no preliminary issues or these have been dealt with, the Chairman must ask that the allegation(s) is read out by the hearings officer in its entirety.
58. The Chairman must ask whether the relevant person objects to the allegation(s) on a point of law.
59. The Chairman must enquire as to what if any allegation(s) are admitted.
60. This can be done in a way that is most practicable given that allegation(s) could be short and simple or long and complex. Admissions should only come from the relevant person or their legal representative.
61. Where the relevant person has not attended, the Chairman must enquire if the relevant person has made any admissions in writing. Any written admissions must correspond to the allegation(s) as set out in the notice of hearing. The relevant person will already have been sent a 'case management form' which has the allegation(s) set out so that any admissions can be recorded.
62. The Committee must exercise caution in finding allegation(s) proven by admission where any admissions appear to be equivocal or qualified.
63. The Chairman must then enquire as to whether the relevant person admits that he or she is guilty of misconduct.
64. The Chairman must announce that any facts that have been admitted are found proved. Even if admissions are made as to misconduct this cannot be announced as "proved" in the true sense as it is a matter of judgment for the committee to determine in the exercise of their discretion.

## After the allegation(s) has been addressed

65. The Chairman will ask the case presenter to open the facts. Even where all the facts have been admitted, and thereby found proved, the case presenter will set out the facts firstly so that the Committee can assess whether the behaviour amounts to misconduct and to deal properly with the remaining stage, of sanction, the Committee will need a full understanding of the circumstances that give rise to the facts of the charge.
66. The case presenter may set out an opening note, however an opening note would generally only be provided in complex cases. This is not evidence but a summary of the case to assist the Committee in understanding the evidence that will follow.
67. The case presenter will then present ACCA's evidence in support of its case. The case presenter can present facts on any allegation and evidence should still be presented in relation to any admitted facts. This will enable the Committee to fully understand the implications thereof which is crucial to their considerations of misconduct and if necessary, sanction. This will include calling witnesses to give oral evidence, reading witness statements and referring to exhibits and other documentary evidence. The manner in which evidence is called will depend on the particular circumstances of the case.

68. CDR Regulation 12(2)(a) states that subject to the requirements of justice and of fairness to a relevant person, a Disciplinary Committee considering any allegation 'may admit oral, documentary or other evidence, whether or not such evidence would be admissible in a court of law'. As a general principle, the Disciplinary Committee shall take into account the fact that any disputed oral evidence of a witness has not been tested in cross-examination when considering what weight, if any, should be attached to it.

### **Procedure when the case presenter calls witnesses**

69. The case presenter shall:
- ensure each witness is identified;
  - the case presenter will question the witness;
  - the relevant person or their representative can cross examine;
  - the case presenter has the opportunity to re-examine;
  - the Committee then have the opportunity to question the witness;
  - the relevant person / representative may ask any questions arising out of the Committee's questions;
  - the case presenter may finally ask any questions arising out of the Committee's questions.

### **Procedure once the Case Presenter has closed the Association's case**

70. Having heard the evidence the relevant person, their respective representative or the Committee may of their own volition wish to consider whether or not The case presenter has presented sufficient evidence to establish a case to answer on the facts, only in relation to any facts not admitted by the relevant person as those admitted will already have been recorded as being found proved;
71. The CDRs do not contain any expressed provisions for half-time submissions, but it is entirely proper for a Committee to consider and determine upon a half-time submission made by or on behalf of a member. There is no useful purpose served in continuing proceedings if, based upon the case before it, the Committee determines that there is no real prospect of ACCA proving the facts alleged, or of the Committee concluding that the acts amount to the grounds of an allegation, for example, misconduct. In such circumstances the Committee will invite submissions, firstly from the relevant person, if present, and then the case presenter. The Committee will invite the legal assessor to advise them.
72. Disciplinary proceedings share some characteristics with criminal proceedings in that they are not based upon a dispute between parties, but upon an allegation made against a member by a public authority. Therefore it is entirely appropriate for a Committee to consider the test which is laid down in *R v Galbraith*.<sup>5</sup>

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5 [1981] 1 WLR 1039

73. If The Committee should consider whether ACCA has presented any evidence upon which they could find the allegation, or an element of it, proved. If not, then there will be no difficulty in stopping the proceedings at that stage as ACCA will not have discharged the burden of proof. If ACCA has presented some evidence which is relevant to the allegation then the Committee should go on to consider whether that evidence is unsatisfactory or tenuous in nature, inherently weak or vague or inconsistent with other evidence. The strength of evidence can rest upon the Committee's assessment of the reliability and credibility of a witness. The Committee may also need to consider whether the evidence, presented by ACCA, is such that, when taken at its highest, no reasonable Committee could properly conclude that the ground for the allegation is met. The Committee may also consider whether the allegation is misconceived, in that the evidence is not disputed, but it is insufficient to establish the ground. The Committee should ensure that it only considers the evidence presented by ACCA and not any evidence which may have been provided by the member in advance of the hearing.
74. If the Committee disagrees with any such submission then the proceedings must continue and the Committee must hear any evidence the member wishes to present. The Committee must hear this evidence fairly and objectively, keeping an open mind in relation to the facts.

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## THE RELEVANT PERSON'S CASE

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### **Defence/factual background to admissions**

Defence to the facts alleged – Relevant Person's case on the factual background to any admissions

75. If the relevant person is unrepresented or represented by someone who is not legally qualified, they will need guidance and/or assistance at this stage on the following:
- explain that this is their opportunity to present their case;
  - that they can either make submissions on the facts or that they can give evidence;
  - that if they make submissions then the case presenter cannot question them, but if they give evidence then they can be questioned by the case presenter and the Committee;
  - that being questioned may involve their evidence being challenged;
  - that giving evidence can potentially carry greater weight;
  - that if they intend to rely upon other witnesses, then the relevant person will be expected to call their evidence (see also CDR 10(4)).

### Procedure when the relevant person calls witnesses

76. The relevant person/their representative shall:
- ensure each witness is identified;
  - the relevant person will question the witness;
  - the case presenter can cross examine;
  - the relevant person has the opportunity to re-examine;
  - the Committee then have the opportunity to question the witness;
  - the case presenter may ask any questions arising out of the Committee's questions;
  - the relevant person may finally ask any questions arising out of the Committee's questions.

### Procedure once the relevant person has closed their case

77. Once the relevant person confirms that they have no further evidence to present the Chairman shall:
- invite the case presenter to make any final submissions they wish to make;
  - invite the relevant person to make any final submissions they wish to make;
  - invite the legal adviser to provide any legal advice relevant to making findings on facts;
  - invite the parties to comment on the advice given by the legal adviser;
  - the Committee must deliberate on the facts in private together with the legal adviser. At this point it is the task of the Committee to decide on the evidence whether the allegations are proved and not to consider any other aspect of the case, such as misconduct.
78. The Committee must return for the Chairman to announce its findings on facts and give reasons for its decision. Whilst there is no general obligation in law to give separate decisions on findings of fact, in more complex cases it may be necessary to do so. The management of the steps in the process will depend upon the nature and complexity of the case and, as the court accepted in *Saha v General Medical Council*<sup>6</sup> the process is composed of steps rather than stages. As the Court of Appeal stated in *Phipps v General Medical Council*.<sup>7</sup>

*"...every Tribunal ....needs to ask itself the elementary questions: is what we have decided clear? Have we explained our decision and how we have reached it in such a way that the parties before us can understand clearly why they have won or why they have lost?"*

*If in asking itself those questions the Tribunal comes to the conclusion that in answering them it needs to explain the reasons for a particular finding or findings of fact that, in my judgment, is what it should do. Very grave outcomes are at stake. Respondents ... are entitled to know in clear terms why such findings have been made."*

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6 [2009] EWHC 1907 (Admin)

7 [2006] EWCA Civ 397

79. The Committee must ensure that the reasons on findings of fact include reference to any facts admitted and found proved, setting out where appropriate the relevant background and context. The Committee has a legal duty to explain their decisions and to provide adequate reasons for them; *Threlfall v General Optical Council*.<sup>8</sup> A Committee must give adequate reasons for its decision in order to enable the relevant person to exercise the right of appeal. This is also relevant as part of the obligation to provide a fair hearing under Article 6 of the European Convention on Human Rights. Both the parties and the appellate court must be able to understand why the decision was reached. Detailed reasons for their findings on facts may need to be given in more complex cases where the reasoning may not be obvious and needs some elucidation
80. Complaints and Disciplinary Regulation 12(4)(h) require the Committee announce its finding(s) in respect of each allegation and give reasons for its decision. However, it is crucial to give reasons for all significant decisions taken. The Committee may need to give more detailed reasons for their findings on facts in complex cases.<sup>9</sup> The parties and anyone else needs to be able to understand how they arrived at their findings.
81. Reasons give transparency to the regulatory process, explain to the relevant person in sufficient detail the basis of any findings made and in certain cases enable proper scrutiny by the Financial Reporting Council (FRC) or Irish Auditing and Accounting Supervisory Authority (IAASA). Deficient reasons can subsequently lead to a Committee's decision being appealed to the High Court by either the relevant person or the Association. The reasons need not be lengthy but should show how, and why, and what particular evidence influenced the Committee in coming to its decision.

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## EVIDENCE

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### Evidence in Chief / expert evidence

82. The stages of any witness' evidence shall be in the following order:
- First the witness will be examined by the party calling them;
  - They may then be cross examined by the opposing party;
  - Then they may be re-examined by the party calling them;
  - Finally the witness can be questioned by the committee.

#### **The Civil Procedure Rules (CPR)**

83. CPR 32.2 states that any fact which needs to be proved at trial shall be 'by their oral evidence'. However, CPR 32.5 states that when called to give evidence 'his witness statement shall stand as his evidence in chief'.

#### **Relevant factors when considering evidence-in-chief**

84. It is important to bear in mind that the first stage above, the 'evidence-in-chief' of the witness, is not the stage of evidence at which the witness' evidence is being tested or challenged: it is the stage at which the evidence is being adduced. The witness' evidence can and should be tested by questions put in cross-examination.

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8 [2004] EWHC 2683 (Admin)

9 *Southall v General Medical Council* [2010] EWCA Civ 407

85. The first stage can be undertaken by the witness being asked to verify their statement by the party calling them, and then when they have done so, reading aloud the witness statement prepared either by them or on their behalf as necessary. This applies to any witness, whether called by ACCA or the relevant person.
86. ACCA will in most cases adopt this approach to adducing evidence in chief. There are some occasions when it may be preferable for a witness to give their evidence-in-chief by question and answer. These may include, but are not limited to:
- where there is a factual dispute confined to one person's account as against another;
  - where the evidence of the witness is short and uncomplicated;
  - where the evidence relates to events such that the Committee would benefit from detailed description in oral evidence at all stages, for example a description of taking client monies over a protracted period.

## Expert evidence and opinion evidence

87. The first consideration in relation to the admissibility of evidence should be CDR 12(2).

Rule 12(2)(a) states:

*'Subject to the requirements of justice and fairness to the relevant person, a Disciplinary Committee considering any allegation may admit oral or documentary evidence whether or not such evidence would be admissible in a court of law'.*

88. In England and Wales, the admissibility of expert evidence in civil proceedings is governed by section 3 of the Civil Evidence Act 1972. This states:

*'Admissibility of expert opinion and certain expressions of non-expert opinion.*

*s3(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.*

*s3(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.*

*s3(3) In this section "relevant matter" includes an issue in the proceedings in question'.*

### Case Law

89. The principle or contention that a professional called to give evidence on facts will inevitably and appropriately give evidence based on her professional experience and expertise as no professional can justify or explain their actions other than by reference to their expertise and experience has been confirmed in *ES v Chesterfield and North Derbyshire Royal Hospital Trust*.<sup>10</sup>
90. In *DN v London Borough of Greenwich*,<sup>11</sup> it was held to be wrong to not allow defendants to a professional negligence claim to rely on opinion evidence in the witness statement of an educational psychologist who was said to have been negligent. This was applied in *Multiplex Constructions (UK) Ltd v Cleveland Bridge Ltd*,<sup>12</sup> where the court allowed an engineer giving factual evidence to also provide statements of opinion reasonably related to facts within his knowledge and relevant comments based on his own experience.

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<sup>10</sup> 2003] EWCA Civ 1284

<sup>11</sup> [2004] EWCA Civ 1659

<sup>12</sup> [2008] EWHC 2220 (TCC)

91. In relation to ACCA proceedings the Committee may well consider that an accountant witness, suitably qualified, is capable of giving opinion evidence of procedures within their experience and expertise related to the allegations set out against the relevant person. A Committee should be aware that a witness providing opinion evidence in this way, does not owe the same 'duty' to them as an expert witness. This does not mean that the evidence should be excluded. The Committee may consider this evidence to be a matter of the weight which may be given to it.
92. Relevant factors when considering expert or opinion evidence include (but are not limited to):
- expert evidence is evidence which is outside the knowledge and experience of the Committee, upon which an expert is competent to give evidence;
  - evidence which does not fall within this description is not 'expert evidence'.
93. Frequently matters will be discussed in evidence before a Committee which are complicated and technical. Because each Committee will feature an accountant member, this will mean that often, despite the technical nature and complexity of the evidence, it is nonetheless within 'the Committee's' knowledge and experience and is not as such 'expert evidence'.
94. It is a basic principal that there is no property in a witness; this applies equally to expert witnesses. The effect of this is that the mere fact that one party has obtained a statement from a witness and the witness is likely to be called to give evidence for that party, does not prevent the other party from taking a statement from or calling that witness. Accordingly it will be relatively rare for there to be any need for there to be more than one expert witness involved in an ACCA case.
95. The Civil Procedure Rules, whilst they do not strictly govern ACCA proceedings should be given regard to. In particular rule 35.3:
- 'CPR 3(1) It is the duty of experts to help the court on matters within their expertise.*
- CPR 3(2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid'.*
96. It is permissible for an expert witness to give evidence on 'the ultimate issue' in the case. Even though the expert's evidence may be the sole determining evidence it is nonetheless, in principle, admissible.
97. In a case in which more than one expert witness gives evidence, it is open to the Committee to accept, reject or prefer the evidence of one expert witness over another. Where this is so, it is important that the Committee gives clear and detailed reasons for that being the case.
98. Because of the specialist nature of expert evidence, where one party intends to rely on the evidence of an expert witness it is very important for that party to give sufficient notice of that intention to the other party. It is open to the Committee to refuse to admit evidence having given consideration to the requirements of 'justice and fairness' contained within CDR 12(2)(a), if insufficient notice has been given by the party seeking to rely on the expert evidence (see also CDR 10(1) and 10(4)).
99. An expert should not be called as a witness by either party unless they have prepared a written report.

## Misconduct

100. In respect of misconduct, the Committee must first determine in the exercise of its judgment, that the facts found proved amount to misconduct. This is because not all failures, omissions or acts will necessarily amount to misconduct. Misconduct is an act or omission which falls short of what would be proper in the circumstances and (will insert citation if agreed) includes (but is not limited to) any act likely to bring discredit upon the relevant person, ACCA or the accountancy profession (see Bye-law 8(c) and (d)).
101. Parties are able to present evidence specifically related to the issue of misconduct but there is no burden or standard of proof to be applied in this regard.

## Sanction

102. At this stage the Committee will have to consider whether in light of its findings, what if any sanction to impose.
103. The Chairman must invite the parties to make representations as to any relevant factors which may affect the Committee's decision on sanction.
104. Parties are able at this stage to present further evidence specifically related to the appropriate sanction. Evidence may be of any previous disciplinary history, mitigating circumstances or aggravating circumstances or other relevant factors which may affect the Committee's decision on the sanction, if any, to be imposed. The case presenter shall draw the Committee's attention to the Guidance for Disciplinary Sanctions issued by ACCA annually. Any testimonial evidence the relevant person adduces or personal mitigation should be considered at this stage.
105. The procedure at this stage is that the Chairman shall:
  - invite the legal adviser to give any legal advice relevant to making findings on sanction;
  - invite the parties to comment on the advice given by the legal adviser;
  - the Committee must deliberate in private together with the legal adviser;
  - the Committee must return for the Chairman to announce the decision on sanction in public, giving reasons.

## The Statutory Auditors and Third Country Auditors Regulations 2016 (SATCAR)

106. The Statutory Auditors and Third Country Auditors Regulation 2016 (SATCAR) came into force as of 17 June 2016. The legislation conveys specific duties on the FRC as the Competent Authority. FRC delegates specific duties to ACCA as part of a delegation agreement signed in June 2016.
107. The SATCAR provisions are relevant to Disciplinary Committee, Admissions and Licensing Committee, Interim Orders Committee, Health Committee and Appeal Committee in cases concerning statutory auditors practising and/or operating in the United Kingdom.
108. Regulation 5(1) of SATCAR introduces a number of additional sanctions available to a Committee where an auditor has contravened a relevant requirement.

109. Regulation 5(3) of SATCAR requires that the [relevant] Committee:
- 'In determining the type and level of sanctions to be imposed under this regulation, the competent authority must take into account all relevant circumstances, including –*
- (a) *the gravity and duration of the contravention;*
  - (b) *the Auditor's degree of responsibility;*
  - (c) *the Auditor's financial strength;*
  - (d) *the amount, so far as can be determined, of profits gained or losses avoided by Auditor;*
  - (e) *the extent to which Auditor has co-operated with the competent authority;*
  - (f) *any previous contravention by Auditor of a relevant requirement.'*
110. Regulation 6(3) of SATCAR provides four grounds where a relevant person's (an auditor practising and/or operating in the UK only) name should not be published.

### **Statutory Auditors practising and/or operating in Ireland**

111. Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts ("the Directive") came into force as of 17 June 2016. The legislation conveys specific duties on IAASA as the Competent Authority as well as ACCA as a Recognised Accountancy Body.
112. The provisions of the Directive are relevant to Disciplinary Committee, Admissions and Licensing Committee, Interim Orders Committee, Health Committee and Appeal Committee in cases concerning statutory auditors practising and/or operating in Ireland.
113. Article 30(b) of the Directive provides that when determining the type and level of administrative sanctions and measures, competent authorities (and relevant ACCA Committees) are to take into account all relevant circumstances, including where appropriate:
- (a) the gravity and the duration of the breach;
  - (b) the degree of responsibility of the responsible person;
  - (c) the financial strength of the responsible person, for example as indicated by the total turnover of the responsible undertaking or the annual income of the responsible person, if that person is a natural person;
  - (d) the amounts of the profits gained or losses avoided by the responsible person, in so far as they can be determined;
  - (e) the level of cooperation of the responsible person with the competent authority;
  - (f) previous breaches by the responsible legal or natural person.

Additional factors may be taken into account by competent authorities (and relevant ACCA Committees), where such factors are specified in national law.

114. In relation to publicity in cases concerning Statutory Auditors practising and/ or operating in Ireland, the default position is that the Disciplinary Committee's reasons for decision, including details in relation to the identity of the relevant person and any sanctions or penalties imposed will be disclosed to the public.
115. The Disciplinary Committee will not issue a direction that the identity of the relevant person should be made available to the public where it considers that disclosure of the identity of the relevant person:
- (a) may have an adverse impact on the interests of third parties;
  - (b) may have an adverse impact on the health or safety of a member such that publication would be unduly harsh;
  - (c) is not necessary for the publication of the public interest having regard to the nature and seriousness of the offence; in this regard the Disciplinary Committee should take into consideration the following:
    - (i) whether the offence concerned dishonesty, integrity, theft, fraud, negligence, recklessness or incompetence;
    - (ii) any likely consequences of non-disclosure;
    - (iii) the sanction imposed;
    - (iv) the likelihood of the repetition of the offence;
    - (v) the disciplinary history of the relevant person; and
    - (vi) any other circumstances or factor it considers relevant.
116. There must be sufficient reasons to justify making a direction that the identity of the relevant person should not be made available to the public; essentially, the case must cross a high threshold to satisfy one or more of the exceptions denoted above. However, where the Disciplinary Committee exercises its discretion in this manner it will set out in writing the reasons for the decision.
117. Publicity of such sanctions will be publicised by ACCA as soon as possible and will be made available on ACCA's website for at least five years from the date of the sanction, or where the sanction has been appealed, at least five years from the conclusion of that appeal, or such longer period as is proportionate to the breach in question.

## Costs

118. When any or all of the allegations have been found proved ACCA shall apply for costs (CDR 15(1)) to be paid by the Relevant Person. The breakdown of costs will be provided in schedule form to the Relevant Person in advance of the hearing and to the Committee once all findings in relation to the allegations, misconduct and sanction have been announced. Costs can also be awarded against ACCA and in favour of the Relevant Person in the event that none of the allegations are found proved (CDR 15(1)(2)). The quantum of costs, irrespective of the amount applied for, remains a matter for the discretion of the Committee.

## SECTION 5: POST-HEARING ISSUES

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### Publicity

119. ACCA shall publish all findings and orders against a relevant person; all non-statutory audit cases are publicised for a minimum of two years. Ordinarily, this will be via ACCA's website as well as a press release to the locality of where the relevant person resides if UK based. All decisions concerning non-statutory audit cases remain on the website for approximately 24 months.
120. In cases where the relevant person is excluded for a specified period (for example five years); the decision will remain on the web site for duration of the specified period. In addition, regulation 6(4)(b) of SATCAR requires publication of the Committee's order and/or reasons must remain on ACCA's website for at least five years from the date of publication.

### Right to appeal

121. A right of appeal is afforded to any relevant person against whom a finding or order has been made by the Disciplinary Committee within 28 days of the same. The procedure in this regard is set out in the Appeal Regulations and amplified in the Appeal Guidance<sup>13</sup> issued by the Adjudication Department. It should be noted that the following exemptions to appeal exist:
- no appeal shall lie solely on the question of costs save as is provided for by the Appeal Regulations;
  - no appeal shall lie against any conditions imposed upon the grant of an adjournment;
  - the right of appeal applies equally to the Association against any findings or orders made by the Disciplinary Committee.

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<sup>13</sup> See Guidance for Appeal Hearings

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