RECBC REAL ESTATE COUNCIL OF BRITISH COLUMBIA

Real Estate Council of BC

SANCTION GUIDELINES

February 27, 2018

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1. Overview

1.1 When the Guidelines apply

1.1.1 These RECBC Sanction Guidelines (the "Guidelines") are effective March 1, 2018.

1.1.2 The Council may amend the Guidelines from time to time by posting amended versions of the Guidelines on its website (www.recbc.ca). Readers should check the website to ensure they have the most recent version.

1.2 Purposes of the Guidelines

1.2.1 The Council administers the *Real Estate Services Act*, S.B.C. 2004, ch. 42 ("RESA" or the "Act"), and the regulations, administers rules and bylaws, and upholds and protects the public interest in relation to the conduct and integrity of its licensees.

1.2.2 The Council upholds and protects the public interest in part by setting and enforcing licencing requirements, enforcing rules, and enforcing standards of conduct and practice through discipline proceedings.

1.2.3 The Guidelines enhance transparency, consistency of approach and fairness, by giving principled guidance about disciplinary sanctions to persons acting under Part 4 of RESA, including

a. legal counsel and licensees negotiating consent order proposals,

b. discipline committees, including the Consent Order Review Committee ("CORC") and Presiding Members at settlement conferences, in assessing consent order proposals, and

c. discipline committees in making discipline orders following a hearing.

1.2.4 A range of sanctions may be reasonable in any given case. The Guidelines do not fetter the discretion of decision-makers in how they may apply powers or fulfil duties in the context of specific facts.

1.3 Terminology

1.3.1 The term "misconduct" includes, for convenience, both "professional misconduct" (RESA s. 35(1)) and "conduct unbecoming a licensee" (RESA s. 35(2)). The term covers "culpable" conduct, but also includes incompetence and non-culpable conduct, e.g., conduct resulting from a physical or mental condition for which a licensee is not at fault.

1.3.2 Respecting the term "sanction":

a. "sanction" includes all measures that may bind a licensee, through a consent order (RESA s. 41) or a discipline order (RESA s. 43), e.g., reprimands, suspensions, cancellations, restrictions or conditions, and monetary orders (i.e., fines and disgorgement of remuneration);

b. "sanction" includes *punitive* measures, but also *preventative* and *corrective* measures, e.g., an order that a licensee refrain from or engage in "any specified activity" (RESA s. 43(2)(e)) or an order for study or training (RESA s. 43(2)(f));

c. "sanction" does not include any non-disciplinary actions the Council may take after an investigation and without issuing a notice of hearing (RESA ss. 37 and 40), e.g., a letter of advisement informing a licensee of standards, or a letter of caution not impacting a licensee's rights; and

d. "sanction" does not include enforcement expenses (RESA s. 44(1)).

1.3.3 The term "fine" refers to any monetary discipline penalty under RESA s. 43(2)(i), i.e., "a discipline penalty in an amount of (i) not more than $500,000 [brokerage]… or (ii) not more than $250,000, in any other case…."

1.3.4 The term "disgorgement of fees" refers to a monetary penalty under RESA s. 43(2)(j), i.e., "an additional penalty up to the amount of the remuneration accepted by the licensee for the real estate services…."

2. Sanction principles

2.1 Order sanctions that fulfil specific purposes

2.1.1 Sanctions serve multiple purposes, all of which further an overarching goal of *protecting the public* by requiring that licensees follow rules and other standards of conduct set by or under RESA. These specific purposes include the following:

a. denouncing misconduct, and the harms caused by misconduct;

b. preventing future misconduct by rehabilitating specific respondents through corrective measures;

c. preventing and discouraging future misconduct by specific respondents through punitive measures (i.e., specific deterrence);

d. preventing and discouraging future misconduct by other licensees (i.e., general deterrence);

e. educating respondents, licensees and the public about rules and standards;

f. maintaining public confidence in the real estate industry.

2.2 Use corrective sanctions where appropriate

2.2.1 A decision-maker should decide if corrective measures better serve the public interest than punitive measures in given circumstances, e.g., where licensees act in good faith, but misconduct arises from ignorance, a misunderstanding about rules or standards, or a lapse of judgment.

2.2.2 Corrective measures may address respondents who suffer from physical or mental conditions, including addictions to alcohol or drugs that impair their ability to practice. If a licensee suffers from such a condition, a decision-maker may need to decide if, or to what extent, misconduct was non-culpable (i.e., conduct attributable to the condition) or culpable (i.e., conduct attributable to choices for which the licensee is responsible). For example, undesirable conduct arising solely from a bi-polar disorder, combined with the side-effects of a medication change, may exclude punitive measures entirely: *Stuart v. BC College of Teachers*, 2005 BCSC 645.

2.2.3 Where a licensee does or may suffer from a "physical or mental disability" within the meaning of the *Human Rights Code,* R.S.B.C. 1996, c. 210, a decision-maker should consider, and may seek submissions or legal advice concerning, human rights laws and how they may relate to regulatory requirements and sanctions.

2.3 Consider proportionality (generally)

2.3.1 The nature and severity of sanctions in each case should be proportional to the seriousness of the misconduct, resulting harms, and the degree of responsibility or blameworthiness of the licensee. Proportionality may depend on many factors, including

a. expectations within the industry,

b. expectations of the public,

c. parity with sanctions previously imposed for similar misconduct in similar circumstances,

d. legislative changes (e.g., increases in fine powers under RESA), and

e. changes in public policy concerning specific types of misconduct.

2.3.2 Proportionality means that sanctions must not be too lenient, or be too harsh, to uphold the public's confidence in the Council's ability to regulate licensees fairly and in the public interest. For example, licence cancellation is the most severe form of punishment available under RESA, and should be reserved for cases of serious misconduct, or misconduct of a serious character. This does not mean however that it should be reserved only for misconduct at the highest end of the severity scale: *Parsons v. Real Estate Council of British Columbia*, 2015 RSA-002(d) (FST) at para. 91.

2.4 Consider proportionality (when dealing with several instances of misconduct)

2.4.1 A decision-maker may order sanctions for each individual instance of misconduct by a respondent. RESA expressly allows fines "for each contravention" (RESA s. 43(2.1)).

2.4.2 A decision-maker should not sanction multiple instances so that the cumulative sanctions are disproportional to the totality of the misconduct. Where a respondent has engaged in multiple instances of misconduct, e.g., due to a systemic problem, a decision-maker *may* take a "global" or "aggregated" approach to similar acts of misconduct to avoid excessive sanctions.

2.4.3 A decision-maker may also decide that, in some circumstances, e.g., intentional wrongdoing, multiple instances of misconduct justify cumulative sanctions, or constitute an aggravating factor.

2.5 Account for progressive discipline

2.5.1 The severity of sanctions may increase where a respondent's prior disciplinary record shows

a. misconduct of an identical or similar nature (especially if prior misconduct is more recent), or

b. a general disregard for compliance with rules or standards, or the public interest.

2.5.2 A pattern of misconduct may allow a decision-maker to infer that prior sanctions were inadequate to deter a respondent from further misconduct, and that specific deterrence justifies an increase in the severity of sanctions.

2.6 Consider suspension and fine effectiveness in specific contexts

2.6.1 A decision-maker may consider the relative severity of different forms of sanctions on different kinds of licensees.

2.6.2 Many professions consider suspensions a categorically more severe form of sanction than fines, as suspensions may, in addition to having immediate financial impacts through lost revenues, also interfere with client relationships, and "blight" a licensee's reputation. For example:

a. A tribunal in the legal profession has said that, "[42] … a suspension is the more severe sanction and is more suitable to address serious misconduct than is a fine." See *Law Society of BC v. Nguyen*, 2016 LSBC 21, at para. 42, and more generally at paras. 36-47.

b. Where a suspension may cause a financial adviser to lose his or her "book of business," a securities commission panel has said that, "Suspension of any length beyond the range of a normal vacation is, for a registered representative, an extremely serious matter." See *Investment Industry Regulatory Organization of Canada (re)*, 2013 BCSECCOM 308 ("Steinhoff #1") at para. 90 (penalties set aside); also see 2014 BCSECCCOM 23 ("Steinhoff #2") at paras. 29-32 (suspension would achieve nothing that could not also be achieved by a fine of $100,000).

2.6.3 A decision-maker may, however, consider the extent to which a fine or a suspension may be relatively more or less effective on specific licensees or group or classes of licensees due to the nature of their practices and their ability to avoid or mitigate suspension impacts, e.g., where relationships with residential clients are intermittent and such "dormant" relationships will be largely unaffected by a suspension, or through a licensee's ability to re-arrange transactions so that they fall outside of a suspension period.

2.6.4 A decision-maker may consider if circumstances may justify a fine *instead of* a suspension, such as where the licensee is the sole managing broker of a brokerage and a suspension would unduly impact the related licensees, or a fine *as well as* a suspension.

2.6.5 A decision-maker may also consider if a fine would have a disproportional impact on a licensee due to a licensee's demonstrable inability to pay the fine. A decision-maker may consider if a payment plan may prevent any disproportional impact of a fine.

2.7 Prevent profit from wrongdoing

2.7.1 Discipline may fail to achieve a genuine deterrent effect if sanctions are low enough that misconduct is still profitable. A decision-maker may order sanctions, including fines and disgorgement of fees, with a view to preventing or limiting a licensee's benefit from proceeds of misconduct. "Sanctions should be more than a cost of doing business." FINRA Sanction Guidelines (April 2017) at p.2. "A fine must not be tantamount to a licensing fee to engage in the misconduct." MFDA Penalty Guidelines (September 2006) at p.5.

2.8 Consider if misconduct justifying a lengthy suspension justifies cancellation

2.8.1 If misconduct is sufficiently serious to merit a suspension of two years, the decision-maker should consider if the misconduct justifies cancellation of licensure.

3. What factors to consider when choosing sanctions

3.1 Mitigating and aggravating factors

3.1.1 Some factors that decision-makers may consider when selecting a sanction are as follows:

a. the respondent's age and experience; [1]

b. the respondent's discipline history; [1]

c. the nature and gravity of the misconduct, [1] [2] including

i. if the misconduct involved fraud, dishonesty or deception;

ii. the vulnerability of affected persons, or the general public, e.g., due to lower sophistication, or to a relationship of trust;

iii. if the misconduct involved the respondent engaged in misconduct knowing of, willfully blind to, or reckless of rules or standards, including where the respondent received warnings from the Council or others;

iv. if the respondent demonstrably and reasonably relied on competent advice (e.g., legal advice); and

v. the duration, number of instances, or any pattern of misconduct, e.g., isolated, or repeated, pervasive or systemic; [1]

d. if and to what extent the respondent obtained or attempted to obtain a financial benefit, or other advantage, from the misconduct; [1]

e. the extent of harm or consequences to clients, other persons, or the general public; [1] [2]

f. if the respondent has, prior to or during investigation,

i. acknowledged and accepted responsibility for misconduct, [1] [2] or

ii. voluntarily taken measures to compensate or mitigate impacts on others, or to avoid recurrence of the misconduct; [1] [2]

g. if the respondent concealed or attempted to conceal misconduct from, or mislead, affected persons, or other persons, including where the respondent has acted to frustrate, delay or undermine investigations by the Council;

h. the impact that different forms of corrective, [1] preventative or punitive sanctions might have on a respondent, [1] and how those impacts might achieve specific purposes, e.g., by depriving a respondent of benefits of misconduct, by otherwise deterring a respondent from future misconduct, [1] by deterring others from future misconduct, [1] and maintaining public confidence in the profession and the disciplinary process; [1] [2]

i. the impact of criminal or other sanctions or penalties, if any, relating to the same conduct; [1] and

j. the proportionality of sanctions, including parity with sanctions previously imposed for similar misconduct in similar circumstances. [1]

Note (1) shows a factor corresponding to a non-exhaustive list of matters "worthy of general consideration" from the often-cited case of *Law Society of British Columbia v. Ogilvie*, 1999 LSBC 17 (approved in *Faminoff v. Law Society of British Columbia*, 2017 BCCA 373 at para. 36).

Note (2) shows a factor corresponding to a shortened, non-exhaustive list of factors identified by a tribunal in *Law Society of British Columbia v. Dent*, 2016 LSBC 05.

3.2 Reprimands

3.2.1 Reprimands are at the lowest end of penalty options. They admonish or chastise respondents for misconduct. A reprimand is the "least onerous of penalties, effectively an invocation to go forth and sin no more": *Law Society of British Columbia v. Watt*, [2001] LSBC 16, [2001] L.S.D.D. No. 45 (Discipline Hearing Panel) at para. 10. Discipline tribunals of many professions order reprimands and fines together.

3.2.2 Factors that may specifically support a reprimand include

a. no prior discipline history;

b. isolated misconduct;

c. less serious misconduct;

d. the respondent's culpability is low;

e. no identifiable harm to any individual; or

f. the likelihood of future misconduct of a similar nature is low, e.g.,

   i. where a respondent has shown insight into his or her behaviour, or

   ii. where a respondent has engaged in, or has completed, proper remedial action.

3.3 Restrictions and conditions

3.3.1 Restrictions and conditions, including studies (RESA s. 43(2)(d), (e) and (f)) may serve corrective and preventative functions. For example, restrictions and conditions may support

a. mandatory training or retraining;

b. medical or other assessments;

c. limitations against specific activities;

d. implementation of specific processes; or

e. supervision or other reporting.

3.3.2 Factors that may specifically support restrictions or conditions include

a. discrete areas of licensee knowledge or conduct that are problematic, but improvable through training or supervision;

b. the public is safe where a licensee continues to give services subject to the restrictions or conditions; or

c. potential for the respondent to respond positively to retraining.

3.4 Lesser fines

3.4.1 Factors that may specifically support a lesser fine as the primary sanction include

a. isolated misconduct; and

b. less serious misconduct.

3.5 Suspensions, significant fines, and disgorgements of fees

3.5.1 Factors that may specifically support a suspension, or a significant fine, include

a. a licensee's prior discipline history;

b. a pattern of misconduct;

c. serious misconduct;

d. fraudulent or other willful misconduct;

e. misconduct involving significant harm to the public;

f. the public is still at risk, justifying a preventative suspension until the respondent satisfies remedial conditions;

g. other circumstances making a smaller fine (only) insufficient or inappropriate.

3.5.2 Factors that may specifically support a significant fine, or disgorgement of fees, may include misconduct that produces a financial benefit, or other advantage, that the respondent would not otherwise have received.

3.5.3 The power to order disgorgement of fees (under RESA s. 43(2)(j)) was granted to the Council by the government following a recommendation of the Independent Advisory Group to add disgorgement to RESA for "the taking back of proceeds of misconduct" to "make it unprofitable [for licensees] to engage in misconduct": see the Report of the Independent Advisory Group (June 2016), Recommendation 17 (p.44). RESA limits disgorgement to "the amount of *the remuneration* accepted by the licensee for the real estate services in respect of which the contravention occurred." Disgorgement of fees may, however, be in addition to a fine (since RESA s. 43(2)(i) allows for a fine, and s. 43(2)(j) refers to an "additional" penalty).

3.6 Cancellations

3.6.1 Factors that may specifically support cancellation of licence include

a. the misconduct involves a significant departure from rules or standards;

b. the misconduct is criminal or quasi-criminal in nature;

c. the misconduct involved serious harm;

d. the likelihood of recurrence is high;

e. circumstances show the licensee is "ungovernable" by the Council as a regulatory body; or

f. circumstances show the licensee is unsuitable as a licensee, e.g., due to conduct involving dishonesty, an abuse of trust, violence, or a persistent lack of insight.

4. Applying, or diverging from, earlier decisions

Decisions about penalties are not an exact science. Discipline committees must exercise discretion, based on a variety of factors. In addition to considering the various goals of the disciplinary regime, and the proportionality of the sanctions to the nature of the misconduct, the licensee, and other mitigating and aggravating factors, a decision-maker should also consider the desirability and necessity of sanctions being like other sanctions imposed in similar circumstances.

4.1 Legal constraints

4.1.1 Like all administrative tribunals, discipline committees may only exercise their sanction-powers in a *reasonable* way (i.e., not irrationally, arbitrarily, based on irrelevant grounds, or for improper purposes). Within this constraint, however, decision-makers will have a range of reasonable sanctions open to them.

4.1.2 As administrative tribunals, discipline committees are not, strictly-speaking, bound by their earlier decisions. Discipline committees are however, bound by the decisions of "higher" tribunals and courts (i.e., the Financial Services Tribunal, the B.C. Supreme Court, the B.C. Court of Appeal, and the Supreme Court of Canada).

4.2 Policy grounds for adhering to earlier decisions

4.2.1 Consistently fair decision-making by discipline committees promotes specific purposes such as denouncing misconduct, deterrence and promoting public confidence by increasing predictability, and by extension, reducing disputes about sanctions in specific kinds of cases.

4.3 Policy grounds for diverging from earlier decisions

4.3.1 Where earlier sanction decisions involve enough similarities with a given case to provide some guidance about what sanctions would be reasonable, discipline committees should generally endeavour to order sanctions consistent with the sanctions in the earlier decisions. Discipline committees may, however, also diverge from earlier decisions for good grounds, including

a. good faith exercises of judgment;

b. differences in mitigating and aggravating factors between cases;

c. changes in legislative requirements or powers (e.g., increases in fine powers under RESA); and

d. changing expectations within the industry, changing expectations of the public which may stem from evolving "contemporary values in Canadian society" (e.g., see *Adams v. Law Society of Alberta*, 2000 ABCA 240 at para. 27 on past cases bearing on sanctions for sexual misconduct) or changing policies of government or the Council (e.g., as illustrated in the 2016 Report of the Independent Advisory Group).

5. Considering consent orders

5.1 The Act does not address how the Council should deal with consent order proposals or the considerations involved in accepting or rejecting a proposed consent order (RESA s. 41). Where parties have jointly-proposed sanctions, a decision-maker should, however, consider the "critical systemic benefits that flow from joint submissions", and be aware of the reasons why the Supreme Court of Canada has decided that criminal courts must exercise restraint when considering joint submissions: see ***R. v. Anthony-Cook***, [2016] 2 S.C.R. 204 at paras. 48 ("Anthony-Cook").

5.2 Discipline tribunals have been applying the principles in *Anthony-Cook* in a professional regulation context, e.g., in *Yu (re)*, 2017 ONCPSD 54 (College of Physicians and Surgeons of Ontario); *Law Society of Upper Canada v. Archambault*, 2017 ONLSTH 76 at paras. 14-16; and *Law Society of Alberta v. Kaczkowski*, 2017 ABLS 22.

5.3 Under *Anthony-Cook*, a criminal court may not depart from a joint submission on sentencing "unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest" (*Anthony-Cook* at para. 32). Under this "public interest" approach, a criminal court may not reject a joint submission on sentencing unless

5.3.1 it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system" (*Anthony-Cook* at para. 33); or

5.3.2 it is so "unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down." (*Anthony-Cook* at para. 34.)

5.4 This policy of deferring to a joint submission is based on leniency being in exchange for benefits that may include the certainty of the Crown avoiding risks of acquittal (e.g., due to flaws in its case), the sparing of victims and witnesses the emotional costs of a hearing, and savings for the Crown in terms of time, resources and expenses.