

Formal Hearings

October 2016

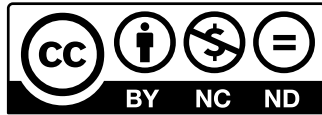


The United Church of Canada
L'Église Unie du Canada

Formal Hearings (October 2016)



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About This Resource

This resource contains

- policies and procedures that must be followed
- best practices that provide information, guidance, and advice on the best ways to live out mandatory policies and procedures, which you are encouraged but not required to follow. Following these best practices will help ensure compliance with secular law requirements that apply to formal hearings.

Please refer to the current edition of *The Manual*.

There are no substantive changes from the August 2013 edition of this resource.

Living Out God's Mission in the World

The policies and procedures of The United Church of Canada exist to support the church in living out God's mission in the world. The formal hearing procedures aim to support the adjudication of disputes within the church with compassion and justice.

Policies and Procedures

This section contains policies and procedures that are mandatory and must be followed.

The Manual contains the basic policies and procedures for formal hearings. The Rules of Procedure for Formal Hearings set out below contain all of the policies and procedures that apply to formal hearings, including the basic policies and procedures from *The Manual* and additional rules of procedure inserted where appropriate.

Section J.14 of *The Manual* has also been included here for quick reference, as it contains the policy and procedures for giving notices and other documents in the formal hearing process.

Rules of Procedure for Formal Hearings

J.12. Formal Hearing

12.1 Rules of Procedure

A formal hearing is a process like a trial in a civil court. It is used to resolve a formal complaint or an issue in a formal way. There are rules of procedure that must be followed in all formal hearings.

12.2 Who May Hold a Formal Hearing

A formal hearing may be held by

- (a) the governing body of a pastoral charge, the presbytery, or the Conference for any matter within its responsibility; or
- (b) the Judicial Committee of the General Council for any matter within the General Council's responsibility.

12.3 When a Formal Hearing Is Held

A formal hearing is held for a formal complaint when

- (a) a court orders a formal hearing; or
- (b) a Formal Hearing Committee orders a formal hearing in response to a request under section J.12.5 below.

A court may also order a formal hearing to decide any matter within its responsibility.

12.4 Appointment of Formal Hearing Committee

The court of accountability is responsible for appointing three to five United Church members to serve as the Formal Hearing Committee. The court must name the chair and secretary of the committee.

If the court of accountability is the General Council, the Executive of the Judicial Committee of the General Council has this responsibility.

Additional Rules of Procedure

12.4.1 Formal Hearings re Sexual Abuse Policy

This section applies to a formal hearing of a formal complaint under the Sexual Abuse Policy. The following requirements apply:

- (a) the Formal Hearing Committee must include both men and women;
- (b) at least half the members of the Formal Hearing Committee must be the same gender as the complainant; and
- (c) the Formal Hearing Committee must be familiar with the Sexual Abuse Policy before the formal hearing.

12.4.2 Terms of Reference

The body responsible for appointing the Formal Hearing Committee under J.12.4 above also

- (a) names the chair and secretary of the Formal Hearing Committee;
- (b) sets deadlines for holding the formal hearing and for the Formal Hearing Committee to report to that body;
- (c) names the resources available for the formal hearing;
- (d) names the issues to be considered in the formal hearing; and
- (e) may set limits on the authority of the Formal Hearing Committee.

12.5 Requesting a Formal Hearing

This section applies to formal complaints other than formal complaints under the Sexual Abuse Policy.

The court may decide on its own initiative to order a formal hearing of the formal complaint. If it does not, the complainant or respondent may request a formal hearing.

Additional Rules of Procedure

12.5.1 Process for Requesting a Formal Hearing

The following process applies:

- (a) The requesting party must send the request to the secretary of the court where the formal complaint was made;
- (b) The request must include the requesting party's arguments in support of holding a formal hearing;
- (c) The requesting party must send a copy of the request and arguments to the other party to the formal complaint, within seven days of sending the request under paragraph (a) above;
- (d) The other party to the formal complaint may choose to send a reply to the request. If so, the other party must send it to the secretary of the court and the requesting party within 30 days of receiving a copy of the request as set out in section J.14.4 below;
- (e) The Formal Hearing Committee reviews the request and any reply, and decides whether it is in the best interests of justice to hold a formal hearing for the formal complaint;
- (f) If the Formal Hearing Committee decides that it is in the best interests of justice to hold a formal hearing, the Formal Hearing Committee proceeds to hold the formal hearing;
- (g) The Formal Hearing Committee sends a copy of its decision to the parties to the formal complaint and to the court. If it decides not to hold a formal hearing, the reasons must be included; and
- (h) All documents sent under this section must be sent as set out in section J.14.4 below.

12.5.2 Procedure for Holding the Formal Hearing

The Formal Hearing Committee holds a formal hearing following these rules of procedure.

- a. **Notice of Hearing.** The Formal Hearing Committee must give each of the parties at least 15 days' notice of the appeal hearing as set out in section J.14.4 below.

- b. **Counsel.** Any party to the formal hearing may participate at the formal hearing personally or through legal counsel or another representative.
- c. **Open or Closed Hearing.** The formal hearing is open unless
 - (i) the Formal Hearing Committee decides to close it on the basis that an open hearing would adversely affect any person; or
 - (ii) the formal hearing involves a formal complaint under the Sexual Abuse Policy, in which case it is closed.

When a formal hearing is closed, the only people who may be present are the parties, their legal counsel or other representatives, the Formal Hearing Committee and its legal counsel, and the recorder. The Formal Hearing Committee may also allow one or two support persons to attend for each party.

- d. **Rules of Evidence.** The formal hearing is conducted like a hearing in a secular court of law. The Formal Hearing Committee must follow the applicable rules of evidence for the province or territory in which the hearing is held.
- e. **Standard of Proof.** In formal hearings for formal complaints under the Sexual Abuse Policy, the standard of proof is a preponderance of evidence based on provincial or territorial law.
- f. **Hearing Record.** The Formal Hearing Committee must ensure that a word-for-word full and accurate record of the hearing proceedings is kept, unless the parties agree to some other form of record.
- g. **Costs.** The Formal Hearing Committee decides who is responsible for paying or contributing to the costs related to the formal hearing. This includes the costs for the record of the hearing proceedings, travel and accommodation for the parties and witness, and legal counsel fees and legal counsel disbursements.

12.6 Decisions and Recommendations

The Formal Hearing Committee is responsible for making decisions and recommendations that are

- (a) within its terms of reference; and
- (b) within the authority of the court that appointed it.

Additional Rules of Procedure

12.6.1 Who Receives a Copy of the Decision

Promptly after the formal hearing, the Formal Hearing Committee must send a copy of its decision with reasons to each of the parties to the formal hearing and to the secretary of the court that appointed it.

12.7 Decision on Formal Complaint

In a formal hearing of a formal complaint, the Formal Hearing Committee is responsible for deciding whether the formal complaint has been proven.

If a formal complaint has been proven, the Formal Hearing Committee must decide on the appropriate action to be taken in response. The action must include one or more of the actions described below:

- (a) **Admonition:** The respondent may be admonished. This is a private reprimand;
- (b) **Rebuke:** The respondent may be rebuked. This is a more severe reprimand and may be done in public;
- (c) **Suspension of Ministry Personnel:** A respondent who is a ministry personnel may be suspended from functioning as ministry personnel, including from the offices they hold, for a period named by the Formal Hearing Committee;
- (d) **Suspension of Layperson:** A respondent who is a layperson may be suspended from one or more offices that they hold for a period named by the Formal Hearing Committee;
- (e) **Deposition of Ministry Personnel:** A respondent who is a ministry personnel may be permanently removed from the offices they hold. This may include dissolving the pastoral relationship;
- (f) **Deposition of Layperson:** A respondent who is a layperson may be permanently removed from the offices they hold;
- (g) **Discontinued Service List (Disciplinary):** The name of a respondent who is a member of the order of ministry may be placed on the Discontinued Service List (Disciplinary). A Formal Hearing Committee appointed by the presbytery may recommend that the Conference take this action. A Formal Hearing Committee appointed by the Conference may take this action;
- (h) **Discontinued Lay Ministry Appointment List:** The name of a respondent who is a ministry personnel (but not a member of the order of ministry) or congregational designated minister may be placed on the Discontinued Lay Ministry Appointment List. A Formal Hearing Committee appointed by the presbytery may take this action. A Formal Hearing Committee appointed by the Conference may recommend that the presbytery take this action;
- (i) **Expulsion:** A respondent may have their membership in the United Church removed; or
- (j) **Restitution:** A respondent may be required to pay financial compensation or to make some other form of restitution.

12.8 Other Decisions

A Formal Hearing Committee appointed by the presbytery may also make one or more of the decisions set out in section J.9.4 [of *The Manual*]. In that case, sections J.9.6 to J.9.9 [of *The Manual*] also apply. A Formal Hearing Committee appointed by the Conference may recommend that the presbytery take this action.

12.9 Implementation of Decisions

12.9.1 Formal Hearing of Formal Complaint

Where a formal hearing is held in response to a formal complaint, the decision of the Formal Hearing Committee comes into effect on the date specified by the committee. If no date is specified by the Formal Hearing Committee,

- (a) a decision to suspend the respondent comes into effect when the committee gives a copy of the decision to the court that appointed it and to the parties to the formal hearing; and
- (b) any other decisions come into effect 15 days after the respondent receives the decision under section J.14 below.

12.9.2 Other Formal Hearing

Where a formal hearing is held for any reason other than a formal complaint, the decision of the Formal Hearing Committee comes into effect on the date specified by the committee. If no date is specified by the Formal Hearing Committee, the decision comes into effect when the committee gives a copy of the decision to the court that appointed it and to the parties to the formal hearing.

12.10 Court's Response to Decision

The decision of a Formal Hearing Committee is the decision of the court that appointed it. The court may not debate the decision or change it in any way.

12.11 Court's Responsibility for Decision

The court is responsible for

- (a) making a decision on any recommendations made to that court by the Formal Hearing Committee; and
- (b) deciding whether to share the decision with others beyond the parties and the court, either in whole or in part.

Giving and Receiving Documents

J.14. Documents—Giving and Receiving

14.1 Application

This section (J.14) applies to the notices and other documents that are given and received as part of the formal hearing and appeal processes.

14.2 Documents in Writing

All documents must be in writing.

14.3 Address for Giving Documents

A document must be given to the person

- (a) at the address or fax number that the person has given to the court in writing; or
- (b) if no address or fax number has been given, at the address for the person as shown in the records of the court.

14.4 How to Give Documents

There are five ways to give documents. One of these ways must be used:

- (a) **Personally:** The document may be given to the person personally. It is considered received by them on the date it is given;
- (b) **Fax:** The document may be given to the person by sending it by fax if the person has given their fax number to the court in writing. The document is considered received by them on the day it is sent;
- (c) **Assured Delivery:** The document may be given to the person by sending it by assured delivery (registered mail). It is considered received by them on the 10th day after it is sent;
- (d) **Courier Delivery:** The document may be given to the person by sending it by courier. It is considered received by them when that person has signed to acknowledge receipt of the document; or
- (e) **E-mail:** The document may be given to the person by sending it by e-mail. It is considered received when the recipient confirms to the sender that the document has been received.

The sender must include the sender's name, the sender's e-mail address, the date and time of transmission, and the name and telephone number of a person to contact if there are transmission problems.

14.5 Calculating Notice Period

If the notice period for giving or receiving a document is seven days or less, the following days are not counted: Saturdays, Sundays, statutory holidays, and the time between December 25 and January 1.

Best Practices for Formal Hearings

This section contains information, guidance, and advice on the best ways to live out mandatory policies and procedures. You are encouraged but not required to follow these best practices. Following these best practices will help ensure compliance with secular law requirements that apply to formal hearings.

All section references are to *The Manual* and the parallel section in the Rules of Procedure for Formal Hearings (above, pp. 4–9).

In most cases, there are two parties to a formal hearing. This resource has been written on that basis. In some situations, however, there may be three or more parties. This resource still applies with any necessary adjustments to include the other parties.

Before the Hearing

When is a formal hearing held?

A formal hearing may be held for a formal complaint (see next question, below).

Under section J.12.3, a formal hearing must be held when it is ordered by a court to decide any matter within the court's responsibility. For example, a formal hearing may be ordered by the Conference to deal with a presbytery recommendation that the name of a member of the order of ministry be placed on the Discontinued Service List (Disciplinary).

When is a formal hearing held for a formal complaint?

The parties to a formal complaint are not automatically entitled to a formal hearing. There are two reasons why a formal hearing is held for a formal complaint.

1. **At a party's request:** If a party wants a formal hearing to be held, they submit a written request to the Formal Hearing Committee. They include reasons with their request. The other party has an opportunity to give their reasons for agreeing or disagreeing with the request.

The Formal Hearing Committee considers the reasons each party has given for or against the request. It decides whether it is in the best interests of justice to hold a formal hearing for the formal complaint. If so, a formal hearing is held. If not, the formal complaint is referred back to the court where it was made, without a formal hearing. There is no right of appeal from this decision by the Formal Hearing Committee.

2. **At the order of the court:** The court where the formal complaint was made may also decide to order a formal hearing, even if neither party has requested one. The court has this authority because the party named in the formal complaint is accountable to the court. If a court orders a formal hearing, the Formal Hearing Committee simply proceeds to hold the formal hearing. It does not need first to make a decision on whether a formal hearing is in the best interests of justice.

Who may serve on a Formal Hearing Committee?

Usually the executive or sub-executive of the court appoints the Formal Hearing Committee.

Members of the Formal Hearing Committee do not need to be members of the court that is holding the hearing. The only requirements are that (i) they be members of the United Church and (ii) there are no bias concerns about them, as outlined below.

Under secular law, Formal Hearing Committee members must not be biased for or against either of the parties. It is not enough for committee members to believe honestly that they can be impartial in their role. There must also be no appearance of bias or reasonable apprehension of bias.

Here is a test for determining if either of these concerns exists. It is based on the point of view that an average reasonable person would have in the situation. It assumes the person knows all the facts about the Formal Hearing Committee member. Would that average reasonable person suspect that the committee member might be influenced, even unintentionally, to favour one side or the other in the formal hearing? A committee member might be influenced by something they read or hear at the formal hearing. That is acceptable. But if the average reasonable person thinks the committee member might be influenced for any other reason, that member should not serve on the Formal Hearing Committee.

Here are some guidelines for deciding whether a particular Formal Hearing Committee member is biased:

- The Formal Hearing Committee member should not be a friend or relative of any of the parties to the formal hearing, or have any other close association with them.
- The Formal Hearing Committee member should not have “prejudged” the case by expressing an opinion about it about it in favour of or against any party.
- If there has been a previous formal hearing or appeal hearing involving any of the parties, none of the members from the previous Formal Hearing Committee or Appeal Committee is automatically disqualified from the formal hearing, but it would be preferable to appoint a new committee.

What should be included in the terms of reference?

The court must set terms of reference for the Formal Hearing Committee under section 12.4.2 of the Rules of Procedure for Formal Hearings. Here are section-by-section best practices (in small type) for setting the terms of reference:

12.4.2 Terms of Reference

The body responsible for appointing the Formal Hearing Committee...also

- (a) names the chair and secretary of the Formal Hearing Committee;
- (b) sets deadlines for holding the formal hearing and for the Formal Hearing Committee to report to that body;

Best Practices: *Specify a date, and also give the Formal Hearing Committee the right to extend past that date if it becomes necessary or desirable (for example, due to the illness of one of the parties during the course of the formal hearing).*

*Do not simply specify an absolute deadline, as limiting the Formal Hearing Committee's discretion in this way may be considered a breach of natural justice.**

(c) names the resources available for the formal hearing;

Best Practices: *Name the expenses the court will reimburse or pay for (e.g., formal hearing room rental) and the expenses the parties pay for themselves (e.g., travel costs for support persons).*

(Do not indicate that either party will have to pay another party's costs. This will be determined by the Formal Hearing Committee after it makes its decision.)

The terms of reference may include a financial limit for the expenses of the Formal Hearing Committee as long as they also include a statement that the Formal Hearing Committee may exceed this limit if it becomes necessary or desirable. For example, additional funds may be needed to pay for a wheelchair-accessible hearing room if one of the parties or their legal counsel or other representative requires it.

*Do not simply specify an absolute limit on the amount that is available to the Formal Hearing Committee for expenses. Limiting the Formal Hearing Committee's discretion in this way may be considered a breach of natural justice.**

(d) names the issues to be considered in the formal hearing; and

Best Practices: *State the questions raised in the formal complaint. Only these questions can be considered by the Formal Hearing Committee.*

(e) may set limits on the authority of the Formal Hearing Committee.

Best Practices: *Indicate any specific limits on the authority of the Formal Hearing Committee. Otherwise, the Formal Hearing Committee will have all authority given to it under The Manual (and there is no need to indicate that).*

* If a breach of natural justice occurs in the course of the formal hearing, it may affect the validity of the Formal Hearing Committee's decision. See "Natural Justice and the Duty to Act Fairly" on page 15 below for more information.

How are the parties notified about the scheduling of the formal hearing?

Under section 12.5.2 of the Rules of Procedure for Formal Hearings, the Formal Hearing Committee must give notice of the formal hearing in writing to the parties at least 15 days before the formal hearing takes place.

It is wise for the Formal Hearing Committee to give the parties more than the minimum period of notice, so that the parties have adequate time to arrange for legal counsel (if desired) and to prepare for the formal hearing. Before sending out the notice, the secretary of the Formal Hearing Committee should check out possible dates with the parties. This will help to avoid, for example, a party requesting an adjournment because their lawyer is unavailable that day.

The notice of the hearing should include a copy of the court's motion setting the terms of reference for the Formal Hearing Committee and naming its members. Providing the information at this stage will help to ensure that questions about bias of committee members are raised earlier rather than later in the proceedings.

As with all documents in the formal hearing process, the notice of the hearing must be given in one of the ways set out in section J.14.4.

Who is responsible for making sure the witnesses attend the formal hearing?

The Formal Hearing Committee does not have the authority to require people to testify as witnesses at the formal hearing. Witnesses participate on a voluntary basis. In some cases, a United Church member or ministry personnel serves in a position that gives them particular knowledge of an issue in the formal hearing (for example, the chair of the pastoral charge's Ministry and Personnel Committee). They are accountable to a court of the church for that particular position, and may be required by the court to participate in the formal hearing. As a general rule, it is up to each party to inform its witnesses at the formal hearing of the time and place of the formal hearing, and to ensure that the witnesses will be present.

Are witnesses necessary to prove all of the relevant facts? Is there any other option?

Formal hearings can be time-consuming and expensive if there are many facts and issues to be addressed. The parties can reduce formal hearing time and costs by agreeing on as many facts as possible ahead of time and presenting this agreement to the Formal Hearing Committee either before or at the beginning of the hearing. This option is often used in tribunal or secular court proceedings. If the parties can agree on certain facts, no witnesses or testimony is required to prove these facts.

In most cases, the parties can agree that at least certain facts are not in dispute. For example:

1. Jane, the party named in the formal complaint, is the minister under appointment to X congregation. John, the complainant, is a member of this congregation, treasurer of the congregation and member of the Church Board.
2. John went to Jane for counselling for marital problems. Jane met with John for this purpose three times on *[specify dates]*.
3. The Church Board executive met on *[specify dates]*. John did not attend that meeting. The following executive members were present at the meeting: A, B, C, D, E, F, and G. Jane also attended the meeting and said that John was going through a divorce with significant financial difficulties and could not continue to serve as the treasurer.
4. At that meeting, the Church Board executive ordered an independent audit of the church's books.
5. John sent a letter dated *[specify date]* to the Church Board secretary in which he resigned as treasurer. He has not attended church since the date of the meeting referred to in paragraph 3 above.

Natural Justice and the Duty to Act Fairly

What does “natural justice” mean? How does it apply to formal hearings?

In a formal hearing, the Formal Hearing Committee must (i) be unbiased and (ii) give each party a fair opportunity to present their case. These are the general principles of natural justice and are requirements under secular law. If the Formal Hearing Committee conducts the formal hearing and comes to a decision in a way that honours these general principles, the secular courts will not interfere with the Formal Hearing Committee’s decision.

See page 12 above on the issue of bias for the Formal Hearing Committee.

On the requirement for a fair opportunity to present a case, the secular courts have said that the standard of natural justice depends on the circumstances. As a rule, the greater the adverse consequences to a party in a formal hearing, the more strictly the Formal Hearing Committee should observe the duty to be fair.

For example, if a formal complaint against a member of the order of ministry is proven, one of the decisions that the Formal Hearing Committee might make is to dissolve the pastoral relationship and recommend that the person’s name go on the Discontinued Service List (Disciplinary). This means the person’s right to continue in paid accountable ministry is at stake, and a high standard of fairness is required throughout the process. Under secular law, before any decision may be made that would deprive a person of their right to earn a livelihood,

- the person is entitled to know the case against them;
- the person is entitled to have an opportunity to respond to the case against them, including an opportunity to respond to all evidence presented at the formal hearing that is prejudicial to them; and
- the formal hearing must *substantially* meet the Rules of Procedure for Formal Hearings and any other procedural rules of the church that are applicable.

If person named in a formal complaint holds a voluntary position such as a church school teacher, the outcome of the formal hearing could be removal from that position or even expulsion from membership in the United Church. In secular law, the loss of privileges associated with voluntary membership in an organization is considered less severe than the loss of a means of livelihood. That means the standard for natural justice is probably lower in a formal hearing if the formal complaint is against a lay volunteer rather than if it is against a member of the order of ministry.

Can minor procedural mistakes be fixed?

The parties can waive procedural rules that exist for their benefit as it may save them time and expense. For example, the Rules of Procedure for Formal Hearings require giving each party 15 days’ advance notice of the formal hearing. If both parties agree to accept only 13 days’ advance notice, there is no breach of natural justice.

Once a formal hearing is ordered, how soon must it be held?

The Formal Hearing Committee should ensure that the formal hearing takes place within a reasonable period of time after their appointment. A lengthy delay may prejudice one or both of the parties. The memories of the parties and their witnesses may fade over time so that their testimony is not as full and accurate as it could have been. Also, if a formal hearing is pending for many months, the uncertainty of the outcome may affect a party's health or employment prospects. The secular courts may even strike down the eventual decision of a Formal Hearing Committee if they decide that the delay was unreasonably long. Whether or not a delay is "unreasonable" would, again, depend on the facts of the case. As a guideline, a formal hearing should be concluded within six months of the Formal Hearing Committee's appointment.

At the same time, however, the Formal Hearing Committee should be open to granting adjournments to the parties where necessary to ensure they receive a fair hearing. For example, if one party's legal counsel becomes unavailable on the original date fixed for the hearing, one adjournment should be acceptable. If, however, a party's legal counsel becomes unavailable for a period of several months, the party should be instructed to retain another legal counsel to avoid unreasonable delay. When a formal hearing is adjourned, the Formal Hearing Committee should ensure that the parties are given notice of the new date and time as set out in section J.14.4.

Are there any special requirements for formal hearings involving formal complaints of sexual abuse?

Section 12.4.1 of the Rules of Procedure for Formal Hearings has a special requirement for formal hearings of formal complaints under the Sexual Abuse Policy. Members of the Formal Hearing Committee must be familiar with issues related to sexual abuse before the formal hearing takes place. For example, they may study the issues through reading appropriate resource materials or attending workshops on the issue. The Conference personnel minister can offer specific guidance in this area.

Procedure at the Hearing***What happens at a formal hearing?***

Section 12.5.2 of the Rules of Procedure for Formal Hearings requires the proceedings to be like those of a secular court of law. A typical way of proceeding is set out below. Wherever there is a reference to a step taken by a "party," it includes the party's legal counsel or other representative if they have one. If the formal hearing is being held for some reason other than to hear a formal complaint, it is up to the Formal Hearing Committee to decide the order in which the parties will present their cases. *Remember, this resource assumes a two-party hearing, with a "complainant" and a "respondent," but there may be cases where there are multiple parties to the formal hearing.*

1. **Opening procedures:** The chairperson calls the formal hearing to order, introduces the Formal Hearing Committee, explains the order of the proceedings, states the issues, has the notice of hearing filed as the first exhibit together with the terms of reference, asks the parties and their legal counsel or representatives to identify themselves, and asks if there are preliminary matters to address.

2. **Complainant's opening statement:** The complainant makes an opening statement outlining their position and listing the evidence that will be given on their behalf.
3. **Examination-in-chief of complainant:** The complainant is sworn in as a witness, then asked questions by their legal counsel or other representative. If the complainant is not represented, they simply tell their story after being sworn in.
4. **Cross-examination and re-examination of complainant:** The respondent cross-examines the complainant. The complainant's legal counsel or other representative is entitled to re-examine the complainant. The re-examination is limited to asking questions about anything arising out of the cross-examination.
5. **Other witnesses for the complainant:** If there are any witnesses for the complainant, they testify following the same procedure (examination-in-chief, cross-examination, re-examination) until the complainant advises the Formal Hearing Committee that they are finished presenting their case.
6. **Respondent's case:** The respondent makes an opening statement and calls witnesses following the same procedure, with the witnesses being sworn in, questioned by the respondent, then cross-examined by the complainant and finally re-examined by the respondent. Again, re-examination is limited to questions about matters arising out of the cross-examination. The respondent advises the Formal Hearing Committee that they are finished presenting their case.
7. **Reply evidence:** The complainant may then present reply evidence, but only to rebut something raised by the respondent or any of the respondent's witnesses that the complainant couldn't have anticipated before the formal hearing.
8. **Questioning by Formal Hearing Committee:** Formal Hearing Committee members may ask witnesses questions for clarification while they are testifying. It is customary to allow both parties to ask any follow-up questions about the answers the witnesses gave to these questions. Formal Hearing Committee members should limit questions to evidence raised in the witnesses' evidence and not make their own independent inquiry.
9. **Legal arguments:** Each party then has an opportunity to present legal argument. Each party summarizes the evidence and the legal implications flowing from it. The complainant's counsel goes first followed by the respondent. The complainant has the final word, with an opportunity to reply to the respondent's argument.

Who may attend a formal hearing? Are hearings confidential?

A formal hearing is open unless it involves a formal complaint under the Sexual Abuse Policy or the Formal Hearing Committee decides to close it, in whole or in part.

A formal hearing that involves a formal complaint under the Sexual Abuse Policy is always closed under section 12.5.2 of the Rules of Procedure for Formal Hearings.

If a party wishes to have the formal hearing closed for any other kind of hearing, they should make the request of the Formal Hearing Committee by no later than the start of the formal hearing. They would also need to support their request with reasons why an open hearing would adversely affect any person.

The Formal Hearing Committee may grant the request if it feels that an open hearing might adversely affect any person. Before the Formal Hearing Committee makes a decision on the request, it should give the other party an opportunity to explain their position on the request. The other party may oppose the request, agree with the request, or not take a position on the request.

Any party wishing to have one or two support persons present should make this request to the Formal Hearing Committee at the start of the hearing.

Any party or witness may make a request that their name be kept confidential following the formal hearing so that they are not referred to by name in the decision. For example, in a formal hearing of a formal complaint, the party named may request that their name be kept confidential if the Formal Hearing Committee decides that the formal complaint has not been proven. The Formal Hearing Committee makes a decision on these requests.

If the Formal Hearing Committee has not made a decision that the hearing is closed, anyone may attend the formal hearing.

Are there any legal rules of conduct for Formal Hearing Committees?

A Formal Hearing Committee member may later become disqualified by reason of bias based on their conduct at the formal hearing. To avoid disqualification, Formal Hearing Committee members should not

- display feelings of antagonism to either party or to either party's legal counsel or other representative;
- be overly friendly with either party or with either party's legal counsel;
- make derogatory remarks about either party;
- meet privately with one party in the absence of the other party;
- hold private interviews with witnesses;
- consider any information or argument provided by a party after the hearing takes place. If relevant information becomes available after the formal hearing, a party should ask the Formal Hearing Committee to reopen the formal hearing so that both parties are present when the new information is presented;
- socialize with either of the parties or any of the witnesses after hours during the hearing; or
- be absent for any part of the hearing.

If Formal Hearing Committee members choose to question the witnesses, they should adopt a neutral approach in their questioning. They should not display any kind of partiality as, for example, is done in cross-examination.

What if bias does become apparent during the course of the formal hearing?

An allegation of bias may be raised by either party or by a committee member. It is up to the Formal Hearing Committee to decide if the allegation is valid. If it decides that the allegation is valid, the Formal Hearing Committee should take action to remedy the situation. There are three options.

1. **Waiver of bias:** The parties may agree that the Formal Hearing Committee member may continue to act in spite of their bias. This is an option if the bias affects the parties to the same degree. For example, if a Formal Hearing Committee member is unavoidably absent from a formal hearing for a few hours, the parties may agree that any resulting prejudice to either of them may be remedied if the Formal Hearing Committee member reads the record of any part of the formal hearing that took place during their absence.
2. **Member excused and hearing continued:** If the parties do not agree to waive the bias, the Formal Hearing Committee member should be excused from the rest of the formal hearing. The remaining committee members continue with the formal hearing. This is an option if the required minimum of three members remain on the Formal Hearing Committee.
3. **New hearing:** If only two Formal Hearing Committee members are left after the biased member is excused, the formal hearing should be adjourned. The departing member may not be replaced by a new committee member during the course of the formal hearing. That means a completely new Formal Hearing Committee should be appointed to conduct a new formal hearing.

Evidence

Is evidence allowed at a Formal Hearing?

Evidence is admitted at a formal hearing through a witness's testimony or documents entered as exhibits. Section 12.5.2 of the Rules of Procedure for Formal Hearings provides that the Formal Hearing Committee must follow the applicable rules of evidence for the province or territory in which the formal hearing is held.

What if one of the parties doesn't follow the rules of evidence?

When one party is calling or questioning a witness, the other party may object to the evidence being admitted on some technical legal ground. The Formal Hearing Committee makes a decision on the objection. The committee determines whether the evidence is admissible based on accepted rules in that province or territory.

If the other party doesn't object, the Formal Hearing Committee may assume that the other party consents to admission of the evidence.

May the Formal Hearing Committee object?

Occasionally, the Formal Hearing Committee may take the initiative and object when the other party does not. For example, it may instruct a party to stop a line of questioning that is clearly irrelevant and a waste of time for the issues under consideration at the hearing. Or it may caution a party to tone down an overly antagonistic cross-examination ("badgering the witness"). A Formal Hearing Committee should only take this action with careful attention to fairness so that the committee does not appear to be advocating for one of the parties.

May the Formal Hearing Committee get legal advice on whether to admit certain evidence?

The rules of evidence are complex. It is strongly recommended that the Formal Hearing Committee have independent legal counsel to advise the committee throughout the hearing. The legal counsel may be present or, at a minimum, available by telephone throughout the hearing.

The role of the Formal Hearing Committee's independent legal counsel is to provide legal advice to the committee. After consultation with legal counsel, the committee ultimately makes its own decision.

Do witnesses need to be "sworn in"?

Evidence is given by a party or witness under oath or solemn affirmation, depending on the preference of that party or witness. Before the party or witness starts to testify, the Formal Hearing Committee should ensure that one of these two steps is followed:

1. **Under oath:** The party or witness places their right hand on the Bible and says, "I swear that the testimony that I am about to give will be the truth, the whole truth, and nothing but the truth, so help me God."
2. **Under solemn affirmation:** The party or witness says, "I affirm that the testimony that I am about to give will be the truth, the whole truth, and nothing but the truth."

These precise words do not need to be used, as long as the intent of the party or witness is clear. It is helpful for the Formal Hearing Committee to arrange to have the two optional phrases printed on a card that may be given to each party and witness to read before they begin testifying.

What are some basic rules of evidence that would apply to a formal hearing?

The rules of evidence are complex, and it is important for a Formal Hearing Committee to have legal advice to interpret them. If a Formal Hearing Committee makes a decision based on legally inadmissible evidence, the decision may be overturned on appeal to the Judicial Committee of the General Council, or reviewed and struck down by the secular courts.

This section contains some of the basic secular rules of evidence for general information only. Whether—and how—these rules apply to a particular fact situation will depend on provincial/territorial legislation and precedents from secular case law.

1. **Documents:** In most cases, documents must be identified by a witness before being entered in evidence as an exhibit. Some exceptions apply for medical evidence. The Formal Hearing Committee should ensure that all exhibits are appropriately marked. The task of marking exhibits is often given to the person recording the formal hearing. The exhibits form part of the record of the hearing.
2. **Questioning witnesses:** The questioning must be relevant to the facts and issues that the Formal Hearing Committee is required to decide. Witnesses should be asked about facts within their personal knowledge or experience, not their opinions (unless they have been called to give an expert opinion on some point).

3. **Examination-in-chief and re-examination:** The party asking questions must not lead the witness so as to suggest the answers the party is seeking. Instead, they must ask neutral questions seeking details and explanations, such as: “What happened?” “When did this happen?” “Where did it happen?” “Who was there when it happened?” “What did you do next?”
4. **Cross-examination:** In cross-examination, the party asking questions may lead the witnesses by suggesting answers or asking questions that only require a “yes” or “no” response. Cross-examination must not become abusive toward the witness.
5. **Hearsay evidence:** Hearsay evidence is evidence that is not based on the witness’s direct experience. An example of hearsay evidence is a witness testifying that her friend told her that he saw the complainant at a particular time. Hearsay evidence is generally inadmissible, but there are a few exceptions. One exception that the Formal Hearing Committee may encounter is a “dying declaration” made by a person who has since died and is therefore not available to give evidence personally.

After the Hearing

How does the Formal Hearing Committee make a decision?

The committee considers the evidence and makes its decision. It is customary for the committee to withdraw for consideration and provide its decision at a later time (for example, in a few weeks). The members of the Formal Hearing Committee should work toward consensus in their decision but ultimately, the decision of the committee is the decision of its majority.

Under section 12.6.1 of the Rules of Procedure for Formal Hearings, the Formal Hearing Committee must provide reasons for the decision. The reasons should

- summarize the evidence;
- indicate which evidence the Formal Hearing Committee accepted or rejected, and why; and
- state a conclusion that is supported by the evidence accepted by the Formal Hearing Committee.

The reasons do not need to address every single point made by each party during the hearing. However, detailed reasons are especially important if the decision has adverse legal consequences for a party. For example, when a formal complaint is found to be proven and the decision is made to dissolve a party’s pastoral relationship, that party is entitled to know how and why the committee reached its decision.



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