Brian Robert Clarence: Summary, as Published in *CheckMark*

Brian Robert Clarence, of Mississauga, was found guilty of two charges under Rule 206 of failing to perform his professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the *CICA Handbook*. While engaged to perform audits of the financial statements of two related companies, Mr. Clarence failed to obtain sufficient appropriate audit evidence to support the valuation of certain balance sheet items, and failed to carry out an adequate review of subsequent events. He was fined $10,000, ordered to pay costs agreed upon of $19,250 in respect of a motion he had brought and later withdrawn, and suspended from membership for three months. Upon Mr. Clarence's appeal, the order of suspension was deleted by the appeal committee on the grounds that it may have resulted from a factual error made by the discipline committee.

CHARGE(S) LAID re Brian Robert Clarence

The Professional Conduct Committee hereby makes the following charges against Brian R. Clarence, CA, a member of the Institute:

1. THAT, the said Brian R. Clarence, in or about the period January 1, 1998 through May 31, 1998, while engaged to perform an audit of the financial statements of Coventry Financial Limited Partnership for the year ended December 31, 1997, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the *CICA Handbook*, contrary to Rule 206 of the rules of professional conduct, in that;

    (a) he failed to obtain sufficient appropriate audit evidence to support the valuation of the balance sheet item "Investments, net (Note 1) $2,567,156";

    (b) he failed to carry out an adequate review of subsequent events.

2. THAT, the said Brian R. Clarence, in or about the period January 1, 1998 through May 31, 1998, while engaged to perform an audit of the financial statements of Coventry Financial Limited Partnership for the year ended December 31, 1997, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the *CICA Handbook*, contrary to Rule 206 of the rules of professional conduct, in that;

    (a) he failed to properly document matters that are important in providing evidence to support the conclusion expressed in his report.

3. THAT, the said Brian R. Clarence, in or about the period January 1, 1998 through May 31, 1998, while engaged to perform an audit of the financial statements of Coventry Financial Corporation for the year ended December 31, 1997, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the *CICA Handbook*, contrary to Rule 206 of the rules of professional conduct, in that;

    (a) he failed to obtain sufficient appropriate audit evidence to support the valuation of the balance sheet item "Investments, net (Note 1) $1,823,748";

    (b) he failed to carry out an adequate review of subsequent events.

4. THAT, the said Brian R. Clarence, in or about the period January 1, 1998 through May 31, 1998, while engaged to perform an audit of the financial statements of Coventry Financial Corporation for the year ended December 31, 1997, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the *CICA Handbook*, contrary to Rule 206 of the rules of professional conduct, in that;

    (a) he failed to properly document matters that are important in providing evidence to support the conclusion expressed in his report.

Dated at Toronto, this 9h day of January, 2001.

RICHARD JOHNSTON, FCA, DEPUTY CHAIR
PROFESSIONAL CONDUCT COMMITTEE

DISCIPLINE COMMITTEE re Brian Robert Clarence

IN THE MATTER OF: Charges against **BRIAN ROBERT CLARENCE, CA**, a member of the Institute, under **Rule 206** of the Rules of Professional Conduct, as amended.

DECISION AND ORDER MADE NOVEMBER 26, 2001

DECISION

THAT, having seen, heard and considered the evidence, charges Nos. 2 and 4 having been withdrawn, the Discipline Committee finds Brian Robert Clarence guilty of charges Nos. 1 and 3.

ORDER

IT IS ORDERED in respect of charges Nos. 1 and 3:

1. THAT Mr. Clarence be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Clarence be and he is hereby fined the sum of $10,000, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Clarence be and he is hereby charged costs fixed at $19,250.73, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.

4. ~~THAT Mr. Clarence be suspended from the rights and privileges of membership in the Institute for a period of three (3) months from the date this Decision and Order becomes final under the bylaws.~~ *DELETED BY APPEAL COMMITTEE*

5. THAT notice of this Decision and Order, disclosing Mr. Clarence's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the discipline committee:

    (a) to the Public Accountants Council for the Province of Ontario;
    (b) to the Canadian Institute of Chartered Accountants; and
    (c) by publication in *CheckMark*.

6. ~~THAT Mr. Clarence surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Clarence.~~ *DELETED BY APPEAL COMMITTEE*

7. THAT in the event Mr. Clarence fails to comply with any of the requirements of this Order, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in *The Globe and Mail*.

DATED AT TORONTO THIS 30TH DAY OF NOVEMBER, 2001
BY ORDER OF THE DISCIPLINE COMMITTEE

BRYAN W. STEPHENSON, BA, LLB
SECRETARY – DISCIPLINE COMMITTEE

DISCIPLINE COMMITTEE re Brian Robert Clarence

REASONS FOR THE DECISION AND ORDER IN THE MATTER OF: Charges against **BRIAN ROBERT CLARENCE, CA**, a member of the Institute, under **Rule 206** of the Rules of Professional Conduct, as amended.

REASONS FOR THE DECISION AND ORDER MADE NOVEMBER 26, 2001

1. This panel of the discipline committee of the Institute of Chartered Accountants of Ontario convened on October 18, 2001 to hear the charges of professional misconduct brought against Brian Robert Clarence, a member of the Institute. The hearing was adjourned that day on the request of both parties, and was reconvened and concluded on November 26, 2001.

2. The formal decision and order was sent to the parties on November 30, 2001. These are the reasons of the discipline committee, given in writing pursuant to Bylaw 574, and include the charges and the decision and order.

The proceedings

3. This hearing was scheduled to commence on September 20, 2001 and continue on September 21, 2001. Counsel for the member brought a motion asking that the charges be dismissed for unfairness on the part of the professional conduct committee. There were affidavits prepared by the parties in support of and in opposition to the motion, and the September hearing days were cancelled to permit the parties' cross-examination on each other's affidavits.

4. On October 18, 2001, originally scheduled as the third day of the hearing, Mr. B.P. Bellmore appeared for the professional conduct committee and Mr. V.R.P. Bersenas appeared for the member. Mr. Clarence was not present. The notice of assignment hearing, notice of hearing and charges were marked as exhibit Nos. 1, 2 and 3, respectively.

5. Both counsel advised that the issues between the professional conduct committee and the member had been resolved, and requested that the hearing be adjourned to a later date at which time it would proceed on an uncontested basis. Ultimately, November 26, 2001 was agreed upon as the date for the hearing to reconvene.

6. On November 26, 2001 Mr. Bellmore again appeared for the professional conduct committee. Mr. John Douglas CA, the investigator appointed by the professional conduct committee, and Mr. Ray Harris, FCA, an expert appointed by the professional conduct committee, accompanied Mr. Bellmore. Mr. Clarence was in attendance with his counsel, Mr. John Lane, an associate of Mr. Bersenas.

7. Before a plea was entered to the charges, Mr. Bellmore advised the discipline committee that the agreement the parties had reached was that the member would not plead to charges Nos. 1 and 3, would not call evidence and would not make submissions, and that charges Nos. 2 and 4 would be withdrawn.

8. The chair directed that charges Nos. 2 and 4 be withdrawn, and that a plea of not guilty be entered on the record on behalf of the member to charges Nos. 1 and 3, which read as follows:

1. *THAT, the said Brian R. Clarence, in or about the period January 1, 1998 through May 31, 1998, while engaged to perform an audit of the financial statements of Coventry Financial Limited Partnership for the year ended December 31, 1997, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the CICA Handbook, contrary to Rule 206 of the rules of professional conduct, in that;*

   (a) *he failed to obtain sufficient appropriate audit evidence to support the valuation of the balance sheet item "Investments, net (Note 1) $2,567,156";*

   (b) *he failed to carry out an adequate review of subsequent events.*

3. *THAT, the said Brian R. Clarence, in or about the period January 1, 1998 through May 31, 1998, while engaged to perform an audit of the financial statements of Coventry Financial Corporation for the year ended December 31, 1997, failed to perform his professional services in accordance with generally accepted standards of practice of the profession, including the Recommendations set out in the CICA Handbook, contrary to Rule 206 of the rules of professional conduct, in that;*

   (a) *he failed to obtain sufficient appropriate audit evidence to support the valuation of the balance sheet item "Investments, net (Note 1) $1,823,748";*

   (b) *he failed to carry out an adequate review of subsequent events.*

The case for the professional conduct committee

9. Mr. Bellmore called Mr. Douglas as a witness and introduced a document brief consisting of 191 pages. The document brief includes relevant pages from the auditor's working papers and the financial statements of two related entities, Coventry Financial Limited Partnership ("CFLP") and Coventry Financial Corporation ("CFC"), both for the year ended December 31, 1997, together with the unqualified audit reports of BDO Dunwoody, Chartered Accountants ("BDO"), both dated at Mississauga, Ontario on April 8, 1998.

10. Mr. Douglas testified that he made two reports to the professional conduct committee. His evidence focused on the audit evidence relating to the investments of CFLP and CFC, and the events subsequent to the year end. In his testimony, Mr. Douglas made specific reference to the document brief and to discussions he had with Mr. Clarence when they met on January 24 and May 31, 2000.

11. Mr. Harris also testified on behalf of the professional conduct committee. The opinion he gave to the professional conduct committee by letter dated February 1, 2001 addressed to Mr. Farley was entered as exhibit No. 7.

12. Mr. Harris expressed the opinion that Mr. Clarence did not perform his professional services in accordance with generally accepted standards of practice of the profession with respect to the audit of the financial statements of CFLP and CFC for the year ended December 31, 1997 in that he did not obtain sufficient and appropriate evidence to support the valuation of the balance sheet item "investments", and that he did not adequately review subsequent events with respect to either CFLP or CFC.

13. Mr. Lane did not cross-examine Mr. Douglas or Mr. Harris. When Mr. Bellmore closed the case for the professional conduct committee, Mr. Lane confirmed that he was not calling evidence.

The facts in brief

14. CFLP and CFC, together referred to as "Coventry", were in the business of providing short term financing to smaller, growth-orientated businesses. Coventry loaned money at a relatively high rate of interest, 2 to 4% per month. It factored accounts receivable and loaned 75% of their stated value, charging interest in the range of 2 to 4% per month. Coventry also factored tax credits by loaning 70% of the credit and charging 3.5 to 4% interest per month. The loans were typically short-term loans due in 90 to 120 days.

15. According to the balance sheets, the investments of CFLP constituted over 90% of its assets, and the investments of CFC constituted 95% of its assets. Further, each individual investment exceeded the amount the member determined to be material, namely $25,000 with respect to CFLP and $19,000 with respect to CFC. But no work was done to confirm the value of any individual investment, and very little work was done to confirm the existence or ownership of any of the investments.

16. With respect to three investments, confirmations were sent to the same person at the same address. These three related loans totalled $996,000 and constituted more than 20% of the total investments of Coventry. The total of the three related loans exceeded the loan limit of both Coventry and its bank, the Laurentian Bank. In fact, one of these three loans itself exceeded the $500,000 limit. While the crucial issue was the value of the investment, and little work was done to assess the likelihood of the loan being repaid, what work was done should have alerted the member to a serious problem.

17. With respect to the second particular of both charges, the failure to carry out an adequate review of subsequent events, the evidence was that there was virtually no review of subsequent events. The minute books of the companies were not reviewed. Despite the nature of the loans and the fact that they totalled over $4,000,000, the significance of the fact that only $250,000 was received between the year-end, December 31, and April 8 was either missed or ignored by the auditor.

Decision on the charges

18. Upon deliberation, the discipline committee found that particulars (a) and (b) of both charges had been proven, and that Mr. Clarence's conduct fell far below the standard the profession requires. Accordingly, he was found guilty of both charges. The decision, which was sent to the member on November 30, 2001, reads as follows:

> <u>DECISION</u>
>
> THAT, having seen, heard and considered the evidence, charges Nos. 2 and 4 having been withdrawn, the Discipline Committee finds Brian Robert Clarence guilty of charges Nos. 1 and 3.

SANCTION

19. Both counsel confirmed that they were not calling evidence with respect to sanction.

20. Mr. Bellmore submitted on behalf of the professional conduct committee that the appropriate sanction was one which provided for a reprimand from the chair, a fine of $10,000, costs payable by the member in the amount of $21,250.73, two specified professional development courses, and publication of notice of the decision and order in *CheckMark*.

21. Mr. Bellmore made it clear that the terms of the requested sanction were discussed between counsel and settled in the discussions that resulted in the withdrawal of the member's motion and the agreement that the hearing proceed on an uncontested basis. He said that while the professional conduct committee's original instructions with respect to sanction in the event of a finding of misconduct were more onerous than the sanction actually requested at the hearing in light of the agreement between the parties, the fact that the expense of at least one day and likely many days of hearing had been saved by the uncontested proceeding made the requested sanction appropriate in this case.

22. While Mr. Lane did not make extensive submissions, he concurred with the submissions of Mr. Bellmore.

23. Early in its deliberations, the discipline committee decided that in view of orders made in past cases it would like to hear submissions as to why a suspension was not appropriate in this case. Accordingly, our concern was made known to counsel for both parties and the hearing reconvened to provide an opportunity for both counsel to make such submissions.

24. Mr. Lane stated there was some difficulty putting forward points on Mr. Clarence's behalf in light of the parties' agreement that the hearing would proceed on an uncontested basis and that the member would not call evidence. He acknowledged that he had been aware of this limitation when the parties made the agreement to proceed as they did, and also that he knew the imposition of sanction was a matter for the discipline committee's determination. Even so, he submitted that the discipline committee should take into account that the parties would have been aware of the factors which would justify a departure from what might appear to the committee to be the appropriate order when they reached their agreement as to how to proceed.

25. He also submitted that this was an exceptional case, that there was a history to this proceeding which should be considered, that the motion brought and abandoned by the member had raised issues of fairness, and that the agreement to abandon the motion had been based on the agreement reached between the parties as to the appropriate terms of a joint submission on sanction.

26. Mr. Clarence made a brief statement in which he apologized for this single lapse in his 25-year career, and assured the discipline committee that he not only had been deeply humiliated by this process but had been stimulated to approach each assignment with renewed rigour.

27. Neither counsel made specific reference to any previous cases of the discipline committee.

Order as to sanction

28. The discipline committee deliberated and when it reached a conclusion the hearing reconvened and the terms of the order were made known to the parties. The formal order which was sent to the parties on November 30, 2001 reads as follows:

ORDER

IT IS ORDERED in respect of charges Nos. 1 and 3:

1. THAT Mr. Clarence be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Clarence be and he is hereby fined the sum of $10,000, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Clarence be and he is hereby charged costs fixed at $19,250.73, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.

4. THAT Mr. Clarence be suspended from the rights and privileges of membership in the Institute for a period of three (3) months from the date this Decision and Order becomes final under the bylaws.

5. THAT notice of this Decision and Order, disclosing Mr. Clarence's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the discipline committee:

   (a) to the Public Accountants Council for the Province of Ontario;
   (b) to the Canadian Institute of Chartered Accountants; and
   (c) by publication in *CheckMark*.

6. THAT Mr. Clarence surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Clarence.

7. THAT in the event Mr. Clarence fails to comply with any of the requirements of this Order, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in *The Globe and Mail*.

Is a suspension required?

29. In this case the three general principles which govern the imposition of sanction, namely general deterrence, specific deterrence and rehabilitation, are all applicable. As in many cases, the most difficult aspect of this case was the task of determining the appropriate sanction which is fair to this member, consistent with sanctions imposed against other members who have been disciplined in the past, and reinforces the standards of the profession and thus strengthens it to the benefit of the public it serves.

30. A joint submission from counsel does not relieve the discipline committee of the obligation to compare the misconduct and the member in this case to both the misconduct and the member in other cases, and the conduct of members who maintain the standard. If the suggested sanction does not appropriately apply one of the sanctioning principles, or is unjustifiably inconsistent with the sanctions imposed in other cases, the discipline committee is obliged to reject the joint submission. We did so in this case.

31. Prior to this hearing, this member of 25 years had an unblemished record. There is no suggestion of moral turpitude, or that the member's standards generally are not appropriate. The misconduct was an isolated incident, and there was no evidence that the audit failure was a contributing factor in any Coventry losses.

32. Often a plea of guilty at an early stage in the proceeding is an indication that a member is remorseful and that the process of rehabilitation has already begun. The decision in this case to proceed on an uncontested basis only after a four day hearing had initially been scheduled and adjourned a couple of times does not obviously fall within the category of early. On the other hand, Mr. Clarence has had an extensive engagement with the discipline process, and we saw no reason to doubt his statement that he is deeply remorseful and that the process has had a significant impact on him and the way he now practises.

33. We also weighed the reasons submitted by counsel as to why we should not impose a suspension, but found them insufficient to persuade us to depart from the general practice of the discipline committee to suspend in standards cases of this kind. The misconduct in this case, which is summarized in paragraphs 14 to 17 above, is virtually a complete failure to adhere to the required standards of practice applicable in audit engagements.

34. This case was similar to the cases involving Mr. Lefebvre, Mr. Crawley, and Messrs. Aulthouse, Dutschek and Hall. All of those cases involved audits, and the essential misconduct in each of them was a failure to obtain adequate audit evidence before rendering an opinion. Suspensions were imposed in those cases.

35. We also compared the misconduct in this case with proper conduct, as we are required to do. The member either failed to recognize or failed to adequately deal with two serious risks – the risk inherent in conducting a first audit for a client, and the risk inherent in auditing an entity which essentially has only one asset. Every audit requires members to pay due care and attention. But the first audit and the audit of an entity with essentially only one asset are recognized by practitioners as engagements with increased risk requiring particular care and attention. On the evidence we heard, while the misconduct in this case was not a wilful departure from the required standard of the profession, the member completely ignored that standard.

36. The suspension in this case is not likely to have the same impact as a suspension on a sole practitioner, though we do not doubt that the suspension will have an impact on Mr. Clarence and his relationship with his partners, and perhaps even have an impact on his partners themselves, which would not be entirely undeserved. It was clear on the evidence that Mr. Clarence was not the only member of the firm involved with this audit. The failure to adequately investigate and analyse the investments and the failure to consider the events after the year-end should have been caught by both the manager and partner conducting the second partner review.

37. It appeared from the other cases we reviewed that a suspension in the range of three to six months would be appropriate and ultimately we concluded there would be a three month suspension.

Reprimand

38. In keeping with past cases, the panel ordered that the member be reprimanded in writing by the chair of the hearing, to stress to him the serious nature of the offences, and the unacceptability of his conduct as a chartered accountant.

Fine

39. The discipline committee thought a fine was required as a general and specific deterrent, and in the circumstances of this case concluded that the appropriate amount of the fine was $10,000.

Suspension

40. For the reasons set out above, we concluded that a suspension was required as a general deterrent to the membership as a whole as well as a specific deterrent to Mr. Clarence. The profession should know that even if the misconduct of the kind in this case is an isolated incident it will not be tolerated.

Professional Development Courses

41. The discipline committee recognized that Mr. Clarence is a partner of a national accounting firm which on the evidence has appropriate checklists and procedures. We were satisfied that Mr. Clarence and his partners did not need the assistance of professional development courses to make sure that he is fully rehabilitated and that the required standard of practice is met.

Costs

42. Counsel for the professional conduct committee asked that the member be ordered to pay costs in the amount of $21,250.73. This amount included the costs attributed to the motion which was withdrawn, and in this regard Mr. Bellmore provided a schedule particularizing these costs which totalled $19,250.73. In addition, Mr. Bellmore asked that the member be required to pay costs in the amount of $2,000 for the hearing itself.

43. Again Mr. Lane confirmed that this was one of the terms of the order which was discussed when the parties reached the agreement that the hearing would proceed as an uncontested matter.

44. One of the amendments to the *Chartered Accountants Act* which came into force in January 2001 explicitly authorizes the Institute to pass a bylaw giving the discipline committee power to award costs. The relevant bylaw provision is contained in Bylaw 530(3), which reads as follows:

(3) After a hearing the discipline committee shall find the member, student, firm or professional corporation guilty or not guilty of a charge. If the member, student, firm or professional corporation is found guilty of a charge, the discipline committee may order one or more of the following, namely:

(c) that any such member, student, firm or professional corporation shall be charged the costs of the hearing as may be fixed by the discipline committee;

45. This panel of the discipline committee was not prepared to award costs of the day of the hearing, but we concluded that it was appropriate to require the member to pay the costs associated with the motion which was to be part of the hearing but was withdrawn. The motion delayed the hearing and resulted in considerable expense, and as it was withdrawn it appears it was unnecessary or unfounded. Also important to the committee's determination to charge the costs of the motion was the member's agreement to pay them. The parties had agreed that the amount of the motion costs were $19,250.73, and these were the costs ordered.

DATED AT TORONTO THIS 7TH DAY OF FEBRUARY, 2002
BY ORDER OF THE DISCIPLINE COMMITTEE

L.P. BOOKMAN, CA – CHAIR
THE DISCIPLINE COMMITTEE

MEMBERS OF THE PANEL:

P.B.A. CLARKSON, CA
G.R. PEALL, CA
S.W. SALTER, CA
N.C. AGARWAL (Public representative)

APPEAL COMMITTEE re Brian Robert Clarence

ORDER IN THE MATTER OF: An appeal by **BRIAN ROBERT CLARENCE, CA,** a member of the Institute, of the Order of the Discipline Committee made on November 26, 2001, pursuant to the bylaws of the Institute, as amended.

ORDER MADE JUNE 12, 2002

HAVING heard and considered the submissions made on behalf of Brian Robert Clarence, and on behalf of the professional conduct committee, upon Mr. Clarence's appeal of the Decision and Order of the Discipline Committee made on November 26, 2001, the Appeal Committee orders:

1. THAT Mr. Clarence's appeal be and it is hereby allowed.

2. THAT the Decision and Order of the Discipline Committee made on November 26, 2001 be and it is hereby varied by deleting therefrom paragraph 4 relating to the suspension of Mr. Clarence.

3. THAT in all other respects the said Decision and Order of the Discipline Committee is confirmed in its entirety.

4. THAT the said Decision and Order of the Discipline Committee will become final, binding and conclusive pursuant to the bylaws on the tenth calendar day after the day this Order is mailed to Mr. Clarence pursuant to Bylaw 107.

DATED AT TORONTO THIS 19TH DAY OF JUNE, 2002
BY ORDER OF THE APPEAL COMMITTEE

BRYAN W. STEPHENSON, BA, LLB
SECRETARY – APPEAL COMMITTEE

APPEAL COMMITTEE re Brian Robert Clarence

REASONS FOR DECISION AND ORDER IN THE MATTER OF: An appeal by **BRIAN ROBERT CLARENCE, CA,** a member of the Institute, of the Order of the Discipline Committee made on November 26, 2001, pursuant to the bylaws of the Institute, as amended.

DECISION AND REASONS FOR DECISION MADE JUNE 12, 2002

This appeal was heard by a panel of the appeal committee of the Institute of Chartered Accountants of Ontario on June 12, 2002.

Mr. B. P. Bellmore appeared on behalf of the professional conduct committee, and Mr. V.R.P. Bersenas appeared for and with Mr. Clarence.

THE DISCIPLINE COMMITTEE'S DECISION AND ORDER

The professional conduct committee had laid four charges of professional misconduct under the rules of professional conduct, two of which it withdrew at the outset of the discipline hearing. On November 26, 2001, the discipline committee found Mr. Clarence guilty of the remaining two charges, and then went on to make the following order:

1. THAT Mr. Clarence be reprimanded in writing by the chair of the hearing.

2. THAT Mr. Clarence be and he is hereby fined the sum of $10,000, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.

3. THAT Mr. Clarence be and he is hereby charged costs fixed at $19,250.73, to be remitted to the Institute within three (3) months from the date this Decision and Order becomes final under the bylaws.

4. THAT Mr. Clarence be suspended from the rights and privileges of membership in the Institute for a period of three (3) months from the date this Decision and Order becomes final under the bylaws.

5. THAT notice of this Decision and Order, disclosing Mr. Clarence's name, be given after this Decision and Order becomes final under the bylaws, in the form and manner determined by the discipline committee:

   (a) to the Public Accountants Council for the Province of Ontario;
   (b) to the Canadian Institute of Chartered Accountants; and
   (c) by publication in *CheckMark*.

6. THAT Mr. Clarence surrender his certificate of membership in the Institute to the discipline committee secretary within ten (10) days from the date this Decision and Order becomes final under the bylaws, to be held during the period of suspension and thereafter returned to Mr. Clarence.

7. THAT in the event Mr. Clarence fails to comply with any of the requirements of this Order, he shall thereupon be expelled from membership in the Institute, and notice of his expulsion, disclosing his name, shall be given in the manner specified above, and in *The Globe and Mail*.

RELIEF SOUGHT FROM THE APPEAL COMMITTEE AND GROUNDS FOR APPEAL

Mr. Clarence's Notice of Appeal stated as follows:

> RELIEF SOUGHT:
>
> The member asks that the sanction imposed in the November 30, 2001, Order of the Discipline Committee be varied by setting aside item four of the Order regarding suspension of the member for three months.
>
> GROUNDS FOR APPEAL:
>
> 1. The Discipline Committee erred in rejecting the joint submission presented by the PCC and the member regarding sanction where the submission was reasonable and was consistent with the range of sanctions imposed by the Committee previously in comparable cases.
>
> 2. The Discipline Committee erred in finding and relying on the erroneous finding that the member's motion for dismissal of the charges for procedural unfairness was unnecessary or unfounded, and erred in concluding that the member's agreement to abandon the motion was not relevant for the purpose of evaluating the reasonableness of the joint submission.

THE APPEAL COMMMITTEE'S DECISION

After hearing and considering the submissions of both counsel, the appeal committee made the following order:

1. THAT Mr. Clarence's appeal be and it is hereby allowed.

2. THAT the Decision and Order of the Discipline Committee made on November 26, 2001 be and it is hereby varied by deleting therefrom paragraph 4 relating to the suspension of Mr. Clarence.

3. THAT in all other respects the said Decision and Order of the Discipline Committee is confirmed in its entirety.

4. THAT the said Decision and Order of the Discipline Committee will become final, binding and conclusive pursuant to the bylaws on the tenth calendar day after the day this Order is mailed to Mr. Clarence pursuant to Bylaw 107.

These are the reasons for the appeal committee's Order.

THE APPELLANT'S POSITION

On behalf of Mr. Clarence, Mr. Bersenas submitted that the agreement made between the member and the professional conduct committee encompassed more than simply the joint submission on sanction, but included the withdrawal by the member of his motion, and the member's not contesting the charges. The effect of the agreement, he submitted, was to shorten the hearing to less than one day from what had been scheduled for four days, resulting in a substantial reduction in costs to the Institute. The downside to Mr. Clarence's entering into the agreement, he submitted, was that he lost the opportunity to respond to the evidence presented by the professional conduct committee, not so much to dispute questions of guilt as to give his version of events in order to provide the discipline panel with a more balanced perspective of the matters in question. Mr. Bersenas emphasized that although the two charges of which Mr. Clarence was found guilty related to audits of two separate clients, the clients were closely-related companies in the same line of business and with the same year-ends, as a result of which the member's deficiencies should be viewed as having been in respect of a single audit. He pointed out that except for the name of the company – Coventry Financial Limited Partnership in one charge and Coventry Financial Corporation in the other – the two charges were almost identical.

The First Ground of Appeal

The first ground of appeal advanced by Mr. Bersenas was that, in the circumstances of this case, the discipline committee should have accepted rather than rejected or departed from the joint submission on sanction that had been agreed between the prosecution and the defence. He stated that the agreement had been reached as a means of avoiding further delay, and expediting the hearing on a consent basis whereby the charges would not be contested by the member. The position of the appellant, he advised, was that in the circumstances of this case the departure from the joint submission by the discipline committee was contrary to applicable law.

Mr. Bersenas presented to the panel a schedule of sanctions imposed by the discipline committee in somewhat similar cases over a period of approximately the last ten years where no suspension had been included in the sanctions order. He emphasized that the charges against Mr. Clarence arose from an isolated incident in a 25 year career as a chartered accountant, that the discipline committee had recognized that Mr. Clarence was remorseful, that there was no moral turpitude involved, and that the fine imposed of $10,000 and the costs of more than $19,000 were not insignificant in this sentencing.

Mr. Bersenas quoted Mr. Bellmore at page 68 line 17 of the discipline hearing transcript, where Mr. Bellmore said of the case: "It's a situation we're dealing with of a member who has been a member in good standing for over 25 years and this is the first instance of discipline that we certainly are aware of of the member, and one where he does have firm partners around him to assist him. I believe the aspect of rehabilitation is dealt with adequately by the taking of the refresher courses. And, of course, the specific deterrence and general deterrence is addressed with what would be a very – somewhat of a – high fine. And certainly the costs imposed are not insignificant in this case. That too sends a message to the profession and to the public at large that this is a matter that's regarded as serious by the panel." Mr. Bersenas explained that Mr. Bellmore was submitting to the discipline committee that the three sanctioning principles of general deterrence, specific deterrence and rehabilitation were very much in the mind of the professional conduct committee when it agreed to the joint submission on sanction presented to the discipline committee.

Mr. Bersenas submitted that the generally recognized law is that a judge or a sentencing tribunal should accept a submission on sanction that is jointly agreed upon and recommended by the prosecution and the defence unless the proposed sanction is so disproportionate to the offence or the charge that it would be contrary to public interest and would bring the process into disrepute to accept it. He referred the panel to the case of *R. v. Bosklopper* in the Appellant's Book of Authorities, Exhibit 4, Tab 4. This decision is an Ontario Court of Appeal decision rendered in 1995. It is a decision in a criminal case in which the trial judge did not accept the joint submission on sentencing and imposed a more severe sentence. The Court of Appeal allowed the appeal and reduced the sentence to what had been proposed in the joint submission. In doing so, the Court of Appeal said that even though the jointly proposed sentence was at the low end of the range, it was within the accepted range and, therefore, should have been accepted by the trial judge. Mr. Bersenas also referred to the case at Tab 1 of his Book of Authorities, cited as *Peoples (Re)*, which was a case before the discipline committee of the College of Physicians and Surgeons of Ontario heard in 2001. At page 4 of its reasons the committee states: “The Committee also understood the law with respect to joint submissions, which was reviewed at the hearing. The Committee was aware that it had the discretion to accept or not a joint submission, but that the Ontario Court of Appeal had stated that there should not be a departure from a joint submission, "unless the sentence proposed is so disproportionate to the offense that it would be contrary to the public interest of justice and bring the administration of justice into disrepute”. Mr. Bersenas referred to other cases in his authorities brief in support of this principle.

Mr. Bersenas concluded that as the joint submission with no suspension provision was not disproportionate to the misconduct in this case but fell within the range of sanctions for similar misconduct that had been established over time by past discipline cases, the discipline committee should not have departed from it by adding the suspension provision.

The Second Ground of Appeal

The second ground of appeal argued by Mr. Bersenas was that the discipline committee made a finding adverse to the member which had no basis in fact, thereby raising an apprehension of bias on the part of the committee when it added to the sanctions order proposed by the parties an order suspending Mr. Clarence for a period of three months.

The member had brought a motion alleging unfairness and a denial of natural justice by the professional conduct committee by reason of the manner in which its investigation had been conducted in its latter stages. Mr. Bersenas quoted the finding in the discipline committee’s reasons that the motion was “unnecessary or unfounded”, and had delayed the hearing before the discipline committee and resulted in considerable expense. He indicated that there was no evidence before the discipline committee upon which to properly make that finding, and that on the contrary the motion brought by the member had raised real and justiciable issues that were worthy of consideration. Mr. Bellmore agreed with Mr. Bersenas as to the legitimacy of the motion. The submission of Mr. Bersenas was that the discipline committee's finding that the motion was unnecessary or unfounded led to a mindset negative to the member which influenced the committee's decision to add suspension to the sanctions order proposed by the parties.

Mr. Bersenas stated that the joint submission appropriately applied all of the sanctioning principles, and was within the range of sanctions consistent with previous cases of a similar nature. The fact, therefore, that the discipline committee felt compelled to increase the sanctions jointly sought by the parties could lead one to conclude, Mr. Bersenas submitted, that the committee had been negatively and improperly influenced by its erroneous view of the member's motion. He quoted from paragraph 45 of the discipline committee's reasons: "The motion delayed the hearing and resulted in considerable expense, and as it was withdrawn it appears it was unnecessary or unfounded". He submitted that delay caused by the motion was also cited by the discipline committee for its conclusion that Mr. Clarence had been slow to show remorse and begin the rehabilitation process, and quoted from paragraph 32 of the discipline committee's reasons: "Often a plea of guilty at an early stage in the proceeding is an indication that a member is remorseful and that the process of rehabilitation has already begun. The decision in this case to proceed on an uncontested basis only after a four day hearing had initially been scheduled and adjourned a couple of times does not obviously fall within the category of early." Though the paragraph went on to state that the discipline committee accepted that Mr. Clarence was remorseful and that his involvement in the discipline process had had a significant impact on him, Mr. Bersenas contended that the opening sentences of the paragraph provided another indication that the discipline committee may have been unnecessarily biased against Mr. Clarence when it imposed the suspension that went beyond what had jointly been submitted by the parties as the appropriate sanction in the case.

Mr. Bersenas concluded that as the discipline committee's exercise of discretion in increasing the sanctions against Mr. Clarence was based on its erroneous conclusion as to the merits and purpose of the motion brought on the member's behalf, its decision on sanction was tainted by an apprehension of bias which required correction by the appeal committee.

THE RESPONDENT'S POSITION

Mr. Bellmore began his submissions by indicating that the professional conduct committee did not resile from its position taken before the discipline committee as to the appropriate sanctions order in this case, which proposed order did not include suspension. He also indicated, however, that the professional conduct committee accepts and respects the authority of the discipline committee to determine the appropriate order as to sanction in each case before it, and to choose not to follow a joint submission that it does not consider adequate in the circumstances of the particular case. He submitted that joint submissions should carry great weight which discipline panels should be reluctant not to follow, but that ultimately each panel has the right and the authority to make the final determination.

Mr. Bellmore submitted that the important issue with respect to the alteration of the sanction by the discipline committee was that it notified both counsel that it was considering the additional sanction of a suspension and invited them to make submissions before making its decision. He indicated that the discipline committee dedicated a considerable amount of space in its reasons (paragraphs 29 to 37) to addressing the issue of whether a suspension was required in the circumstances of this case, and that it considered the mitigating factors put forward by Mr. Bersenas, including that the member had had a 25 year unblemished record as a CA, that there had been no moral turpitude involved in the misconduct, and that there was no evidence that the member's standards in general were not appropriate. The discipline panel also recognized, in paragraph 31, that the misconduct "was an isolated incident, and there was no evidence that the audit failure was a contributing factor in any Coventry losses". The discipline panel listened to and weighed the reasons submitted by counsel as to why a suspension was not appropriate, but found those arguments insufficient to persuade it to depart from the general practice of the discipline committee to suspend in standards cases of this kind, and ultimately concluded that there should be a three month suspension. Mr. Bellmore submitted that the discipline committee clearly had the jurisdiction to impose a greater or lesser sanction than the one that had been recommended by the parties.

Mr. Bellmore advised that there were past discipline cases involving breaches of Rule 206 in which a suspension had not been imposed, but that there were also cases in which a suspension had been imposed, and cited a number of those cases. He also referred to the 1989 decision of the Divisional Court in the case of *College of Physicians and Surgeons of Ontario v. Petrie*, wherein a joint submission was made to the discipline committee of the College of Physicians and Surgeons by counsel for the College and counsel for the physician recommending a penalty of an unpublished reprimand. After deliberating, the discipline committee of the College ordered a published reprimand and a suspension. Counsel had not been asked to make representations on the more severe penalty before it was imposed, and the physician appealed. Mr. Bellmore quoted from the judgment of Callaghan ACJHC at the bottom of page 101 as follows: "While it is within the jurisdiction of the Committee to reject a joint submission, we are of the view that when a Committee with disciplinary power rejects such a submission and proposes to impose a sentence of a more severe character, then the rule of *audi alteram partem* should be involved and the Committee should afford counsel the opportunity to make representations addressing the issue of the more severe penalty". The appeal of the sanctions decision was allowed, and the matter was sent back to the College's discipline committee for reconsideration. Mr. Bellmore pointed out that in the case at hand the discipline committee did advise counsel that it was contemplating the imposition of a suspension, and requested and obtained submissions from counsel on the issue before making its final determination.

THE APPELLANT'S REPLY

Mr. Bersenas submitted that on the basis of the policy considerations enunciated by the courts in the cases which he cited, the discipline committee should not have departed from the joint submission, even if the departure resulted in a sanction within the appropriate range of sanctions for similar misconduct in past cases.

Mr. Bersenas pointed out that the discipline committee specifically cited in its reasons only the cases of Mr. Lefebvre, Mr. Crawley, and Messrs. Aulthouse, Dutschek and Hall, as authorities for the imposition of a suspension in cases involving failure to obtain adequate audit evidence. It does not appear that any other cases were made available to the committee or that it considered other cases in which no suspension was ordered for breaches of Rule 206. Mr. Bersenas also made the point that although counsel before the discipline committee were given the opportunity to make submissions on the issue of a suspension, they had not come prepared to argue precedent cases in which suspensions were not imposed in similar circumstances because they had not contemplated the possibility that the discipline committee might not accept their joint submission.

THE PANEL'S DETERMINATION

With respect to the first ground of appeal put forward by the member relating to the issue of whether the discipline committee has the discretion to vary a joint submission on sanction put forward by the member and the professional conduct committee, it is the unequivocal determination of the appeal committee that the discipline committee does have such discretion. Subject to the power of this committee upon appeal, the discipline committee bears the sole responsibility and authority to determine whether or not a member charged with professional misconduct is guilty on the basis of the evidence put before it, and then to decide in cases in which it makes a finding of guilty what the appropriate sanctions should be in the circumstances.

A discipline panel has an obligation to hear and weigh the evidence and submissions presented by both parties on the issue of sanction. It has an obligation to notify the parties if it is considering the imposition of a sanction materially different from what has been proposed by either party, and to give the parties an opportunity to make submissions thereon before reaching a final decision. In the opinion of the appeal committee, a joint submission on sanction is entitled to be accorded great weight by a discipline panel in its deliberations on sanction. But the ultimate decision as to the appropriate sanction in each individual case rests with the discipline committee panel that hears the case, taking into consideration both the general sanctioning principles of specific deterrence, general deterrence and rehabilitation, and the sanctions imposed in prior discipline committee cases of a similar nature to ensure that the order as to sanctions falls within the range of sanctions appropriate to the misconduct.

The appeal committee rejects the proposition put forward on behalf of the member that a joint submission within the range of appropriate sanctions cannot be interfered with. The responsibility and authority of the discipline committee to determine the appropriate sanction in every case before it cannot be diminished or undermined by the presentation of a joint submission. A panel must give weight to a joint submission on sanction, but it cannot be held to any obligation to accept it. The first ground of appeal put forward on behalf of the member fails.

However, the member's second ground of appeal must succeed. The appeal committee concluded that the discipline committee's reasons, specifically the wording contained in paragraphs 32 and 45 thereof, raised an apprehension that the discipline committee may have added the suspension provision to its sanctions order on account of the influence upon it of its erroneous conclusion that the motion brought by the member inappropriately delayed the discipline hearing and was "unnecessary or unfounded". Counsel for the professional conduct committee made it clear to the appeal panel that the member's motion was not without merit, and that this should not have been an issue of concern to the discipline committee, nor a negative influence upon its sanctions order. At paragraph 28 of the respondent's factum, Mr. Bellmore states: "The Respondent agrees with the Appellant's submission that the Member's pre-hearing motion for dismissal raised real and justiciable issues and that there was no evidence before the Discipline Committee that the Member's motion was unnecessary or unfounded. It is respectfully submitted that no adverse inference could be drawn against the member by reason of his decision to abandon the motion and proceed with the hearing on an uncontested basis". While Mr. Bellmore goes on in his factum to say that the discipline committee's error as to the merits of the member's motion was not of such magnitude as to justify interfering with its order, the appeal committee concluded otherwise.

The panel wishes to emphasize that it has not concluded with certainty that the discipline committee was in fact unduly influenced in its sanctions deliberations by an erroneous factual finding, but rather that certain portions of the discipline committee's reasons could be read to suggest that the committee may have been so influenced. Based on the often-stated principle that justice must not only be done but must be seen to be done, the panel decided that any ambiguity in the reasons of the discipline committee in terms of having possibly been influenced by a factual error had to be resolved in favour of the member.
Accordingly, Mr. Clarence's appeal was allowed, and paragraph 4 relating to his three month suspension from membership was deleted from the discipline committee's order.

DATED AT TORONTO, THIS 21ST DAY OF AUGUST, 2002
BY ORDER OF THE APPEAL COMMITTEE

M.B. MARTENFELD, FCA – CHAIR
THE APPEAL COMMITTEE

<u>MEMBERS OF THE PANEL</u>:

J.J. LONG, CA
S.F. MITCHELL, CA
D.P. SETTERINGTON, FCA
V. INGLIS (Public representative)