

Complaint & Discipline Procedures Manual

**OFFICE
OF THE Registrar**
NEW BRUNSWICK
REAL ESTATE ASSOCIATION



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Part 1: Overview

Pursuant to ss. 5(a) and (e) of *An Act to Incorporate The New Brunswick Real Estate Association* (the “Act”), objects of the New Brunswick Real Estate Association (the “Association”) include the regulation of the practice of trading in real estate, the governance of its members in order to serve and protect the public interest and the establishment, maintenance, development and enforcement of professional ethics.

In furtherance of those objects, the Association is empowered, pursuant to ss. 6(a) of the Act, to provide for the discipline, government, control and honour of persons practicing the profession of trading in real estate in the Province of New Brunswick.

The Association is therefore charged with the responsibility of considering and investigating the conduct or competence of any member of the Association and determining whether any such member is guilty of professional misconduct or incompetence.

The following statutes, by-laws, and other documents are relevant to the Complaint and disciplinary process:

1. The Act;
2. *The New Brunswick Real Estate Agents Act* (the “Real Estate Agents Act”);
3. The Association’s By-Laws; and
4. The REALTOR® Code (the “Code”).

This Complaint & Discipline Procedures Manual (the “Manual”) is intended as a guide for the administration of Complaint and discipline relating to professional misconduct and/or incompetence under sections 20 to 24 of the Act. The Manual is intended as a guide only and is not intended to be legal advice.

In adopting the rules of procedure and standards set out in this Manual, the Association recognizes and adopts the principles of natural justice and procedural fairness that apply to administrative tribunals and courts in order to ensure fair and just hearings. This includes an individual’s right to:

- hear the evidence in support of the allegations made against him/her;
- have an adequate opportunity to prepare and present evidence in defense; and
- have the decision made by only those who have heard the evidence.

Procedural fairness is put in practice by requirements which include notices of hearing, rules of evidence, composition of committee panels, rules of deliberations, and decision making, all of which are discussed in this Manual. Additionally, a member has the right to be represented by a lawyer at any stage of the proceedings.

Part 2: The Role of Key Participants in the Complaint and Discipline Process

The Complaint and discipline process involves a number of participants including the Board of Directors (the “Board”), the Registrar, the Complaint and Discipline Committees, the Investigator, the Complainant, the Respondent, the Prosecutor, and other members and individuals who have information about the matter, who may be witnesses. The following is a brief description of the roles these participants play in the process:

1. The Board

Pursuant to the Act, the Association’s Board is entrusted with serving the public interest in the discharge of a series of important functions with respect to the disciplinary process. Notably the Board:

- (a) Appoints, from its members, the Chairperson for the Complaint Committee;
- (b) appoints the Chairperson of the Discipline Committee;
- (c) reviews the treatment of Complaint by the Complaint Committee;
- (d) has the power to refer a matter concerning the conduct or competence of a member to the Complaint Committee;
- (e) has the power to refer a matter concerning the conduct of a member to the Director of the Financial and Consumer Services Commission (the “Director”) for investigation under the *Real Estate Agents Act*; and
- (f) has the power to direct that the Discipline Committee hold a hearing into the conduct or competence of a member.

Further, pursuant to the Association’s By-Laws, the Board has the authority to approve the procedures used by the Complaint and Discipline Committees. Therefore, it is the Board’s obligation to ensure that the disciplinary process is functioning in accordance with the Act and By-Laws.

2. The Registrar

The Registrar is the administrative channel through which the Complaint and Discipline Committees carry out their respective functions.

The Registrar is not a member of the Complaint or Discipline Committees and does not make any decisions or determination in relation to professional misconduct and/or incompetence. The Registrar advises, as requested, on required and appropriate procedures and coordinates the hearing process from receipt of a complaint to its final determination. This coordination involves communicating with all of the persons involved in a disciplinary matter, providing required

forms, and sending and receiving all correspondence and notices. In addition, hearing arrangements, transcribing decisions and record retention are the responsibility of the Registrar.

3. The Complaint and Discipline Committees

The two Committees of the Association involved with the Complaint and discipline process are the Complaint Committee appointed under s. 20 of the Act, and the Discipline Committee appointed under s. 22 of the Act. These two Committees serve a critical role in the proper handling and enforcement of disciplinary matters.

The Complaint and Discipline Committees are distinct, each having separate areas of jurisdiction and functions. No individual can serve on both Committees at the same time.

(a) Complaint Committee

Under ss. 20(1) of the Act, the Complaint Committee consists of one member of the Board, appointed by the Board, who shall be the Chairperson; one member of the Association appointed by the Board; and one person, not a member of the Association, appointed by the Director. Under ss. 20(2), the Board names one member of the Association and the Director names one person, not a member of the Association, as alternate members who may be called upon by the Chairperson of the Complaint Committee to act as necessary.

Under ss. 21(1) of the Act, the Complaint Committee is required to consider and investigate the conduct or competence of a member upon receipt of: a complaint filed in writing with the Registrar; a Board resolution; or a referral from the Director under the *Real Estate Agents Act*.

In accordance with ss. 21(2) of the Act, the Complaint Committee is not required to hold formal hearings and it does not make any final determinations with respect to professional misconduct and/or incompetence.

After consideration and investigation, the Complaint Committee must dispose of the matter in accordance with ss. 21(3) of the Act.

(b) Discipline Committee

Under ss. 22(1) of the Act, the Discipline Committee consists of four members of the Association appointed by the Board; and one person, not a member of the Association, appointed by the Director. Under ss. 22(2) of the act, the Board also names three members of the Association and the Director names one person, not a member of the Association, as alternate members who may be called upon by the Chairperson of the Discipline Committee to act as necessary. The Board may also appoint further alternate members of the Association as necessary.

When so directed by the Board, by the Complaint Committee, or the Director, the Discipline Committee has the obligation to conduct a hearing to determine if the Respondent is guilty of professional misconduct or incompetence as set out in the written complaint, Board resolution or referral from the Director and, if so, to discipline

the Respondent in accordance with ss. 23(4) of the Act, or to make a recommendation to the Director under ss. 23(5) of the Act, or both.

4. The Investigator

Where circumstances justify, the Registrar or the Complaint Committee may appoint an Investigator to investigate the facts of a matter and to report any findings to the Registrar or Complaint Committee.

The role of the Investigator is not to determine the validity of the matter under investigation or to determine whether a violation has occurred, but rather to assemble all relevant facts and/or documents.

5. The Complainant

Any person, whether a member of the Association or not, may file a complaint alleging professional misconduct or incompetence against a member. The person who files the complaint is the “Complainant”.

Under ss. 24(1) of the Act, if the matter proceeds to a hearing, the Complainant is not a party to the proceeding, but may be required as a witness. As such, the Complainant has no right to appeal a decision of the Discipline Committee under ss. 25(1) of the Act.

6. The Respondent

Any member of the Association may be the subject of a written complaint, Board resolution or a referral from the Director alleging professional misconduct or incompetence. That member is the “Respondent”.

Under s. 2 of the Act, a member remains subject to discipline even if he or she is under suspension or has resigned.

7. The Prosecutor

Once a written complaint, Board resolution or referral from the Director has been forwarded by the Complaint Committee to the Discipline Committee for a hearing, the Registrar shall appoint a Prosecutor to represent the Association (the Association being a party to the complaint).

The Prosecutor, a lawyer, is responsible for the carriage of the complaint on behalf of the Association and shall call evidence, question witnesses and present arguments during the hearing.

8. Witnesses

With few exceptions, (i.e., character and expert witnesses), witnesses in a discipline hearing are those individuals who have personal knowledge of the matter in question and are called to testify on behalf of one of the parties. Relevant witnesses may include the Complainant, members of the Association, members of the public and expert witnesses.

Part 3: Filing a Complaint

1. Filing Fee

In the interest of effective enforcement, no fee is required to file a complaint alleging professional misconduct or incompetence of a member of the Association.

2. Filing a Complaint

An individual wishing to file a complaint against a member must do so in writing, preferably on a prescribed form obtained from the Registrar. The complaint must also contain the signature of the complainant.

The complaint should include sufficient information to allow the identification of any potential breaches of the Code or any other standard.

Failure to use the prescribed form does not invalidate the complaint. However, because of the signature requirement, Complaint contained in the body of an email will not be accepted.

Please note that one of the objects of the Association is to regulate the practice of trading in real estate and to govern its members in accordance with the Act and the By-Laws in order to serve and protect the public interest. The Association has no power to award compensation to a Complainant.

3. Handling of Complaint in Writing, Oral Complaint, and Information Received Relating to the Conduct of a Member

Under ss. 21(1) of the Act, the Complaint Committee is obligated to consider and investigate the conduct or competence of any member who is subject to a complaint in writing filed with the Registrar, a resolution from the Board under ss. 22(6) or a request from the Director under ss. 21(1)(c) of the Act. This would apply even in the event a Complainant seeks to withdraw a written complaint.

(a) Complaint in Writing, Board Resolution and Referrals from the Director

Upon receipt of a complaint in writing, Board resolution or referral from the Director, the Registrar shall:

- i. in the case of a written complaint, send the Complainant a written acknowledgement that the complaint has been received and an explanation of the procedure that will be followed;
- ii. ensure the Respondent receives a copy of the written complaint (along with any supporting documentation), Board resolution or referral from the Director pursuant to ss. 21(1)(d) of the Act. The Registrar's covering letter to the Respondent shall be prepared in French and English and will:
 1. explain that the Respondent can reply in either language and that such language will be used throughout the complaint and discipline process unless advised otherwise by the Respondent;

2. explain that the Respondent has not less than two weeks to provide to the Registrar a written response containing any explanations or representations the Respondent wishes to make and that his/her response will be provided to the Complainant;
 3. explain the procedure that will be followed; and
 4. request that the Respondent provide to the Registrar all available records and other documents relating to the matter.
- iii. forward a copy of the written complaint, Board resolution or referral from the Director to the Respondent's agent or manager if the Respondent is a salesperson;
 - iv. forward a copy of the written response, if any, to the Complainant, and provide to the Complainant not less than two weeks to file a written reply should they wish to do so;
 - v. forward all subsequent communications received from either the Complainant or the Respondent to the other; and
 - vi. refer the matter to the Complaint Committee.

(b) Oral Complaint and Information Received Relating to the Conduct or Competence of a Member

The Registrar may, at any time upon receipt of an oral complaint or information relating to the conduct or competence of a member, appoint an Investigator to conduct a preliminary investigation into the matter. The Investigator may be any person considered appropriate by the Registrar.

An Investigator appointed by the Registrar shall have the same powers and obligations, as applicable, as an Investigator appointed by the Complaint Committee.

Upon completion of the preliminary investigation, the Investigator shall prepare and deliver to the Registrar a written report (the "Preliminary Report"), which shall be deemed a complaint in writing for the purposes of ss. 21(1)(a) of the Act.

Upon receipt of the Preliminary Report, the Registrar shall:

- i. ensure the Respondent receives a copy of the Preliminary Report (along with any supporting documentation) pursuant to ss. 21(1)(d) of the Act. The Registrar's covering letter to the Respondent shall be prepared in French and English and will:
 1. explain that the Respondent can reply to the Preliminary Report in either language and that such language will be used throughout the Complaint and discipline process unless advised otherwise by the Respondent;

2. explain that the Respondent has two weeks to provide to the Registrar a written response containing any explanations or representations the Respondent wishes to make and that his/her response will be provided to the Complainant;
 3. explain the procedure that will be followed by the Complaint Committee; and
 4. request that the Respondent provide to the Registrar all available records and other documents relating to the matter.
- ii. forward a copy of the Preliminary Report to the Respondent's agent or manager if the Respondent is a salesperson; and
 - iii. refer the matter to the Complaint Committee.

(c) Complaints as a Result of Trust Account Inspection

The Association is required to inspect all members' trust accounts on a regular basis to ensure compliance with the *Real Estate Agents Act* and regulations. Investigations may, from time to time, identify issues of potential professional misconduct or incompetence by members.

A trust account inspector who identifies a concern relating to the conduct or competence of a member should submit their concerns, in writing, to the Supervisor of Inspections. The Supervisor of Inspections will then consider whether the matter relates to the conduct or competence of the member, and determine whether a written complaint should be made to the Registrar in which case the complaint will be dealt with in the same manner as any other written complaint.

4. Notices

Any notice required to be given or any document required to be served under this Manual may be personally served or delivered, or sent by courier, prepaid certified or registered mail, or by any other means that will assure that private and confidential notice has been given to the person's last known address.

In addition to the above, any notice or document may also be served by attaching a copy of the document to an e-mail message sent to the recipient's e-mail address. Such service is only effective if the recipient provides the sender, by e-mail, with an acceptance of service and the date of acceptance. The e-mail message to which a document is attached shall include:

- (a) the sender's name, address, telephone number, fax number, and e-mail address;
- (b) the date and time of transmission; and
- (c) the name and telephone number of a person to contact in the event of transmission problems.

Where notice is to be given or received within a specified period of days, the period is calendar days. If the last calendar day falls on a Saturday, Sunday or statutory holiday, then the deadline for the notice to be given or received shall be the next day that is not a Saturday, Sunday or statutory holiday. If any action is required by the person receiving the notice, the notice shall state the date when the action is required.

Part 4: The Complaint Committee

As noted above, the role of the Complaint Committee is to investigate and consider a written complaint, Board resolution or referral from the Director and determine if there is sufficient information to reasonably support a charge of professional misconduct or incompetence.

All members of the Association involved in the Complaint and discipline process have an obligation to maintain and protect the confidentiality of all investigations and proceedings. As such, members of both the Complaint and Discipline Committee should refrain from discussing any matter they have dealt with in order to preserve the integrity of the process.

1. Appointment of the Complaint Committee Panel

The Complaint Committee panel must consist of three members, including one member appointed by the Director, one of whom is to be designated as Chairperson of the panel (the “Panel”). The Chairperson of the Complaint Committee may be one of the panelists and may also act as Chairperson of the Panel (ss. 20(1)(a)) and 20(4) of the Act).

Before presiding over any case, each member of the Panel must be aware of and declare any bias, conflict of interest or any other circumstances that might prevent him/her from rendering an impartial decision.

The Registrar shall inform both the Complainant and the Respondent, in writing, the names of the appointed Panel members.

A party who wishes to object to an appointed Panel member must do so, in writing, with the Registrar within 7 days of receiving the names.

However, any member of the panel may be disqualified at any time if the remaining Panel members are made aware of any grounds of disqualification or find any information that might prevent the member from rendering an impartial decision or appearing to do so.

Objections submitted by a party should be determined by the Chairperson of the Complaint Committee or by the Panel, as appropriate in the circumstances, or, if the challenge is against either of these individuals, then by the next most senior member of the Committee based on date of initial appointment. The decision should be made in consultation with the Committee’s legal counsel, following which a written decision shall be rendered.

2. Confirming Jurisdiction

The Complaint Committee has no authority to consider or investigate a complaint that does not fall within its jurisdiction. Accordingly, the Committee must first review a complaint to ensure that it deals with a member’s professional misconduct or incompetence.

3. Appointing an Investigator

Under its obligation to consider and investigate the conduct or competence of a member upon receipt of a written complaint, Board resolution, or referral from the Director as provided for under ss. 21(1), the Complaint Committee may, in its discretion, appoint an Investigator to

investigate and determine relevant facts in relation to a matter for further consideration by the Complaint Committee. The role of the Investigator is not to make a determination with respect to the validity of the matter being investigated.

The Investigator may be any person considered appropriate by the Complaint Committee.

Both the Complainant and the Respondent will be notified, in writing, if any Investigator has been appointed.

4. Powers of the Investigator

In the course of an investigation, the Investigator has the power to require any member to produce (subject to any valid legal objection, i.e. solicitor-client privilege, etc.) all records and documents within the possession of that member which may be relevant to the matter. Failure or refusal to assist in this regard may subject the member to disciplinary action under the Code.

5. Conducting the Investigation

In carrying out this role, the Investigator shall make every reasonable effort to speak to the Complainant and the Respondent, and should speak to any other individuals who may have information relevant to the complaint or matter under investigation. The Investigator shall also gather any relevant records and other documents. The extent of the Investigator's activities will depend on the case and should be left to the discretion of the Investigator.

The Investigator may also act as a witness in the event the matter is referred to the Discipline Committee.

6. Report of the Investigator

Following completion of the investigation, the Investigator shall report his/her findings in writing to the Complaint Committee.

7. Disposition of the Complaint, Board Resolution, or Referral from the Director

Upon conclusion of its consideration and investigation, the Complaint Committee may take the following actions under ss. 21(3) of the Act:

(a) Referral of the complaint, Board resolution, or referral from the Director to Discipline Committee under ss. 21(3)(a) of the Act:

If the Complaint Committee is satisfied that: (1) a member has breached one or more of his or her professional obligations; and (2) that such breach may be serious, the matter must be referred, either in whole or in part, to the Discipline Committee for hearing and determination.

The Complaint Committee does not have to refer the whole of the written complaint, Board resolution or referral from the Director to the Discipline Committee. It may be that the matter falls into two or more parts, some of which should be dismissed or disposed of under ss. 21(3)(d) of the Act. In such cases, the Complaint Committee must clearly indicate what parts of the matter are being referred to the Discipline Committee for hearing and determination.

In giving reasons for its decision under ss. 21(4) of the Act, the Complaint Committee should state why parts of the matter are referred to the Discipline Committee, and also why parts are not, if that is the case.

(b) Dismissal of the Written Complaint, Board Resolution or Referral from the Director under ss. 21(3)(b) of the Act:

If the Complaint Committee is not satisfied that a written complaint, Board resolution or referral from the Director should be referred to the Discipline Committee, it should be dismissed under ss. 21(3)(b) of the Act. There are several examples of matters that will be dismissed by the Complaint's Committee, including those that:

- i. are not within the jurisdiction of the Association;
- ii. are frivolous or clearly unsubstantiated;
- iii. are by one member against another where it is evident that the complaint is being used to prevent or lessen competition; and
- iv. even if true, would not constitute a serious breach of the member's professional obligations.

Under ss. 21(6) of the Act, the Complainant and the Director, if not satisfied with the disposition of the complaint by the Complaint Committee, may apply to the Board for a review of the treatment of the complaint (see Section 10, page 15, entitled "Board Review of the Treatment of Complaint").

An application for a review of the treatment of a complaint shall be filed with the Board within 30 days from the date of the dismissal. The Board may extend the time for filing it when, in the opinion of the Board, the circumstances warrant it. Because the Act does not define the period of time in which such an application can be made, all files relating to a matter that has been dismissed by the Complaint Committee shall not be destroyed until after the expiration of one year from the date of dismissal.

(c) Referral of the Written Complaint or Board Resolution to the Director under ss. 21(3)(c) of the Act:

Under ss. 21(3)(c) of the Act, the Complaint Committee may direct that the matter be referred to the Director under the *Real Estate Agents Act*.

Under the *Real Estate Agents Act*, the Director has the power to:

- i. suspend or cancel licenses (ss. 10);
- ii. direct the examination of books, records and accounts of persons engaged in real estate transactions (ss. 26);
- iii. forfeit a bond by reason of various criminal activities, default judgments based on allegations of fraud and in cases where a person has suffered loss as a result of any willful act or neglect or misappropriation of trust funds (ss. 31(2));

- iv. prosecute offences for violation of those parts of the Act listed in Schedule “A” (s. 44); and
- v. investigate and inquire into any matters concerning the administration of the Act (ss. 32a).

The fact that a matter is referred to the Director does not relieve the Association of its responsibilities with respect to disciplinary procedures or whatever else may be required in the administration of its Act. The Association may, however, hold a written complaint, Board resolution or referral from the Director in abeyance in accordance with section 11, page 16, entitled “Concurrent Proceedings”.

(d) Resolution of the Written Complaint, Board Resolution or Referral from the Director under ss. 21(3)(d) of the Act:

As part of the Complaint and discipline process, the Complaint Committee has the authority to take such action as it considers appropriate in the circumstances to resolve the written complaint, Board resolution or referral from the Director as long as such action is not inconsistent with the Act, the By-Laws or the *Real Estate Agents Act*. In certain circumstances, this allows the Complaint Committee to attempt to resolve written Complaint, Board resolutions and referrals from the Director without resorting to more formal proceedings under ss. 21(3)(a) or (c) of the Act. An example could be the following:

i. Caution Letters:

Where, after considering and/or investigating the conduct or competence of a member in accordance with ss. 21(1) of the Act, the Complaint Committee determines that the alleged conduct is not sufficiently serious to constitute professional misconduct or incompetence, it may issue a Caution Letter to the Respondent advising him or her that under different circumstances, the alleged conduct could constitute professional misconduct or incompetence and that a record of the matter will be kept in their file for a period of three years. A Caution Letter is not a finding of professional misconduct or incompetence and, as such, is not intended to be disciplinary in nature.

ii. Consent Orders:

Where, after considering and/or investigating the conduct or competence of a member in accordance with ss. 21(1) of the Act, where the Complaint Committee considers it appropriate to do so (i.e., in the case of minor alleged offences, etc.), the Complaint Committee may direct the Prosecutor to engage in discussions with the Respondent to determine whether a voluntary resolution to the written complaint, Board resolution or referral from the Director may be reached.

In the event the Prosecutor and the Respondent are able to come to an agreement on a proposed resolution, the Prosecutor shall submit the proposal in writing to the Complaint Committee for its consideration under ss. 21(3)(d). The Committee may:

- (a) approve the proposal, in which case a written Consent Order shall be entered into between the Complaint Committee and the Respondent, which shall contain:

1. a description of the nature of the written complaint, Board resolution or referral from the Director against the Respondent;
 2. confirmation of the Respondent's admission of guilt with respect to the allegations;
 3. a description of the resolution reached and the reasons therefore; and
 4. the signature of each member of the Complaint Committee Panel and the Respondent;
- (b) reject the proposal, in which case the Complaint Committee shall continue to deal with the matter in accordance with ss. 21(3); or
- (c) make recommended changes to the proposal and present the same to the Respondent and the Prosecutor for his/her acceptance or rejection. In the event the Respondent accepts the recommended changes to the proposal, a Consent Order shall be entered into in accordance with paragraph (1) above. In the event the Respondent rejects the recommended changes, the Complaint Committee shall continue to deal with the matter in accordance with ss. 21(3).

8. Agent/Manager Responsibility

Under subsection 21(1) of the Act, upon receipt of a complaint in writing, Board resolution or referral from the Director, the Complaint Committee has the authority to investigate the conduct or competence of "any" member.

As such, if, upon considering and investigating the conduct of a member who is the subject matter of the complaint, Board resolution or referral from the Director, the Complaint Committee determines that there may have been misconduct or incompetence on the part of an agent or manager, the Complaint Committee may, prior to disposing of the complaint, Board resolution or referral from the Director in accordance with paragraph 7 above, instruct the Registrar to:

- (a) Provide written notice to the agent or manager that their conduct or competence is under investigation;
- (b) Provide the agent or manager with a copy of the complaint, Board resolution or referral from the Director; and
- (c) Require the agent or manager to respond under ss. 21(1)(d) of the Act.

In such case, the Complaint Committee shall hold the original complaint, Board resolution or referral from the Director in abeyance until the agent or manager has had the opportunity to respond, or until the time for doing so has expired in accordance with ss. 21(1)(d) of the Act.

Upon considering the conduct or competence of both the named respondent member and the agent or manager, the Complaint Committee may then dispose of the matter as against both parties in accordance with ss. 21(3) of the Act.

9. The Decision of the Complaint Committee

All decisions of the Complaint Committee under ss. 21(3) of the Act must be made in writing, including reasons, as required by ss. 21(4) of the Act.

The Registrar shall provide to the Respondent, the Board and the Director a copy of the written decision and reasons of the Committee and, in the case of a complaint, a copy to the Complainant in accordance with ss. 21(6).

10. Board Review of the Treatment of Complaint

Subsection 21(6) of the Act provides the Complainant and the Director the opportunity to apply to the Board for “a review of the treatment of a complaint by the Complaint Committee” (a “Review”). No right to a Review is granted to the Respondent.

In conducting a Review, the Board’s jurisdiction is limited to process. The Board’s role is to determine whether the Complaint Committee decision was determined in a manner consistent with the Act and the principles of natural justice and procedural fairness. The Review is not a new proceeding where the Board substitutes its judgment for that of the Complaint Committee. Additionally, the Board has no role investigating or considering the merits of the matter.

In order to review the “treatment of the complaint”, the Board should confirm that:

- (a) the Complaint Committee was properly constituted as required under ss. 20(1) of the Act;
- (b) if alternate members of the Complaint Committee were involved in the decision as permitted by the Act, that ss. 20(2) was complied with;
- (c) no member of the Discipline Committee was a member of the Complaint Committee in accordance with ss. 20(3) of the Act;
- (d) the Complaint Committee had a proper quorum of three and that one of those members was appointed by the Director in accordance with ss. 20(4) of the Act;
- (e) the Complaint Committee acted in accordance with ss. 21(1) of the Act and considered and investigated the conduct or competence of the Member and that:
 - i. the Respondent was given a copy of the complaint (or the substance of the matter);
 - ii. the Respondent was given at least two weeks in which to submit his/her written reply; and
 - iii. the Committee examined or made reasonable efforts to examine available records and other documents;
- (f) the Complaint Committee acted in accordance with ss. 21(3) of the Act and either:

- i. directed that the matter be referred to the Discipline Committee; or,
 - ii. directed that the matter not be referred to the Discipline Committee; or,
 - iii. directed that the matter be referred to the Director for action under the *Real Estate Agents Act*; or,
 - iv. took other action to resolve the complaint in a manner consistent with the Act, the By-Laws, and the *Real Estate Agents Act*.
- (g) the Complaint Committee gave a decision in writing including the reasons for its decision under ss. 21(4) of the Act;
- (h) the Registrar provided to the Respondent, the Complainant, the Board and the Director a copy of the written decision and reasons under ss. 21(5) of the Act; and
- (i) no member of the Complaint Committee who participated in the decision was in a position of bias or conflict of interest.

Any written resolutions or minutes of the Board under ss. 21(6) of the Act shall not name the Complainant or the Respondent.

The Board shall exclude the Chairperson of the Complaint Committee from any Review.

11. Concurrent Proceedings

In the event the Respondent is subject to: (a) an investigation or action by the Director under the *Real Estate Agents Act*; (b) a criminal investigation or prosecution; or (c) a civil action based on the same or similar circumstances contained in the written complaint, Board resolution or referral from the Director, the processing of the matter by the Association may be held in abeyance pending the outcome of the concurrent proceeding.

The decision to hold the matter in abeyance is discretionary and should be considered in the circumstances of each case.

The following factors may be taken into consideration in determining whether the matter should be pursued or held in abeyance pending conclusion of the concurrent proceeding:

- (a) the degree of similarity of fact giving rise to the two proceedings;
- (b) the degree to which resolution of the other proceeding may make consideration of the matter unnecessary;
- (c) the nature of the matter; and
- (d) the degree to which the other proceedings would delay prompt disposition of the matter.

12. Minor Infractions

Article 23 of NBREA'S By-laws gives the Board the discretion to define what will constitute a minor infraction and to impose such sanctions it considers appropriate. The intention behind this by-law amendment was that a minor infraction is not considered professional misconduct as only the Discipline Committee has authority under the Act to impose sanctions for such.

In the interests of having a comprehensive Manual it is envisioned that the Complaint Committee would also be tasked with deciding if a complaint constitutes a minor infraction consistent with Board policy. In such a case, if the Complaint Committee decides the matter is a minor infraction, it can refer the matter to the Registrar who can impose an administrative penalty provided it is consistent with Board policy.

The Board is responsible for identifying which types of conduct may constitute minor infractions. The Board may do this by passing a policy from time to time (the Policy). The Board may also pass a policy which determine the appropriate range of penalties for committing a minor infraction. Whenever the Board passes a new policy or resolution regarding minor infractions, it shall notify the Complaints Committee, the Registrar, and all members of the Association in good standing.

The Policy is intended to be applied in cases where a member's conduct is not serious and would not under normal circumstances constitute professional misconduct. The Complaints Committee however, has the discretion to determine whether a member's conduct should be dealt with as a minor infraction or under the normal complaints and discipline process.

The following process is to be followed in dealing with what may constitute a minor infraction:

1. Where the Registrar receives a complaint in writing in respect of what may be a minor infraction, he/she shall notify the member in writing and provide him/her with at least two weeks to provide a response, under ss. 21(1)(d) of the Act.
2. The Registrar must then forward the complaint, the reply and all other documents (if any) to the Complaints Committee for consideration under ss. 21(1).
3. At the next Complaints Committee meeting the Complaints Committee shall then determine whether the complaint qualifies as a minor infraction, and if so, whether the complaint should be dealt with as a minor infraction or under the normal complaints and discipline process.
4. If the Complaints Committee chooses to deal with a complaint as a minor infraction, it shall inquire from the Registrar how many minor infractions of the same category the respondent has committed within 24 months from the date of the complaint.
5. The Complaints Committee will then impose the appropriate penalty in accordance with the Policy.
6. The Registrar shall be responsible for keeping appropriate records of all member's minor infractions, including the penalties imposed for each infraction, and shall ensure such records are kept for no less than 24 months from the date any penalty is imposed for each infraction. The Registrar will make these records available to the Complaints Committee upon request, in accordance with paragraph 4.

7. Where a member has committed more than three minor infractions in the same category within a 24 month period, the Complaints Committee may consider, in its sole discretion, whether to deal with the complaint as a minor infraction or through the normal complaints and discipline process. If a 4th or higher infraction is dealt with as a minor infraction, the Complaints Committee shall impose a reasonable penalty and/or fee that is no more than the maximum amount expressed in the Policy.
8. All administrative penalties and/or fees shall be issued by the Registrar by way of invoice and shall be due and payable by the member within 30 days in accordance with Article 5 Section 1 of the By-laws.
9. In accordance with Article 5 Section 5 of the By-Laws, where a member fails to pay an invoice as required, the Registrar shall serve notice to the member that the invoice is to be satisfied by a stipulated date, the failure of which will result in the suspension of membership in the Association. Such suspension remains in effect until such time as the member has satisfied the outstanding invoice.

Part 5: Discipline Committee Hearings

Pre-Hearing Matters

Upon referral of a complaint by the Complaint Committee, a Board resolution or referral from the Director, the Discipline Committee is required to hear and determine allegations of professional misconduct or incompetence against a member of the Association.

In accordance with ss. 24(1) of the Act, the parties to the proceeding are the Association and the Respondent.

1. Appointment of the Discipline Committee Panel

The Discipline Committee panel must consist of five members of the Discipline Committee, including one member appointed by the Director, one of whom is to be designated as Chairperson of the panel (the “Panel”). The Chairperson of the Discipline Committee may be one of the panelists and may also act as Chairperson of the Panel (ss. 22(2) and (3) of the Act).

2. Qualification of the Hearing Panel

In choosing the Panel, the Chairperson should be aware of any bias or conflict of interest of potential panelists. A person should be automatically disqualified as a member of the Panel where the member:

- (a) has taken part before the hearing in any investigation of the matter, other than as a member of the Board considering the referral of the matter to the Discipline Committee or at a previous hearing of the Committee (ss. 24(3) of the Act);
- (b) is related by blood or marriage to the Respondent, the Complainant, the Investigator or any member of the Complaint Committee;
- (c) is an employer, employee or partner of the Respondent, the Complainant, the Investigator or any member of the Complaint Committee; or
- (d) is a party or witness to the hearing, or a party or witness in any other pending case involving the Respondent or the Complainant.

Before presiding over any case, each member of the Hearing Panel shall sign a Certificate of Qualification confirming that the member is not disqualified for any of the reasons noted above, and that he/she is not aware of any circumstances that might prevent him/her from rendering an impartial decision.

3. Allegations of Bias – Challenging the Panel

At least 10 days prior to the hearing, the Registrar shall notify the parties of the members selected to serve on the Panel, which may be done by letter or in the Notice of Hearing.

A party who wishes to object to an appointed Panel member must do so in writing with the Registrar within 7 days of receiving the names.

However, any member of the panel may be disqualified at any time if the remaining Panel members are made aware of any grounds of disqualification or find any information that might prevent the member from rendering an impartial decision or appearing to do so.

Objections submitted by a party should be determined by the Chairperson of the Discipline Committee or of the Panel, as appropriate in the circumstances, or, if the challenge is against either of these individuals, then by the next most senior member of the Committee based on the date of initial appointment. The decision should be made in consultation with the Committee's legal counsel, following which a decision in writing shall be rendered.

If a challenge is successful prior to the commencement of a discipline hearing, another member of the Discipline Committee shall be named to the Panel in the disqualified member's place. The parties have the same right of objection to the replacement.

After a hearing commences, and not more than two members become unable to act, the remaining three members have authority to complete the hearing (ss. 22(4) of the Act).

4. Notice of Hearing

The Chairperson of the Panel determines a date for the hearing and then directs the Registrar to notify the parties in writing of that date. In selecting a hearing date, the Chairperson, or the Registrar if so directed by the Chairperson, may wish to confer with the parties to the hearing to determine a date that is mutually convenient and acceptable. The location of the hearing will be determined by the Registrar.

A Notice of Hearing will then be issued to the Respondent at least 10 days prior to the hearing.

Once issued to the Respondent, the Notice of Hearing shall be posted on the Association's website. All names contained therein, other than that of the Respondent, shall be blacked out or replaced with initials.

5. Voluntary Admission by the Respondent

Subsection 23(4)(g) of the Act provides that the Discipline Committee may fix the costs of carrying out the disciplinary process against a member who is guilty of professional misconduct or incompetence.

Given the cost consequences which may be fixed against the Respondent, where the matter cannot be resolved through the Consent Order process, the Respondent can voluntarily admit the substance of the Complaint and proceed directly to a penalty hearing. This procedure can be more economical for both the Association and the Respondent and may result in the Discipline Committee imposing reduced costs against the Respondent compared to what it might impose in the event of a full hearing.

The Prosecutor shall advise the Respondent, in writing, that all or part of the allegations to be heard by the Panel can be admitted by the Respondent at any time prior to a hearing and that the Registrar may facilitate such admissions between the Prosecutor and the Respondent.

Should the Respondent wish to proceed in that fashion, he/she has the option of attending the penalty hearing (with a lawyer if one so chooses) or participating in the penalty hearing (again with a lawyer if desired) by way of conference call.

The Prosecutor and the Respondent may prepare an “Agreed Statement of Facts” which can be used to simplify a hearing or eliminate the necessity of any or all witnesses.

6. Counsel for the Panel

The Panel may also have legal counsel present at the hearing to advise on issues of procedure and law in accordance with ss. 24(3) of the Act. The role of counsel in this regard is purely advisory. Counsel is not a member of the Panel and may not take an active role in the conduct of the hearing, including examination and cross-examination of the witnesses. Further, the Panel’s counsel may not rule on hearing matters, such as objections to evidence etc. Such rulings are to be made by the Panel in consultation with its counsel only.

Notice need not be given to the parties of the Panel’s intention to have counsel present.

7. Preparing for the Hearing

Prior to the hearing, the Registrar shall provide the Discipline Panel with a copy of the written complaint, board resolution or referral from the Director, the Respondent’s reply and all other documents filed by each.

However, the Panel does not gather the evidence for the parties. Accordingly, both parties have the job of developing and preparing their respective cases for the Discipline Panel to consider at the hearing.

If documentation is to be presented at the hearing, both parties should make sufficient copies in advance for each Panel member and the other party.

The Respondent shall be afforded reasonable time before the hearing to examine any written or documentary evidence that will be produced, or any report the content of which will be given in evidence at the hearing, in accordance with ss. 24(2) of the Act.

8. Standard and Onus of Proof

The standard of proof required in a hearing before the Discipline Committee refers to the level of proof that must be met in order for the Discipline Committee to find a member guilty of an alleged offence. That level of proof, or threshold, is the civil standard of a “balance of probabilities” which is 51% or higher (i.e., it is more likely than not that the Respondent is guilty of one or more of the alleged offences).

The Association has the onus of proving the allegations against the Respondent, on a balance of probabilities, through documentation, submissions and testimony given under oath or affirmation.

9. Witnesses

(a) Witnesses: Each party has the right to call as a witness any person who may have knowledge of the matter in question. In addition, subject to the Panel’s judgment as to relevance, a party may call any person as an expert or a character witness.

If a party intends to call witnesses, they are encouraged to notify the opposing party at least three (3) days prior to the scheduled date of the hearing.

The party calling the witness is responsible for notifying the witness of the hearing date and time and making any arrangements for attendance at the hearing. If a witness has

prior engagements and is unable to attend on the scheduled hearing date, the party calling the witness may request that the hearing be postponed until such time as the witness is able to attend (see section 10 below).

Pursuant to the Code, it is a duty of every member, when requested with proper notice, to attend a hearing as a witness, to produce records relevant to the case and to testify truthfully. Refusal of a member to cooperate in this regards, without a reasonable excuse, is a violation of the Code, and may be subject to disciplinary action.

- (b) Summons to a Witness:** If a party requires that a witness be summoned to give evidence or produce documents at the hearing, the party shall make such request in writing to the Registrar, who is designated by the Discipline Committee to act on its behalf under ss. 24(5) of the Act. The request shall state the name and address of the witness and where he/she may be served and should be provided to the Registrar as soon as possible prior to the scheduled hearing date.

In accordance with Article 20, Section 2 of the By-Laws, a summons issued under ss. 24(5) of the Act shall be in the form determined by the Board from time to time.

If a person who has been served with a summons in accordance with ss. 24(8) of the Act fails to appear before the Discipline Committee, the Committee may by application to a Judge of the Court of Queen's Bench cause the person to be cited for contempt under the New Brunswick *Rules of Court* in accordance with ss. 24(8) of the Act.

10. Postponements / Adjournments

Requests for postponements/adjournments may be granted if there are extenuating circumstances. Requests for postponement must be made in writing to the Registrar prior to the hearing.

The Chairperson of the Panel will deal with requests for postponements and/or adjournments. In dealing with such requests, consideration should be given to whether or not the other party would be adversely affected or prejudiced by the decision to allow the request. Requests should not be denied by the Chairperson if both parties agree and it is not prejudicial to the public interest to grant the request.

Additionally, the Registrar, with the consent of the Chairperson of the Panel, may postpone a hearing where issues arise in relation to the composition of the Panel, the location of the hearing or for other just cause such as legitimate unavailability of the participants.

In the event of a postponement/adjournment, the Registrar will advise all parties of the new hearing date.

The Hearing Process

11. General Matters

- (a) Public Hearings:** Notwithstanding ss. 24(4) of the Act, as a result of the New Brunswick Court of Queen's Bench decision in *Brunswick News Inc. v. New Brunswick (Attorney General)*, [2008] N.B.J. No. 318, all Discipline Committee hearings are open to the public.

- (b) Recording of Proceedings:** Oral evidence taken at a hearing before the Discipline Committee shall be recorded by a properly qualified court report (ss. 24(9) of the Act). A party may request a transcript of evidence from the hearing at the party's expense.

Tapes and transcripts, if any, shall be maintained by the Registrar for a period of two years from the date of the decision of the Discipline Committee.

- (c) Hearing Format:** Under the single hearing model, the parties address the substance of the allegations contained in the written complaint, Board resolution, or referral from the Director and the potential penalty.

The single hearing model is in contrast to the dual hearing model wherein the Panel determines the merits of allegations in one hearing, and then conducts a second hearing, if necessary, to hear arguments with respect to the appropriate penalty.

At the beginning of every hearing the Discipline Committee shall inquire of the parties whether they wish to have a single hearing or a dual hearing. Should either party request a dual hearing the Discipline Committee shall so proceed with a dual hearing.

Where two hearings are required, there is a corresponding increase in the costs to the Association to prosecute the matter. In the event the Respondent is found guilty of professional misconduct or incompetence, there is not set limit to the amount of costs which can be imposed on the Respondent by the Discipline Committee.

- (d) Exclusion of Witnesses:** With the exception of the Complainant, the Panel shall exclude witnesses from the hearing room until they are required to give testimony.

- (e) Witness Testimony:** When witnesses are called to give evidence, they will be required to be sworn under oath or provide an affirmation in accordance with ss. 24(7) of the Act.

Where a witness who has been served with a summons in accordance with ss. 24(8) of the Act refuses without sufficient cause to answer any question relevant to the hearing, the Discipline Committee may, by application to a Judge of the Court of Queen's Bench of New Brunswick, cause the person to be cited for contempt under the provisions of the *New Brunswick Rules of Court* in accordance with ss. 24(8) of the Act.

12. General Outline of Hearing Procedure

Generally, once all preliminary matters have been addressed, the hearing before the Panel will generally proceed as follows:

- (a) the Notice of Hearing, which outlines the charges, is read into the record or is marked as an exhibit, or both;
- (b) other documents may be presented by the parties and marked as exhibits;
- (c) the parties are given the opportunity to present evidence, testify on their own behalf and call witnesses;
- (d) the parties are given the opportunity to examine and cross-examine witnesses as outline further below;

- (e) the parties are given the opportunity to provide closing statements, which if applicable in the case of a single hearing, include submissions with respect to penalty;
- (f) the hearing is adjourned;
- (g) the Discipline Panel deliberates and renders a decision in writing; and
- (h) in a dual hearing, upon a finding of professional misconduct or incompetence, the same Panel reconvenes and hears submissions with respect to penalty.

13. Examination, Cross-Examination, Re-Examination, and the Right of Reply

Both parties shall have the right to examine, cross-examine and re-examine witnesses. Re-examinations will be limited to the clarification of points raised on cross-examination and that were not raised in the witness's direct examination.

14. Evidence

All evidence, whether documentary or oral, must be given in the presence of the Respondent unless he/she fails to attend the hearing, in which case evidence may be heard in the Respondent's absence.

The Chairperson of the Panel may rule on the admissibility of evidence, but may require a recess to confer with the other Panel members or with counsel.

The Panel is not bound by the rules of evidence applicable in courts of law, but will allow all parties a full opportunity to be heard, present witnesses, and offer evidence, subject to the Panel's judgment as to relevance and fairness.

The Panel may determine its own rules of evidence in line with objectives of relevance, equity, uniformity, and procedural fairness. In doing so, the following guidelines should be taken into consideration:

- (a) Hearsay Evidence:** The Panel should not rely on hearsay evidence to establish facts or as proof of allegations, particularly when the evidence relates to important parts of the case. Direct testimony should always be preferred over hearsay evidence.

Any admission made by the Respondent to a third party is an exception to the hearsay rule. If the Respondent has admitted to being engaged in unethical conduct, then the person hearing the admission may be called to testify to this fact. The Panel may rely on this evidence in reaching its decision, subject to the Respondent's own evidence with respect to the statement.

- (b) Documentary Evidence:** Unless the parties agree, evidence in the form of documents, agreements, letters, notes, objects, etc., should be introduced into evidence as an exhibit through a witness. The witness should be able to identify, describe, and explain the material being introduced, including its origin, relevance, and significance.

Any real or documentary evidence introduced at a hearing should be marked with an exhibit number and date.

- (c) **Privileged Communications:** Most communications between a person and that person's lawyer are subject to solicitor-client privilege and cannot be disclosed unless the person waives the privilege.
- (d) **Experts:** Expert witnesses are an exception to the general rule that witnesses must have personal knowledge of the facts and circumstances that give rise to the complaint.

An ordinary witness cannot give an opinion as to the significance of the facts and cannot suggest the inferences to be drawn from those facts. An expert witness on the other hand, may give opinions on matters within his/her expertise, provided the Panel is satisfied that the expert is qualified to provide opinion evidence.

- (e) **Character Witnesses:** Before permitting testimony relating to the character and general reputation of any person, the Panel should satisfy itself that the testimony has a direct bearing on the matter in issue. If a person's character is not in issue, such evidence is not relevant.

15. Objections

During the hearing, either party may object to a certain procedure or the introduction of certain evidence. The Panel should allow each party to speak to the objection, consider each side, rule on the objection with reasons and proceed with the hearing.

The Chairperson of the Panel may rule on routine objections as they are made, but more complicated objections may require a recess to confer with the other Panel members or with counsel.

16. Absence of Panelists

If not more than two members of the Panel are unable to continue serving on the Panel after the hearing has commenced, the remaining members of the Panel may participate in the hearing and have the full authority of the full Panel to render a decision (ss. 22(4) of the Act).

No member of a Panel may participate in a decision on the merits of the allegations and/or on the appropriate penalty unless he/she has been present throughout the hearing and has heard all the evidence and arguments (ss. 24(10) of the Act).

Post-Hearing Procedures

17. Determination of the Matter

Upon concluding the hearing, the Panel will meet to deliberate and make its decision.

Subsections 23(2) and (3) of the Act outline, in a general way, the circumstances in which a Respondent may be found guilty of professional misconduct or incompetence.

Deliberations of the Panel may be made with its counsel present, if requested, but without the presence of the Registrar and the Registrar shall not participate in the Discipline Panel's deliberations with respect to the innocence or guilt of the Respondent, or the penalty and/or costs to be imposed.

In the event the Respondent is found guilty of professional misconduct or incompetence, the Panel has a wide choice of sanctions that it may impose as set out in ss. 23(4) of the Act. These include but are not limited to:

- suspension or revocation of membership in the Association;
- fines up to \$5,000; and
- the recovery of costs associated with investigating and prosecuting the matter. There is no set limit to the amount of costs which can be imposed by the Discipline Committee.

In imposing discipline, the Panel may consider any records of previous violations and sanctions imposed. Discipline or remedial action must fit the offense and must involve consideration of fairness and equity. As such, the Panel should suspend or terminate membership only for serious violations or repeated patterns of Code violations, incompetence or other matters justifying such action.

In addition to action the Panel may take under ss. 23(4) of the Act, it may also make recommendations to the Director under ss. 23(5).

18. Decision Writing

The decision of the Panel must be in writing and signed by the Panel members or the Chairperson. In addition, it should include the reasons for the decision based on the findings of fact and any discipline, fines and/or costs imposed. The Panel has the discretion to order the payment of any fines and/or costs within a reasonable period of time.

Additionally, the written decision should clearly set out the consequences of failing to pay any fines and/or costs imposed within the specified period of time. If a suspension of membership is imposed, the start and end dates of such suspension should also be specified. Further, if the Respondent is ordered to take an educational course, the Panel should first determine when the course is available and specify how long the member has to successfully complete the course.

The Panel may assign any administrative duties, including transcribing the decision, to the Registrar.

19. Communication and Publication of the Decision

When completed, the Registrar shall forward the Panel's decision to the parties and the Complainant as required by ss. 23(1) of the Act.

All decisions of the Discipline Committee shall be posted on the Association website. With the exception of the Respondent, the names of all persons referenced therein shall be blacked out or replaced with initials.

In addition, under ss. 23(6) of the Act, an order revoking or suspending membership in the Association shall:

- (a) be published, with or without reasons; and
- (b) be given to the Director.

20. Effective Date of Decision

The effective date of the Panel's decision is the date of the decision itself unless the decision provides otherwise.

Additionally, note that under ss. 23(8) of the Act, where the Director revokes, suspends or restricts the right to trade in real estate on grounds of incompetence, the decision takes effect immediately, notwithstanding that an appeal is taken from the decision, unless the court to which the Respondent appeals orders otherwise.

21. Appeal of the Panel's Decision

A party to proceedings before the Discipline Committee may appeal within 30 days from the date of the Panel's decision, order or recommendation to the Court of Queen's Bench in accordance with ss. 25(1) of the Act.

22. Failure to Comply with the Decision

A member who fails to pay any fines and/or costs imposed within the period of time ordered by the Panel shall lose his/her status as a "member in good standing" with the Association as defined by s. 2 of the Act.

Under Article 4, Section 5 of the By-Laws, any member who is not a "member in good standing" of the Association shall immediately lose all rights and privileges and shall be removed from the register. Such suspension remains in effect until such time as the member has satisfied all outstanding amounts owing.

The Association may also file civil action against the Respondent to enforce payment of any fines and/or costs imposed by the decision of the Panel.

23. File Destruction

The files of all matters that have been heard and determined by the Discipline Committee shall not be destroyed until the expiration of three years from the date of the Discipline Committee decision. However, the Registrar shall maintain a permanent record of any conviction and penalty imposed.