



Midwifery Council of New Brunswick
Conseil de l'Ordre des sages-femmes
du Nouveau-Brunswick

Professional Complaints Manual

OVERVIEW

Under the *Midwifery Act* (the "Act"), the Midwifery Council of New Brunswick ("Council") regulates Midwifery in the interest of the public and the profession.

The Council is required to maintain a publicly accessible system to address the conduct and competence of its Members and to determine their fitness for practice ("Complaints").

This Professional Complaints Manual (the "Manual") is intended as a guide for all prospective Complaints received by the Registrar, as well as all Complaints received by the Council's Complaints Committee and those matters heard by the Council's Discipline Committee pursuant.

The authority granted to the Council to address Complaints is statutory and must be fairly exercised in accordance with the Act, By-Laws, and Rules.

The Council intends the procedural standards set out in this Manual to be comprehensive, however, when a situation is encountered that is not addressed by this Manual, the issue will be dealt with in a manner that is fair and reasonable to all concerned.

FAIRNESS & NATURAL JUSTICE

The phrase "natural justice" refers to the body of law relating to rules of procedure and standards designed to obtain fair and just hearings.

These procedures and standards are often referred to as "procedural fairness" which encompasses a number of principles premised on:

- (1) understanding the alleged wrongdoing;
- (2) a fair and unbiased hearing;
- (3) disclosure of the evidence in support of the allegations;
- (4) having adequate opportunity to prepare and present evidence in defense;
- (5) having the decision made by only those who have heard the evidence.

Procedural fairness is put in practice by requirements, including the right to counsel, notice of hearings and rules of evidence, all of which are discussed in this Manual.

The Council's complaints process has the potential of limiting or denying the rights or privileges of a Member to practice their profession; therefore, the regulator's actions must be justified, not only substantively but also procedurally. This calls for strict attention to the requirements of "procedural fairness".

Failure to accord "procedural fairness" not only weakens trust in the complaints process, but may result in reversal of a disciplinary decision by the courts.

OFFICIAL LANGUAGES

The Council is subject to and operates in accordance with the *Official Languages Act*.

With respect to Complaints, this means that both the individual filing the Complaint and the Member subject to the Complaint may proceed in English or French.

COMPLAINTS

A Complaint is, by definition, a written allegation signed by a “Complainant” alleging matters covered in the Act.

The Council **does not** act on anonymous allegations and does not exercise the authority provided for in the Act without a signed written allegation.

INDIVIDUALS INVOLVED IN COMPLAINTS

In order for the Council to effectively process Complaints, many individuals are involved in varying capacities, including: the Council (the "Council"), the Registrar (“Registrar), the Chair of the Complaints Committee, Investigators, the Chair of the Discipline Committee, the Complainant, the Respondent, Legal Counsel, and witnesses summarized as follows:

Council

The Council undertakes the following functions:

1. appointing a roster of roster of panelists and a Chairperson of the Complaints Committee;
2. reviewing the treatment of a complaint that has been dismissed by the Complaints Committee; and
3. appointing a roster of panelists and the Chairperson of the Discipline Committee.

Registrar

The Registrar is responsible for assisting the Complaints Committee and the Discipline Committee in fulfilling their statutory obligations and implementing their decisions.

The Registrar is not a member of either Committee and does not have authority to make decisions or determinations with respect to Complaints.

Roster, Panels, & Panelists

The Complaints and Discipline Committees maintain a roster of members appointed by Council.

A panel is a subset of the membership of either roster.

A panelist is a member of any panel.

Note: A reference to the Complaints or Discipline Committee in this Manual synonymously includes panels and panelists.

Chairperson of the Complaints Committee

The Chairperson of the Complaints Committee is appointed by Council.

The Chairperson works with the Registrar to select panelists and when required, chairpersons for Complaints Committee panels.

Complaints Committee

The *Act* requires the Complaints Committee is composed of a minimum of three individuals, including one public representative.

The Committee investigates and considers complaints and has broad authority to obtain assistance, including legal advisors or investigators.

The Committee has the power to dismiss all or parts of a Complaint and also has the authority to suspend or limit the practice Members who are the subject of Complaints pending the outcome of proceedings of the Discipline Committee.

The Committee's deliberations are judicial in nature and, like judges, panelists will not discuss their reasons or consult with anyone other than legal counsel.

The Committee also has an important role to resolve Complaints.

Investigators

An investigation of a Complaint may require gathering of additional facts and information not provided by the Complainant or the Respondent. In such circumstances the Committee may request the appointment of an Investigator and determine appropriate mandate for investigation.

Chair of the Discipline Committee

The Chair of the Discipline Committee is appointed by the Council.

The Chair of the Discipline Committee works with the Registrar to select panelists and chairpersons for panels.

Discipline Committee

The *Act* and *by-laws* require the Committee to be minimally composed of 3 individuals including a public representative.

The Discipline Committee hears evidence and determines if a Complaint has merit and, when appropriate, imposes sanctions in accordance with the Act.

The deliberations of the Committee are judicial in nature and like judges panelists will not discuss their reasons or consult outside the Committee with anyone other than legal counsel.

The Discipline Committee has the authority to order the Member's license to practice be terminated or suspended, award costs of the process, and impose fines.

The Discipline Committee also has an important role to resolve Complaints without holding a hearing when alternative dispute resolution processes are appropriate or simplifying hearings for the benefit of the Council and the Respondent. As will be demonstrated throughout this Manual, hearings are a significant undertaking for which simplification of procedure will often be appropriate and for which resolutions are encouraged.

Complainant

The public or any Registered Midwife may file a written Complaint with the Registrar regarding a Member's conduct or fitness to practice. The individual, or entity, that files a Complaint is the Complainant.

Note: when a Complaint is forwarded to the Discipline Committee, the Council assumes responsibility for the matter. The Complainant, likely a witness, is not a party to a Discipline Committee hearing and is not responsible for organizing and presenting the evidence.

At the Discipline Committee, the matter will be referred to as the Council v. Member.

Respondent

Any Member, present or former, may be the subject of a Complaint alleging misconduct or unfitness for practice. In this Manual all individuals subject to a complaint are referred to as "Members" or "Respondents".

Legal Counsel

When a Complaint is forwarded to the Discipline Committee, the Council may engage legal counsel to conduct the hearing.

Legal Counsel to Committees

Both the Complaints Committee and the Discipline Committee may, at their discretion, request that the Registrar engage legal counsel to provide advice and assistance as required.

PROCEDURE FOR ALL COMPLAINTS

Language

In accordance with the *Official Languages Act*, Complaints may proceed in English and French.

Unless advised otherwise, the Council will communicate with the Complainant in the language used in the Complaint and will communicate with the Respondent in the language that is habitually with the Council.

Confidentiality & Conflict of Interest

The Council takes confidentiality seriously and will not discuss a Complaint with anyone outside the process before, during, and after any proceeding. Committee members sign confidentiality agreements with respect to each Complaint they are involved with.

The Council also takes active steps to avoid conflicts of interest. Prior to commencing any proceeding committee members will provide a certification that they are not in conflict and are capable of impartial decision-making.

As an added precaution, Complainants and Respondents are notified of the identity of the individuals involved in handling Complaints.

Notices

Any notice required to be given or any document required to be served may be personally served or delivered, or sent by courier, prepaid certified or registered mail, or by any other means, including e-mail, that will assure that private and confidential communication.

Any notice sent by certified or registered mail is deemed to have been received on the fourth day after it has been mailed. If sent by courier, it is deemed received when delivered and signed for.

Committees must adhere to the notice provisions and time periods provided for in the *Act* and this Manual. For clarity, where notice is to be given or received within a specified period of days, the period is calendar days. Further, if any action is required by the person receiving the notice, the notice shall state the date when the action is required.

For example, a Notice requiring 14 days is not workdays and means 14 days.

Note: It is the Member's responsibility to maintain a current address with the Council. Specifically, where a Member does not maintain a current address, the Registrar is not responsible for a failure of that Member to receive information and extraordinary efforts to locate a Member will not be made.

Admissions

The Council is committed to ensuring fair processes that include alternate dispute resolution and simplification of procedure when reasonable.

At every stage of the Complaints process, Respondents are advised of the potential to make voluntary admissions and provided with multiple opportunities to simplify the process.

Written Decision & Timelines

Decision of the Complaints Committee or the Discipline Committee must be in writing.

It is sufficient for Complaints Committee decisions to be executed by the Chair.

Discipline Committee decisions require all decision makers to execute the decision. Decisions are to be finalized within 60 days of the proceedings.

Communication of the Decision

The Complaints Committee provides its decision to the Registrar, who then notifies the Complainant and the Respondent.

The Discipline Committee provides its decision to the Registrar, who then notifies the Complainant, the Respondent, and Council.

Contemporaneous Proceedings

(i) Criminal Prosecutions

In the event the Respondent is involved in a criminal prosecution based on the same circumstances as the Complaint, the Complaints Committee or the Discipline Committee may await the outcome of the criminal prosecution before proceeding.

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

Notably, when a Complaint is held in abeyance, a Complaints Committee or Discipline Committee may suspend or place conditions on a Member's license in accordance with the *Act*.

(ii) Civil Actions

If the Respondent is a party to civil litigation involving similar facts giving rise to the Complaint, the Complaints Committee or the Discipline Committee has the discretion not to proceed with the Complaint at the same time.

The following facts should be taken into consideration in determining whether a Complaint will be held in abeyance pending conclusion of a civil action:

- (1) the degree of similarity of factors giving rise to the two proceedings;
- (2) the degree to which resolution of the other proceeding may make consideration of the Complaint unnecessary and/or more efficient; and
- (3) the degree to which the other proceeding would delay prompt disposition of the Complaint.

In assessing the third factor, the Committee will not hold a Complaint in abeyance for more than a year without compelling reasons. Additionally, any decision to hold a Complaint in abeyance will be revisited within 12 months.

Consistent with the *Act*, neither the Complaints Committee nor the Discipline Committee will hold a Complaint in abeyance in circumstances wherein public safety is at risk or the profession as a whole could be harmed.

COMPLAINTS COMMITTEE PROCEDURE

1. Referral of Complaint to Complaints Committee

The Registrar forwards a report containing all information received from the Complainant and Respondent to the Chair of the Complaints Committee who selects panelists.

2. Conflict of Interest and Confidentiality:

On receiving the above report, the Chair of the Complaints Committee certifies that there are no conflicts of interest and commits to privacy (**See: Conflict of Interest & Confidentiality**).

If there is a conflict, the Council appoints an alternate Chair.

The Complaints Committee Chair is disqualified, when he or she:

- (1) has participated in discussions of the matter prior to the Complaint;
- (2) is related by blood or marriage to the Respondent or Complainant;
- (3) is a party to or a witness in any other pending case involving any of the persons noted in (2);
- (4) has a close employment, business, or other close relationship with the Respondent or Complainant;
- (5) maintains a close personal friendship with the Respondent;
- (6) financially benefits from individuals involved in the Complaint;

- (7) knows that a close relative will be a witness (how “close” the relative is will be a matter of judgment and common sense); and
- (8) has an employment relationship with the Respondent.

3. Appointing Remaining Members:

The Complaints Committee Chair further determines the panelists, each of who confirm there is no conflict of interest and confidentiality in the same manner as above.

The Complainant and Respondent are informed of the Committee’s composition.

4. Allegations of Conflict of Interest

The process outlined above is intended to identify all conflicts of interest.

If circumstances require, other members of the Committee, or the Complainant, or Respondent may seek to challenge a committee member for potential conflict of interest.

In the event the Complainant or Respondent challenge a member, they are to do so in writing on being notified by the Committee’s composition.

5. Complaints Committee - Powers

A Complaints Committee shall investigate and consider all Complaints referred to it, and may do one or a combination of things as provided for at s. 48(1) of the Act, including:

- a) direct that no further action be taken if, in the opinion of the committee, the complaint is vexatious or there is insufficient evidence of professional misconduct, incompetence or incapacity,
- b) refer allegations of professional misconduct, incompetence or incapacity to a Discipline Committee,
- c) caution the member, or
- d) take such actions as it considers appropriate in the circumstances.

6. Deliberation Generally by Documents Only

A Complaints Committee will determine if it seeks any “in person” meetings with anyone during the course of its investigation.

It is neither typical nor expected that the Complaints Committee would hold in person meetings.

In instances where the Committee identifies lapses in information, it will request the Registrar to obtain additional information or request the appointment of an Investigator.

7. Suspensions & Conditions Pending Hearing

In extraordinary circumstances where a Complaints Committee refers a matter for hearing and where it considers it probable that the Member's continued practice will be harmful to the public, it may suspend the Member or place conditions on practice.

Orders by the Committee are not made until the Member has been given notice and an opportunity to make representations, in person.

8. Investigations

A Complaints Committee may request the services of an investigator to gather information and prepare a report regarding a Complaint.

9 Form of Decision

When a Complaints Committee concludes its investigation, it issues a written decision signed by the Chairperson of the panel. Any decision of a Complaints Committee is provided to the Registrar, who then informs the Complainant, and the Respondent.

DISCIPLINE COMMITTEE PROCEDURE

1. Referral of Discipline Committee

The Registrar forwards the Complainants Committee Decision to the Chair of the Discipline Committee who determines Committee composition.

2. Conflict of Interest and Confidentiality

On receiving the Complaint Committee Decision, the Chair certifies that there are no conflicts of interest.

If the Discipline Committee Chair is not qualified due to conflict, Council appoints an alternate Chair.

The Discipline Committee Chair is disqualified, when, he or she:

- (1) has participated in discussions of the matter prior to the Complaint;
- (2) is related by blood or marriage to the Respondent or Complainant;
- (3) is a party to or a witness in any other pending case involving any of the persons noted in (2);

- (4) has a close employment, business, or other close relationship with the Respondent or Complainant;
- (5) maintains a close personal friendship with the Respondent;
- (6) financially benefits from individuals involved in the Complaint;
- (7) knows that a close relative will be a witness (how “close” the relative is will be a matter of judgment and common sense); and
- (8) has an employment relationship with the Respondent.

3. Discipline Committee Chair – Appointing Panelists

The Discipline Committee Chair, with the assistance of the Registrar appoints at least three individuals, including a public representative to hear and consider the Complaint and, if applicable, names the Chairperson.

All Discipline Committee members hearing the Complaint confirm there is no conflict of interest in the same manner as outlined in the previous section and the Respondent is informed of the committee’s composition.

4. Allegations of Conflict of Interest – Challenging Panelists

The Respondent is deemed to have waived any grounds of disqualification unless a written objection is filed within seven days of receiving the names of the Panelists.

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

If a challenge is successful prior to the commencement of a hearing, another Panelist of the Discipline Committee shall be named and who shall also be subject to challenge.

5. Notice of Hearing

The Chair of the Discipline Committee determines a date for the hearing and, in selecting a date, will attempt to secure a date that is mutually convenient and acceptable to everyone involved.

The Registrar then issues a Notice of Hearing, which summarizes the allegations that will be heard, and the hearing process.

The Notice of Hearing shall advise that the Respondent can admit to all or part of the allegations to be heard by the Discipline Committee at any time prior to a hearing. It shall also advise that a pre-hearing conference can be requested.

6. Voluntary Admission by the Respondent

The Discipline Committee may order a Respondent to pay the Costs associated with the investigation and hearing.

Cost consequences are a significant concern to all involved and the Council will attempt to simplify proceedings, at any stage, where possible.

In cases where the Respondent chooses to admit allegations prior to a hearing, the Council and the Respondent may prepare an Agreement to be used to simplify a hearing or eliminate the necessity of any or all witnesses.

7. Pre-Hearing Conference

The Respondent may request a pre-hearing conference with the Registrar, which is voluntary, without prejudice, and can be held in person or by telephone. The purpose of a pre-hearing conference is to:

- (a) determine whether any or all issues can be settled;
- (b) determine whether the issues can be simplified; and
- (c) determine if there are any agreed facts.

The participants to a pre-hearing conference are the Council through the Registrar or legal counsel and the Respondent and his or her legal counsel.

Any agreement by the parties at a pre-hearing conference shall be reduced to writing by the Council and the Respondent and provided to the Discipline Committee.

If the Respondent is not represented by legal counsel at a pre-hearing conference, the Council may require that independent legal advice be sought prior to any agreement being forwarded to the Discipline Committee.

Matters Relevant to the Conduct of a Discipline Committee Hearing

8. Right of Counsel

The parties to a Discipline Committee are the Council and the Respondent.

Each party to the hearing may be represented by a lawyer or any other person.

If a party is to be represented by a lawyer at the hearing, that party must notify the Registrar, in writing, not less than five days before the date set for the hearing.

In the event a party does not give sufficient notice of intention to have legal representation, the Committee should consider taking steps, including adjourning the matter to allow the party, on a reasonable basis, to take advantage of facilitating the right of counsel.

Note: The Complainant is often a witness but is not a party to the proceeding.

9. Discipline Committee Counsel

The Discipline Committee may have legal counsel present at the hearing to advise on issues of procedure and law (this individual is not the Council legal counsel).

The role of the Discipline Committee Counsel is advisory. Legal Counsel is not a Member of the Discipline Committee and may not take an active role in the conduct of the hearing, including examination and cross-examination of the witness.

The Discipline Committee is not required to give notice that it will have counsel.

10. Witnesses

With few exceptions (see: Rules of Evidence, below), only those persons who have personal knowledge of the matter in question may be called as witnesses.

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. Where the Complainant is called as a witness, it should be explained that the Complainant is a witness and not a party to the hearing.

Any party who intends to call witnesses at a hearing should provide the Discipline Committee and the other party with written notice as soon as practicable, but not less than three days before the hearing, of the names of the witnesses intended to be called and a brief explanation of the relevance of their evidence. In light of the parties' rights to know the nature of the evidence, there should be no "surprise" witnesses to a hearing.

As well, any party who intends to rely on affidavit evidence at a hearing should be required to provide the Discipline Committee and the other party with a copy of the affidavit no less than fourteen days before the hearing to allow the other party an opportunity to cross-examine the witness on the affidavit.

11. Refusal or Failure of Witnesses or Respondent to Appear

A witness may be compelled to appear and testify at a hearing before the Discipline Committee by being issued a Summons to Witness and any party who seeks witness testimony and is uncertain of that witness's attendance ought to have a summons issued by the Registrar.

If the Respondent fails to appear at a scheduled hearing, the Committee may still proceed but should not do so without first determining whether the Respondent has received proper notice of the hearing.

As an extra measure to demonstrate all possible effort to protect the Respondent's rights, a telephone call should be made to determine if the Respondent is detained by valid cause or is on the way to the hearing. Following this call, the Discipline Committee may elect whether or not to adjourn the hearing to a later date.

12. Postponements/Adjournments

In dealing with requests for postponements or adjournments, the Discipline Committee should consider whether or not any party would be adversely affected or prejudiced by the decision to allow the request. The Committee should not object to an adjournment if there is an agreement to do so and it is not prejudicial to the public interest to do so.

13. Public Hearing

Discipline Committee proceedings are public unless the Committee orders otherwise.

14. Room and Seating Arrangements

The hearing room should be set up to reflect the formal nature of the proceeding. It is desirable that the Committee and both parties be seated at separate tables in order to provide some privacy and undue congestion.

As witnesses usually will be excluded from the hearing room until they are called to testify, the Committee should ensure that a comfortable waiting room or area is set up for this purpose.

Witnesses may remain in the hearing room after they have testified, but they should be seated in a designated observer area.

15. Recording Evidence

Witness testimony at a Discipline Committee shall be recorded by a qualified court reporter.

Recordings and transcripts should be maintained in the confidential hearing files until all rights of appeal have expired or until an appeal from the decision of the Discipline Committee has been disposed of.

16. Preliminary Matters

Each Panelist should carefully read and be familiar with all the documents that are filed with the Committee for the hearing (i.e., the Complaint, the Reply, the Agreed Facts, if any).

17. Commencing the Hearing

The hearing commences with the Chair calling the hearing to order. This Manual suggests a script for the Chair to follow at the beginning of the hearing to introduce the Panelists, explain the purpose of the hearing, read the Complaint and Notice of Hearing into the record and swear the witnesses. The script also generally outlines how the hearing will proceed.

One of the most important parts of the Chair's opening remarks is the question asking the parties if they have any objection to the composition or the jurisdiction of the Committee to hear and determine the Complaint. It is important to have the response of the parties on the record if, on

appeal, if it is alleged that a Panelist was biased or that the Committee did not have jurisdiction to hear the matter.

With the exception of the Complainant and Respondent, the Committee may exclude witnesses from the hearing room until they are required to give testimony. This procedure ensures that the testimony of a witness is not influenced by another's testimony. Further, when witnesses are called to give evidence, they will be required to be sworn under oath or provide an affirmation.

18. Outline of the Hearing Procedure

1. Opening remarks of the Chair;
2. Complaint is read into the record or is marked as an exhibit, or both;
3. The Respondent's Reply is read into the record or is marked as an exhibit, or both;
4. Other documents may be presented by the parties and marked as exhibits;
5. The parties are given the opportunity to present evidence, testify on their own behalf and call witnesses;
6. The parties are given the opportunity to examine and cross-examine witnesses;
7. The parties are given the opportunity to provide closing statements;
8. The hearing is adjourned;
9. The Discipline Committee deliberates and renders its decision.

19. Function of the Discipline Committee Chair

The function of the Discipline Committee Chair is to ensure that the hearing is conducted properly. It is the Chair's job to control the questioning of a witness, that a witness is not mistreated, and that parties have an opportunity to ask questions.

20. Role of the Committee Hearing Complaint

The function of the Discipline Committee is to make an objective decision based on the evidence presented at the hearing. It is not the role of the committee to prove or disprove either party's position. The committee members may and should ask questions of witnesses and the parties.

21. Appropriate Role of Legal Counsel for the Parties

Legal Counsel for the parties, when present, will advise and consult with their clients and speak on the clients' behalf, subject to appropriate rulings by the Committee.

22. Appropriate Role of Discipline Committee Counsel

Counsel for the Discipline Committee performs an advisory role only. Counsel assists with questions regarding the Committee's legal authority and provides guidance to ensure that all evidence is received and natural justice rules are observed. Counsel for the Discipline Committee is not an active participant in the hearing and is not a Member of the Discipline Committee.

23. Rules of Evidence

The Discipline Committee may rule at any time on the admissibility of evidence. The Committee does not deal with strict questions of law and is not governed by the technical rules of evidence that apply in courts of law.

The Committee's decision is based on the best available evidence. Direct testimony should be preferred over hearsay evidence unless direct evidence is not available.

The Discipline Committee 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

Evidence given by a witness as to what someone else said is generally considered "hearsay".

The reason for rules against hearsay evidence is that this type of evidence takes away the right of a party to cross-examine the person who is alleged to have made the statements.

For this reason, a Discipline Committee should not rely on hearsay evidence to establish facts or as proof of allegations, particularly when the evidence relates to very important parts of the case. Direct testimony should always be preferred over hearsay evidence at a hearing.

(b) Real and 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 documentary evidence introduced at a hearing should be marked with an exhibit number and date.

(c) Written Statements and Affidavit Evidence

An affidavit is a written statement made under oath or affirmation. Affidavits may be submitted into evidence in lieu of witnesses' direct testimony provided the other party has been given the opportunity to cross-examine the witness or consent.

The Committee is not anticipated to permit any other written statements to be admitted into evidence in lieu of a witness' direct testimony without consent of the parties.

(d) Admissions by Respondents

Admissions by the Respondent are an exception to the hearsay rule. If the Respondent has admitted to having engaged in unethical conduct, then the person hearing the admission may be called to testify to this fact. The Committee may rely on this evidence in reaching its decision; subject to the Respondent's own evidence with respect to the statement.

(e) Privileged Communications

Most communications between a person and that person's lawyer are subject to solicitor-client privilege and cannot be compelled or introduced into evidence.

(f) Experts

Expert witnesses are an exception to the general rule that witnesses must have personal knowledge of the facts and circumstances that gave 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 (once qualified by the Committee as an expert).

(g) Character Witnesses

Before permitting testimony relating to the character and general reputation of any person, the Committee 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.

23. Standard of Proof

The term "standard of proof" refers to the degree to which the evidence presented at the hearing should demonstrate the facts set forth in the Complaint and Notice of Hearing. Procedural Fairness requires that decisions be based on the proof of reliable evidence, not assumptions.

The standard of proof in professional regulation matters must be clear, strong and convincing, which means a measure or degree of proof that will produce a firm belief or conviction as to the allegations sought to be established.

This does not require the virtual certainty of “beyond a reasonable doubt”, as applied in criminal prosecutions, but rather on a “balance of probabilities” as in civil cases.

24. Objections

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

The Chair may choose to rule on routine objections as they are made, but more complicated objections may require a recess to confer with the other Panelists or with legal counsel.

25. Adjourning

The Committee should not be hesitant about adjourning the hearing at any time to protect procedural fairness (i.e. to ensure right of counsel, to allow the Respondent time to prepare a defence in light of new evidence, etc.)

In dealing with an adjournment, the Chair should consider whether or not any party would be adversely affected or prejudiced by the decision to allow the request. Prejudice to the public interest should also be considered.

26. Participation by Panelist(s)

No Panelist may participate in a decision of the Discipline Committee unless present throughout the entire hearing, having heard all the evidence and arguments. Further, the Panelists perform a *quasi judicial* role and are not entitled to permit anyone who was not appointed to the Discipline Committee to participate in deliberations.

Procedures Following the Hearing

27. Making the Decision

Upon concluding the hearing, the Committee meets to deliberate and make its decision. When possible, this can be done immediately following the hearing.

The presence of Discipline Committee counsel at this time is a matter of discretion. It is a good idea for legal counsel, however, to review the decision before it is completed and released to the parties.

Decision-making is a three-step process. The first step is to decide on findings of fact. (Note: If the parties have filed an Agreed Statement of Facts, then the Statement should be included with the Committee’s findings). The Committee must then decide whether or not the Respondent engaged in conduct as set out in the Complaint and Notice of Hearing. The decision is made by a majority of the Committee.

If the Committee finds that the Respondent did engage in the conduct alleged in the Complaint and Notice of Hearing, the third step is for the Committee to determine an appropriate penalty, which would include reviewing any similar matters of other similar regulators.

It should be noted that parties will only be asked to address penalty following a determination of the Complaint on its merits. Put another way, only after a finding of misconduct will there be discussion of appropriate remedy.

28. Form of the Decision

The decision must be in writing and signed by the Panelists within 21 days, or if more time is required, no more than 60 days. The decision should include the reasons for the decision based on the findings of fact and any discipline imposed, and may indicate if the decision was a majority or unanimous signed by all Panelists.

29. Writing the Decision

A Panelist should be assigned to write the decision. A Panelist who does not agree with the majority decision, or agrees but for different reasons, may write a separate decision.

30. Discipline

In the event the Respondent is found guilty of the Complaint, the Discipline Committee may consider any records of previous violations and sanctions imposed in determining the discipline to be ordered in the instant case. The Discipline Committee will also hear submissions from the Council as to the reimbursement for costs associated with the hearing, and the reasons for any fine that is sought.

Discipline or remedial action with respect to fitness to practice must fit the offence and must involve every consideration of fairness and equity.

In the written decision, the Committee should be clear about all details of any penalty imposed. If a suspension of privileges is imposed, the privileges should be specified. As well, it is not sufficient to simply order, for example, a “thirty day” suspension. The suspension start and end dates should be specified in line with the Respondent’s right of appeal or tied into some event so that there is no doubt about enforcement. Further, if the Respondent is ordered to take an educational course, the Committee should first determine when the course is available and specify how long the Member has to successfully complete the course.

The powers of the Discipline Committee are found at s. 70 of the Act.

Specifically, if the Discipline Committee determines professional misconduct it may do one or more of the following under s. 70(2) of the Act:

- a) reprimand the member,
- b) direct the Registrar to impose specified restrictions on the member's registration for a specified or indefinite period of time or until specified criteria are satisfied, or both;
- c) direct the Registrar to suspend the member's registration for a specified period of time or until specified criteria are satisfied, or both;
- d) direct the Registrar to revoke the member's registration; or
- e) make such other order as the committee considers appropriate.

If the Discipline Committee determines a member incompetent or incapacitated it may do one or more of the following under s. 70(3) of the Act:

- a) direct the Registrar to impose specified restrictions on the member's registration for a specified or indefinite period of time or until specified criteria are satisfied, or both;
- b) direct the Registrar to suspend the member's registration for a specified period of time or until specified criteria are satisfied, or both;
- c) direct the Registrar to revoke the member's registration; or
- d) make such other order as the committee considers appropriate.

31. Communication and Publication of the Decision

When completed, the decision is given to the Registrar to be forwarded to the parties as well as to the Complainant and Council.

A covering letter should also be sent to the Respondent, advising of the rights of appeal under the provisions of the Act.

32. Delaying of Decision and the Effective Date of Decision

The effective date of the Committee's decision is the date the decision was given, unless the decision provides otherwise.

Enforcement of the decision may therefore be immediate. However, common sense must be applied, depending on the circumstances. If the Respondent indicates a clear intention to appeal, it may be best to delay enforcement until an appeal has been filed or until the thirty days to appeal has expired.

33. Failure to Comply with the Decision

Each decision of the Discipline Committee should confirm any repercussions that will result from a failure by the Respondent to comply with the decision. Notably, any repercussions will only be applicable in the event the decision is not appealed, or is unsuccessfully appealed.