



NURSES ASSOCIATION OF NEW BRUNSWICK
COMPLAINTS AND DISCIPLINE PROCESS

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TABLE OF CONTENTS

	<u>PAGE</u>
INTRODUCTION	1
WHAT IS A COMPLAINT?	2
Mandatory Reporting	2
Discretionary Reporting	3
Lodging a Complaint	3
HOW ARE COMPLAINTS HANDLED?	
Complaints Committee Procedures	5
Support Roles and Responsibilities	6
NANB Staff Support	6
Legal Counsel	6
Discipline and Review Committee Procedures	7
Rights of Nurses and Complainants	7
Discipline and Review Committee	11
Access to Discipline Decisions	11
Support Roles and Responsibilities	12
NANB Staff	12
Legal Counsel	13
Court Reporter	14
Appeals	14
Reinstatement	14
CONCLUSION	16

NOTE: This document is provided for information only and should not be construed as legal advice. Case specific legal questions should be referred to legal counsel.

INTRODUCTION

Under the *Nurses Act*, the Nurses Association of New Brunswick is legally responsible for regulating members of the nursing profession in this province. Regulation makes the profession, and its members, accountable to the public for the delivery of safe, competent and ethical nursing care.

NANB has adopted a three-pronged approach to self-regulation:

1. promoting good practice
2. preventing undesirable practice
3. intervening with unacceptable practice when necessary.

By placing most of our emphasis on promotion and prevention, the need for discipline interventions is kept to a minimum. However, as a self-regulating body, we are legally required to have a formal process for dealing with complaints made against our members. This process is commonly referred to as the complaints and discipline process. This document provides a step-by-step overview of the complaints and discipline process.

The Nurses Association does not take the responsibility of looking into a nurse's practice lightly. It is a disturbing event for a nurse to have a complaint lodged against her. Our primary goal is to provide accurate information about the process, and to ensure that the process is fair for all involved.

WHAT IS A COMPLAINT?

Mandatory Reporting

A complaint is any written, signed report or allegation, regarding the conduct, competence or health of a nurse. Complaints may be made by any individual including a nurse's supervisor, a co-worker, another health care professional, or a member of the public such as a patient or family member. Complaints lodged with the Nurses Association are usually of a very serious nature such as:

1. substance abuse;
2. physical or sexual abuse of patients;
3. lack of knowledge, skill or judgement.

An employer who dismisses a nurse for reasons of incompetence or incapacity is obligated by law to report that nurse to the Nurses Association. In fact, any nurse who has reason to believe that another nurse is unable to function safely to such an extent that the welfare of patients is jeopardized, is obligated to lodge a complaint with the Nurses Association. Failure to report is considered to be professional misconduct in and of itself.

Legislation introduced by the Minister of Health and Community Services in 1997 imposes a legal obligation on health care professionals, including nurses, to report incidents of sexual abuse. Health care professionals who have reason to believe that another health care professional has sexually abused a patient must report that person to his or her regulatory body within 21 days. You must make every effort to advise the patient involved that a report is being filed before doing so.

The patient's name must not be included in the report unless the patient consents in writing. If you have reason to believe that a patient has been sexually abused by another health care professional, you should contact that professional's regulatory body to determine their specific reporting procedures.

Sexual abuse is a form of professional misconduct and is defined in the *Nurses Act* as:

- sexual intercourse or other forms of physical sexual relations between a health care professional and a patient,
- touching of a sexual nature of a patient by a health care

professional, or

- behaviour or remarks of a sexual nature by a health care professional towards a patient.

“Sexual nature” does not include touching, behaviour or remarks of a clinical nature appropriate to the service provided.

Failure to report incidents of sexual abuse as set out in the *Nurses Act* constitutes professional misconduct.

It is our view that the legislation which requires healthcare professionals to report situations of sexual abuse does not serve as a substitute for institutional and agency policies for dealing with these matters. Where such policies exist, it is important that they be reviewed and revised, as required, to ensure consistency with the legal obligations imposed on individual practitioners. In agencies where no such policies exist, it is imperative that protocols be developed which support health care professionals in meeting their legal obligations.

Discretionary Reporting

Other complaints pertaining to the conduct, competence or health of a nurse may be lodged at the discretion of the complainant.

Lodging a complaint with the Nurses Association is usually a measure of last resort, once all local avenues have been exhausted. In general, every attempt is made to deal with the problem at the agency or institutional level, prior to lodging a complaint. In many cases, complaints lodged by employers relate to problems originally identified by co-workers or patients.

The Nurses Association of New Brunswick actively promotes the use of *A Framework for Managing Professional Practice Problems* to all nurses seeking advice on how to handle concerns about a co-worker's performance. The guidelines recommend following the appropriate "chain of command" within the institution.

Lodging a Complaint

Complaints must be submitted in writing and signed by the complainant. Generally speaking, a complaint should include the following information:

1. The identity of the members complained against;
2. The place where the incidents or incidents took place;

3. The date or dates on which the matters arose;
4. The particulars of the facts upon which the complaint is based, with as much specificity as possible; and
5. The names of potential witnesses and a summary of what information they may have that would be relevant to the investigation of the complaint. This may include signed statements from those individuals.

HOW ARE COMPLAINTS HANDLED?

Complaints Committee Procedures

The mechanism for dealing with complaints is dictated by law under the *Nurses Act*. It is a two step process.

As soon as a formal complaint is received by the Nurses Association, the complaints and discipline process is activated. A preliminary investigation is initiated which consists of the collection of relevant written documentation related to the complaint.

First, the nurse is promptly notified and provided with a copy of the actual complaint, and any supporting documentation submitted. The Nurses Association has a policy of "full disclosure" which means that all documentation submitted to the committee is always provided to the nurse in question. The nurse is advised of her rights, and is encouraged to submit any information that she can provide about the matters relating to the complaint.

At the same time, the letter of complaint is acknowledged and the complainant is asked to provide any additional documentation as soon as possible. The nurse's employer(s) must be notified that a complaint has been received. The employer(s) may be asked to submit any information relevant to the complaint.

Once all of the material has been received, a meeting of the Complaints Committee is arranged. The nurse is given at least 14 days written notice of the meeting, and an opportunity to respond in writing to any of the material submitted. Because of our "full disclosure" policy, all documentation submitted is shared with the nurse and the complainant. This is done to ensure the process is fair, and that the nurse has a full opportunity to respond to the allegations.

The documents received are presented to a three-member panel of the Complaints Committee. The panel is made up of a nurse chairperson, another nurse and a member of the public. A peer review process, with meaningful participation of the public, is the most appropriate method of dealing with questions about professional conduct. It recognizes the value of having complaints dealt with by people who have knowledge about nursing practice and the setting. All NANB members, except those on the Board or the Discipline Committee are eligible to be members of the Complaints Committee.

Support Roles and Responsibilities

The Complaints Committee considers written evidence only, so neither the nurse nor the complainant, or their legal counsel, attends the meeting. The committee's review of the documents is a preliminary step intended to screen out complaints that are frivolous, or do not fall under the jurisdiction of the discipline process. It is not the mandate of this committee to decide if the complaint is true or not. It simply decides whether the complaint should be dismissed, or whether the matter should be referred to the Discipline or Review Committee for further consideration and a full hearing. That is why the first step of the complaints and discipline process is known as the screening phase.

If the committee believes the matter warrants further consideration and investigation, it can refer the complaint to the Review Committee or to the Discipline Committee. Health related problems are referred to the Review Committee, while other complaints go to the Discipline Committee. The Complaints Committee can also suspend the nurse's registration pending the outcome of the discipline hearing if it believes that allowing the nurse to continue practising could endanger the public.

The nurse, the complainant and the nurse's employer(s) are promptly notified of the decision of the Complaints Committee.

NANB Staff Support

A designated member of the NANB staff has the delegated authority to oversee the complaints and discipline process. Her role is one of coordination and organization. The staff person assists the Complaints Committee by preparing correspondence, assembling the documentation submitted in relation to the complaint, and by arranging for the committee meeting. She is not involved in the Committee's deliberations or decision beyond the provision of administrative support. NANB staff have no authority to screen complaints, as this is the responsibility of the Complaints Committee.

Legal Counsel

Both the nurse and the complainant have the right to be represented by legal counsel at their own expense. Even if one or both of the parties choose to be represented by legal counsel, their involvement at this stage is very limited since it is just the screening portion of the discipline process. Legal counsel's role at this stage usually consists of assisting in

**Discipline and
Review Committee
Procedures**

the preparation of written documentation for submission to the Complaints Committee.

The Nurses Association does not usually involve a lawyer unless the nurse and/or the complainant have chosen to be represented by legal counsel. The Complaints Committee may request legal advice from legal counsel on procedural issues relevant to a case.

Once a nurse chooses to be represented by legal counsel, all the nurse's future communication about the case normally takes place between the nurse's lawyer and the Committee's legal counsel.

If the Complaints Committee determines that a complaint requires further consideration and investigation, it refers the complaint to the Discipline or Review Committee.

Rights of Nurses and Complainants

Certain rights are guaranteed under the *Nurses Act*. A nurse against whom a complaint has been lodged and the complainant have the right to:

1. receive at least 30 days notice of the Discipline or Review Committee hearing,
2. receive copies of all documents submitted to the committee,
3. present evidence in either English or French,
4. be represented by legal counsel at his/her own expense,
5. examine, cross-examine and re-examine witnesses, and
6. receive prompt notice of the Committee's decision.

Additional preparation is undertaken at this stage and often consists of obtaining further documents and arranging for witnesses to appear at the hearing of the Discipline Committee. The Discipline and Review Committees also have the authority to attempt to resolve informally any complaint when deemed appropriate by the committee. This may include the use of consent orders, agreed statements of fact and undertakings.

Once further documents are obtained and witnesses are arranged, a

meeting of the Discipline Committee is scheduled. A four-member panel of the Discipline or Review Committee meets to hear the complaint (3 nurses plus one member of the public). To the extent possible, the panel members are chosen from outside the geographic area where the nurse works. The Association attempts to include, on the panel, one or more nurses with a background similar to that of the member (for example, area of practice, years of experience, and so forth).

There is considerable debate about the pros and cons of public versus private hearings. NANB disciplinary hearings are conducted in private due to the fact that confidential or sensitive medical or personal information is often disclosed regarding both the nurse and patients.

Both the nurse in question and the complainant have the right to attend the hearing. The employer attends the discipline hearing only if he/she is the complainant. Other persons usually in attendance include the court reporter, the NANB staff support and legal counsel if they are involved. Witnesses are called into the hearing one at a time to give their testimony.

Either party may request the permission of the committee to have someone else accompany them at the hearing. The committee considers such requests on an individual basis taking into account such factors as:

1. Will confidential patient information be revealed during the hearing?
2. Will information concerning the nurse's medical or psychiatric history be revealed?
3. Will sensitive information about the nurse's personal or family history be revealed?

It is the duty of the nurse to attend the hearing. The committee may proceed with the hearing in the event of non-attendance as though the nurse was present, provided that it can be shown that the notice of meeting was mailed to the nurse.

The exact sequence of events or procedure followed during the hearing depends on a number of factors, most notably, whether or not legal counsel are involved. However, the principles followed by the committee are constant across all hearings. Although there is greater latitude in the kind of evidence that is admissible at a professional

conduct hearing as opposed to a court of law, the rules of natural justice are applicable just the same.

The Chairperson of the Discipline or Review Committee presides over the hearing. The testimony of all witnesses is taken under oath, and the committee usually starts by hearing the complainant's evidence. The last word or opportunity to question any witness goes to the nurse or her legal counsel. The Discipline and Review Committees are completely neutral in these proceedings. Unlike most other provinces, the NANB does not assume a prosecutorial role at the hearing. The committee has no vested interest in the outcome other than to ensure that:

1. the hearing is fair;
2. the facts are determined;
3. all parties have an opportunity to present evidence; and
4. the public is protected.

Rather than "taking sides," the committee is on a fact-finding mission. It is the committee's role to conduct a hearing in a manner that enables presentation of evidence on all sides of the case. The committee accomplishes this by asking the complainant, the witnesses and the nurse questions about the events, incidents or problems leading to the complaint. Both the complainant and the nurse have the opportunity to present evidence, or their side of the story, and to fully examine all witnesses and evidence.

Once all the evidence is received, the hearing concludes and the committee deliberates. The committee assesses credibility of the witnesses, weighs the evidence, determines the facts, and considers what are the accepted nursing standards in the situation. The committee considers the nature of evidence in determining the weight to be given to it. If direct eyewitness evidence is available of the occurrence of an event, and if the committee believes the witness, that evidence, in most cases, will be given more weight by the committee than contradictory evidence which is based on hearsay. For example, assuming two witnesses are equally credible and believable, the evidence of a witness who says, "I saw him do it," will usually be given far more weight than the evidence of a witness who says, "I was told by 'X' that he did not do it".

In weighing the evidence, the committee considers other factors relating to the reliability of the evidence, including:

1. whether the witness's recollection is vague or clear;
2. is the recollection of recent or long past events;
3. was collaborating evidence presented; and
4. does documentation made at the time of the events confirm the witness's recollection.

The committee decides if the facts established prove the allegations in the complaint. The standard of proof applied by the committee is the balance of probabilities, based on the preponderance of credible evidence considered in light of the gravity of the allegations.

How much evidence is enough to prove a complaint depends partly on the seriousness of the matter. A complaint of physical abuse or sexual misconduct would likely require a higher standard of proof than a minor complaint to allow the committee to conclude that the complaint had been substantiated.

However, it must be remembered that while the standard of proof may increase proportionally with the seriousness of the complaint, it does not reach the criminal standard of proof beyond a reasonable doubt. If the evidence is not sufficient to establish the allegations, the complaint is dismissed. If the committee decides that the facts prove the allegations, it then considers what are the appropriate orders or remedies to be made concerning the nurse.

The decisions of the Discipline and Review Committee usually contain two main components:

1. the findings, and
2. the order.

The findings are the committee's factual conclusions based on the evidence. The order sets out the remedy or penalty. The Discipline and Review Committee members take their job very seriously. No decision

**Discipline and
Review Committee
Decisions**

is ever made lightly; members are well aware that their decisions affect both the nurse's livelihood and also public safety. The committee's approach is remedial, rather than punitive, to the extent possible. In determining a remedy, the committee will often consider the following question: "what will it take to get this nurse back on track"?

The orders that can be made are outlined in the *Nurses Act* and include:

1. dismissal of the complaint;
2. a reprimand;
3. placing conditions on the nurse's registration;
4. suspension of registration for a period of time until retraining or treatment is obtained;
5. revocation of registration;
6. a fine;
7. an assessment of the costs of the hearing;
8. publication of the discipline decision; and
9. specifying the period of time before which the member may not apply for reinstatement.

**Access to
Discipline
Decisions**

The decision of the Discipline or Review Committee is provided promptly to the nurse, the complainant and the nurse's employer(s). In accordance with the *Nurses Act*, the Registrar must give public notice of all suspensions and revocations. A written notice containing the nurse's name, registration number and discipline decision is sent to all nurse employers in the province, as well as other nursing regulatory bodies. This notice is also published in *INFO Nursing*, and made available to the public, upon request, for a period of five years or indefinitely in the case of sexual abuse.

When a nurse's registration is suspended or revoked subsequent to a finding of sexual abuse of a patient, in addition to providing public notice of the decision, the Nurses Association must also provide for public access to the following information for an indefinite period of time:

1. the Discipline Committee findings;
2. the penalty imposed; and
3. a brief description of the nature of the professional misconduct.

If the decision of the Discipline or Review Committee is to attach conditions to the nurse's registration, this information is printed in *INFO Nursing*, without the nurse's name. The nurse's employer is notified of the conditions. Other decisions such as those resulting in a reprimand, are not published. It should be noted that while the Association is automatically required to give public notice of all suspensions and revocations, the committees have the authority to order that public notice be given of any decision and/or that the findings, penalty and nature of the complaint be entered into the records of the Association and made available to the public upon request for a period of five years or for such longer period they may prescribe.

**Support Roles and
Responsibilities**

NANB Staff

As mentioned previously, an NANB staff person is responsible for overseeing the complaints and discipline process. Her role is one of coordination and organization. The staff support person assists the Discipline and Review Committees by preparing correspondence, assembling the documentation submitted in relation to the complaint, and by arranging for the committee meeting.

The NANB staff support person may also provide additional investigation assistance on behalf of the committee prior to the hearing. This usually consists of soliciting further written documents and may include interviewing potential witnesses. Interviews with potential witnesses are generally done for the purpose of identifying who may have personal knowledge of the events leading to the complaint, and the extent of their knowledge or involvement. The information gathered during the interviews is not presented to the Discipline or Review Committee, but is used for the purpose of arranging and scheduling witnesses. The only report presented to the committee by NANB staff consists of the entire collection of written documentation submitted by those involved with the complaint, the decision of the Complaints Committee, and any relevant correspondence with the parties about the proceedings.

Throughout the actual hearing, the staff person continues to act in an administrative support capacity to the committee and is not part of the Committee's deliberations or decision beyond the provision of such administrative support.

Legal Counsel

Both the nurse and the complainant have the right to be represented by legal counsel at their own expense at all stages of the discipline and review process. The Nurses Association believes strongly in the fairness of a peer review process, and seldom requires a lawyer to attend the hearing unless the parties choose to be represented by legal counsel. It is one of the ways costs are kept to a minimum without jeopardizing the integrity of the process.

If there are lawyers involved, the role of the Discipline Committee's legal counsel is quite limited. Unlike some provinces, the Committee's lawyer does not take on the role of prosecuting the case. He or she is not there to prove the nurse is guilty. Functions that the Committee's lawyer may perform include assisting the committee with questions concerning its role and legal authority, and providing legal guidance to ensure that all necessary evidence is received by the committee and that the rules of natural justice are respected by all parties at the hearing. The Committee's legal counsel does not participate in the committee's deliberations. Legal counsel may be called upon by the committee to provide information on relevant points of procedure.

The role of legal counsel for the nurse and the complainant is to represent the best interests of their clients. They usually arrange for witnesses on behalf of their client, bring out evidence by asking their witnesses questions at the hearing, and cross-examine other witnesses.

Court Reporter

A court reporter attends the hearing to keep a record of the evidence presented to the Discipline or Review Committee. The proceedings are taped so an official transcript can be produced if required, for example, in the case of an appeal.

Appeals

If the complainant is dissatisfied with the decision of the Complaints Committee, or if either the nurse or the complainant are dissatisfied with the decision of the Discipline or Review Committee, they may appeal that decision within 30 days. There are two levels of appeal under the *Nurses Act*. The first level is on appeals to the Board of Directors. The second level of appeal is to the New Brunswick Court of Queens Bench.

Reinstatement

If a nurse's registration is revoked or suspended, she can apply for reinstatement one year after the decision unless otherwise ordered by the Discipline or Review Committee. In fact, a nurse can apply for removal or alteration of conditions or limitations on her registration one year after they have been imposed.

The application for reinstatement must be in writing, be signed by the nurse and include the following:

1. the reason for the application;
2. what the nurse is asking the committee to do; and
3. the remedial or corrective measures taken by the nurse (e.g. courses taken, treatment or counselling received).

A reinstatement hearing is conducted by a panel of the Discipline Committee or the Review Committee, depending on which committee made the original order. However, no committee member who participated in the original discipline decision may participate in the reinstatement procedure.

In considering an application for reinstatement, the onus of proof of

How are complaints handled?

restored professional conduct and/or competence rests with the member.

CONCLUSION

The discipline procedures under the *Nurses Act* provide individuals who have concerns about the professional conduct of nurses with a mechanism to have their complaints dealt with in a full and fair manner. These discipline procedures also provide a mechanism to screen frivolous or vexatious complaints, and to ensure that nurses have an adequate opportunity, in accordance with the principles of natural justice, to fully respond to all allegations which may give rise to disciplinary sanctions.