



NOVA SCOTIA  
BARRISTERS' SOCIETY

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## THE COMPLAINTS RESOLUTION AND INVESTIGATIONS PROCESS:

### *A Lawyer's Guide*

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Navigating the professional responsibility and complaints process can be challenging and intimidating. The purpose of this guide is to help you understand how these processes work and what to expect when the Society receives and, if necessary, investigates a complaint against you. We deal with all complaints in a fair and timely manner. Your cooperation makes a difference.

The objectives of the professional responsibility process are to protect the public and preserve the integrity of the legal profession. As part of this mandate, the Nova Scotia Barristers' Society ("the Society") has the responsibility to enforce the *Legal Profession Act* ("the Act"), regulations, rules of ethics and professional conduct and practice standards, thereby enhancing the competence of lawyers practising in Nova Scotia. The rules of ethics are currently published as the *Code of Professional Conduct* ("the Code"), available online at [nsbs.org/regulation](https://nsbs.org/regulation).

The complaints and investigations process is set out in Part III of the Act and Part 9 of the Regulations. This Guide clarifies the process and identifies the responsibilities of lawyers and the Society in the course of investigation of a complaint.

Complaints can be received at the Society by phone or in writing. The Society receives about 350 complaint calls each year. Telephone complaints are handled by the Complaints and Compliance Officers. Many are resolved with little or no contact with lawyers. The Society generally does not accept complaints filed by electronic means.

### WHAT HAPPENS WHEN THE SOCIETY RECEIVES A WRITTEN COMPLAINT

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When the Society receives a written complaint against a lawyer, the Director of Professional Responsibility assesses whether the complaint sets out potentially valid concerns with a lawyer's ethical conduct, and whether the subject of the complaint is within the Society's jurisdiction to resolve. The complaint may be dismissed with or without a letter of advice to the lawyer, dismissed with or without a written response from the lawyer, informally resolved or investigated, in accordance with Regulation 9.2. These outcomes are explained below:

**Dismissal:** A complaint may be dismissed by the Director of Professional Responsibility following an initial assessment and without obtaining a response from the lawyer, or after obtaining one or more written responses in accordance with Regulations 9.2.2, 9.2.10 and 9.2.12. When a complaint is dismissed, a letter outlining the reasons for the dismissal is sent to the complainant. The lawyer receives a letter advising of the staff dismissal and a copy of the letter with reasons sent to the complainant. Where no response is required of the lawyer, first notification of the complaint will be when he or she receives a copy of the dismissal letter to the complainant.

**Letter of Advice:** When a complaint is dismissed, a lawyer may receive a letter of advice that reviews specific rules of the *Code* for the member's reference, in accordance with Regulation 9.2.10 or 9.2.12. These are normally provided when staff determines that while the lawyer did not breach an ethical rule, needs to be reminded of obligations under the Act,

the Regulations or the rules of ethics, and would benefit from best practice advice. The complainant is notified that the Letter of Advice has been issued to the lawyer and the nature of the advice provided.

**Informal resolution:** Where appropriate, the Professional Responsibility Department will attempt to “mediate” or reach an informal resolution of complaints pursuant to Regulation 9.2.2(b), 9.2.10(b) or 9.2.12(b). This process usually involves an Officer contacting the lawyer by telephone to discuss the complaint, and to work with the lawyer and the complainant to achieve a resolution that is satisfactory to both parties.

**Referral to Complaints Investigation Committee:** Pursuant to Regulation 9.4.1, at any time after a complaint is received, it may be referred to the Complaints Investigation Committee to provide direction or assist with an investigation.

The Society receives an average of 200 written complaints each year; approximately 85% of these are dismissed or resolved. A complaint may be dismissed if it is outside the Society’s jurisdiction (e.g. legal issues), if it is made for an improper purpose, if it is not supported by evidence, or if its allegations involve conduct that would not constitute a breach of the *Handbook* if proven.

## REQUESTS FOR REVIEW

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When a complaint is dismissed by the Executive Director, Regulation 9.3 provides that a complainant may request a review of the dismissal within 30 business days of receipt of the decision. Requests for review are considered by the Review Subcommittee of the Complaints Investigation Committee, which is normally chaired by a Public Representative. This Subcommittee may do one of three things: uphold the decision of staff to dismiss the complaint, direct that an investigation be commenced, or direct that an investigation be completed. Lawyers are notified when a request for review is received, and subsequently contacted if further investigation is required, and notified if the dismissal has been upheld. Note that an average of 12% of staff dismissals result in requests for review, and approximately 95% of reviews result in the staff’s dismissal being upheld.

## NOTICE OF A COMPLAINT TO THE LAW FIRM

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Law firms may designate a lawyer in the firm to receive notice of complaints against lawyers of the firm, pursuant to Regulation 7.2.2. If there is a designated member of the firm, he or she will receive a copy of a complaint, information about the outcome of the complaint and, occasionally, information at interim stages of the investigation process. A designated member may also be asked to participate in informal resolution efforts early on.

## RETAINING COUNSEL

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Lawyers are encouraged to seek the advice of counsel at the earliest stages of an investigation, in particular where the allegations of the complainant are serious in nature. In the event that the complaint is referred to a hearing, lawyers are strongly urged to retain counsel.

The Society has compiled a [list of practitioners](#) who have volunteered to represent lawyers in the professional responsibility process of the Society on a *pro bono* or reduced fee basis. The Society publishes this list on its website, and a copy may also be obtained by calling (902) 422 1491.

### Referral to the Fitness to Practise Program

The Fitness to Practise Program is available through the professional responsibility process to address capacity-related issues. In cases where the Society receives a complaint that concerns a lawyer’s capacity, where a person raises concerns about a lawyer’s capacity to the Society, other than through a complaint, or if a lawyer self-reports to the Society, the Executive Director may refer a lawyer to the Fitness to Practise Program. The Complaints Investigation Committee also has the authority to refer a matter to the Fitness to Practise Program at any stage of the investigation process if there are concerns about capacity.

Capacity is a defined term in the *Legal Profession Act* and means a lawyer’s ability to practise law with reasonable skill and judgment that is not substantially impaired by a physical, mental or emotional condition, disorder or addiction. This program is completely voluntary on the part of the lawyer involved. For more information, refer to the Society’s website.

## **INVESTIGATION OF A COMPLAINT**

*(refer to Regulations 9.2.1 – 9.2.13)*

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If the Society determines that a complaint warrants investigation, the first step is usually to send a copy of the complaint to the member and request a written response within 10 business days. Upon receipt, the lawyer's response will be assessed and may be forwarded to the complainant for further comment, in which case the complainant's comments are usually provided to the lawyer for final response. Interviews with the complainant, the lawyer and any relevant third parties may then be conducted, or further information may be obtained in writing.

If it is determined that there is evidence of one or more possible violations of the rules of ethics and professional conduct and an investigation warrants referral to the Complaints Investigation Committee, a member of that committee is assigned to the file to assist staff with completion of the investigation. If an investigation is complex, the Committee may authorize the Director to retain the assistance of an external investigator.

It is the Society's policy that a lawyer under investigation is invited to attend a recorded interview or otherwise to provide final comments following disclosure of relevant information from the investigation. This happens prior to completion of an investigation report, to ensure that the lawyer has an opportunity to respond to all issues of concern.

## **REFERRAL TO COMPLAINTS INVESTIGATION COMMITTEE**

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The matter may be referred to the Complaints Investigation Committee, either at the end of the staff investigation or for direction during the course of an investigation. The Committee is authorized to do one or more of the following, as set out in s. 36 of the Act:

- Dismiss or resolve the complaint, where it is in the public interest and consistent with the objects of the professional responsibility process to do so (Reg. 9.4.3 (a) and (c));
- Counsel a member (Reg. 9.4.3(d); see definition in Reg. 1.1.1(g));
- With the member's consent and cooperation, arrange for mentoring or practice supervision;
- Caution a member (Reg. 9.4.3(d); see definition in Reg. 1.1.1(e));

- Issue a reprimand with the consent of the member (s. 36(2) (c) and Reg. 9.4.3(f));
- Order a practice review or a financial audit of the member's practice (s. 36(2)(f) and Reg. 9.7);
- Require that the member attend before the Committee for the purpose of assisting with the investigation process (s. 36(2)(a));
- Require that the member attend a hearing to determine whether it is in the public interest to suspend the member's practising certificate or place restrictions on the member's practice (s. 37(1));
- Authorize the Executive Director to lay one or more charges against the member, thereby referring the matter to hearing before a panel of the Hearing Committee (s. 36(2)(d)).

Approximately 15% of written complaints are fully investigated, and about 20% (5-6 per year) of those matters result in charges and referral to formal hearing.

## **REFERRAL TO HEARING**

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A hearing is a quasi-judicial, formal adjudicative process arising from charges of professional misconduct, professional incompetence, incapacity or conduct unbecoming a lawyer. Please see Sections 44-51 for details.

If a lawyer is found guilty of charges by a hearing panel, it can impose one or more of the sanctions under s. 45 of the Act, including the following:

- Order the member to pay all or any part of the costs incurred by the Society in connection with any investigation or proceedings relating to the matter in which the member was found guilty;
- Order that restitution be made to any person;
- Order the member to pay an amount not to exceed \$20,000 to the Lawyers' Fund for Client Compensation;
- Reprimand the member;
- Suspend the member's practising certificate;
- Impose restrictions and/or conditions on the member's practice;
- Expel an articled clerk, or defer or add conditions to

the clerk's call to the Bar;

- Disbar or permit the resignation of the member.

Hearings are open to the public, subject to any panel's order for closure or a publication ban, and decisions of hearing panels are published. In some cases the matter may be resolved by means of a Settlement Agreement (refer to Reg. 9.9 and the Policy on Settlement Agreements), which must have been recommended by the Complaints Investigation Committee and approved by a Hearing Panel at an open hearing.

## WHAT WE EXPECT FROM THE MEMBER UNDER INVESTIGATION

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- Lawyers have a duty to cooperate with an investigation of the Society, pursuant to Rule 6.01 of the *Code of Professional Conduct* and Regulation 9.2.5, and a breach of this duty may lead to an additional complaint being initiated against the lawyer.
- Lawyers must respond to communications of the Society in a timely manner and must submit all information that is requested by the deadline provided by the Society. If it is not possible to provide a response by the deadline provided, it is the lawyer's responsibility to contact the Professional Responsibility department to request additional time to respond. Some extensions may require approval by the Complaints Investigation Committee.
- When responding to a complaint, lawyers should deal with all of the issues raised in the complaint, provide copies of all relevant documents and refrain from personal attacks on the complainant. A calm, rational response can often assist in resolving a complaint.
- The Society has a duty to protect solicitor-client privilege, which attaches to information submitted by the lawyer in the course of an investigation, pursuant to s. 77 of the Act. A lawyer has a duty to provide a fulsome response to the Society and will not be considered to have breached solicitor-client privilege by doing so. However, the lawyer should attempt to restrict the information provided to what is pertinent to the complaint. Where the complainant is not a client, any solicitor-client privileged information submitted in response to the complaint will be protected by the Society and used only for the purpose of the Society's investigation.

## WHAT THE MEMBER SHOULD EXPECT FROM THE SOCIETY

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- The Society will advise a member of any written complaint received against the member, either at the commencement of a mediation or investigation, or at the time that the complaint is dismissed. Complaint inquiries received by phone, which do not result in a mediation or any further action by staff, will not be communicated to the member.
- The Society will provide updates to the member about the progress of an investigation at intervals of approximately 30 days.
- The member will be provided with sufficient information to enable the member to be fully informed of the allegations and submit a response.
- If a matter is referred to formal hearing, the member will be provided with full and timely disclosure.

## REPORTING TO LIANS

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Responding to a complaint does not relieve a lawyer of their obligations to report matters to the Lawyers' Insurance Association of Nova Scotia, in accordance with the lawyer's insurance policy and their duties under the rules of ethics and professional responsibility.

## CONTACT US

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If you have any questions or concerns about the process, please visit [nsbs.org/complaint-process](https://nsbs.org/complaint-process) or contact the Professional Responsibility department at (902) 422 1491 for further information.