**SOAR Annual Conference: Toronto - November 7, 2013**

**Session Summary: Concurrent Session 4 – Ethics: Herding Cats**

Moderator: **Catherine Bickley**, SJTO - Human Rights Tribunal of Ontario

Speakers: **Matthew Wilton,** Matthew Wilton & Associates, **David Wright,** Law Society Tribunal

*This session explored how to control unethical or unruly behaviour by parties or their representatives while respecting a party’s right to full participation and vigorous representation at hearings.*

Introduction**:**

Ms. Bickley introduced the speakers and mentioned that they had prepared for this session on ethics, Mr. Wilton by practicing his civility and Mr. Wright by taking an improv course. Ms. Bickley then outlined the morning's agenda:

1. Roleplaying a situation in which adjudicators might face ethical dilemmas
2. Civility and the *Groia* case
3. Tools that adjudicators can use for "herding cats"
4. Reasonable apprehension of bias
5. Revisiting the role-play and using the tools discussed

Role-playing Incivility

In *Joan Smith v Monster Homes Inc.*, Ms. Bickley represented the plaintiff, Mr. Wilton represented the defendant, and Mr. Wright was the Small Claims judge. The defendant had failed to attend a settlement conference and was now seeking an adjournment on the basis that the plaintiff had not responded to requests for additional documents. In requesting an adjournment, Mr. Wilton behaved without civility: He claimed that Ms. Bickley was lying and used sexist language when speaking about her. He kept interrupting “Justice Wright” when he tried to keep order in the courtroom.

Civility and the *Groia* Case

Mr. Wilton provided the basic facts of the *Groia* case. **Who?** Joe Groia, the lawyer representing John Felderhof against charges of insider trading. **What?** Mr. Groia's inappropriate behaviour at Felderhof's trial, described by the Ontario Superior Court as "guerrilla theatre". **When and where?** In 2011, nine and a half years after the Felderhof trial began, the Law Society of Upper Canada began hearings into Mr. Groia's alleged misconduct. **Why?** To send a message to the legal profession that the Law Society would not tolerate incivility due to its adverse impact on the administration of justice.

Mr. Groia submitted that "incivility" required a high standard (e.g., racist language), but the Law Society disciplinary panel held that consistent rudeness and constant disruption of the trial process was sufficient to find that a lawyer had been uncivil. The panel found Mr. Groia in breach of Rules 4.01 and 6.03 of the Rules of Professional Conduct on the grounds that Mr. Groia had failed to treat the court with courtesy and respect; that he had undermined the integrity of the profession by communicating in an abusive, offensive, or unprofessional manner; and that he had engaged in ill-considered or uninformed criticism of the conduct of the prosecutors.

Mr. Wilton indicated that the case is under appeal. However, he pointed out that while the *Groia* case dealt with the same overarching principles of civility applied to administrative tribunals, in fact, adjudicators should be even more conscious of civility, as fewer methods for accountability may exist in a tribunal setting than in a court (e.g., a court reporter).

Mr. Wilton referenced *Dore* v*. Barreau du Quebec* when discussing the high standard of behaviour for lawyers and noted that the Law Society suspended Mr. Groia for two months and awarded costs of $250,000 against him (the penalty was varied on appeal.) This was a message to the profession that the Law Society would not tolerate incivility as it had a demonstrably adverse impact on the administration of justice.

Mr. Wilton then asked the audience, "How can we use the *Groia* case to assist us when faced with similar situations?" Mr. Wilton noted that judges and adjudicators should not be making findings that a particular lawyer has failed to be civil in their courtroom or hearing room. In the *Groia* hearing, the panel found that, "to require or expect a judge to enforce the Rules of Professional Conduct to the same extent as a Hearing Panel of the Law Society would rightly be perceived as an infringement on the independence of the bar and, in some case lead to a perception of bias."

Judges and adjudicators must walk a fine line and cannot be overly harsh, Mr. Wilton acknowledged. He suggested that adjudicators did not need to reference the Rules or the *Groia* case, but merely mention "incivility" as a gentle reminder to lawyers to behave professionally.

Tools in Your Toolbox: How to Deal with Incivility

Mr. Wright moved the discussion to understanding the reasons for incivility and finding ways to address problems in the hearing room. He asked the audience why a lawyer or paralegal might behave inappropriately in a hearing room, which would be different from a self-represented litigant. A lawyer might act aggressively because their client has certain expectations and has instructed them to take a more adversarial position, even when there's nothing to be gained. Additionally, a lawyer might not have expertise in the administrative tribunal process.

On the other hand, self-represented litigants may be influenced by “Law and Order” and other courtroom dramas. They may use legal terms without fully understanding their meanings. Some self-represented litigants may have mental health issues or could be using the adversarial litigation process for emotional reasons.

Mr. Wright discussed the importance of adjudicators maintaining neutrality and ensuring that all parties can effectively participate in the hearing process. An adjudicator needs to have enough control of their hearing room to make a decision for the parties.

Next, Mr. Wright discussed s. 25.0.1 of the Statutory Powers Procedures Act and A7 and A9 of the Common Rules of Procedure, which apply to all tribunals in the SJTO.

In discussing the role of the adjudicator, Mr. Wright asked the audience to think about their own demeanour in the hearing room. He listed qualities that could assist them in setting the right tone for the parties and their representatives. A short introduction which establishes the adjudicator's role and demonstrates their knowledge of the case can persuade litigants to trust them, especially if there are particularly contentious issues. The adjudicator might want to set ground rules. Don't hesitate to smile.

Mr. Wright acknowledged that there are two possible strategies: wait and see, or jump in ahead of time. There are pros and cons to both approaches. The latter might be seen as micromanaging, but the former might allow litigants to spin out of control.

The adjudicator must be appropriate when dealing with parties behaving improperly. It is important for the adjudicator to be aware of their own emotions. Reminding parties of the ground rules can help, as can providing written reminders in directions. It may even prove helpful to refer to the incidents in the decisions themselves.

Mr. Wright discussed *Cochrane v Workplace Safety and Insurance*, as well as *Cameron v Ontario (Training, Colleges and Universities)*, two HRTO cases in which the applicants behaved inappropriately and the adjudicators felt compelled to address that behaviour in their written decisions. However, Mr. Wright stressed that it may be better not to quote uncivil comments in the written decision, because it would, for example, give a bigger platform to racist remarks.

Mr. Wright also emphasized that an adjudicator's response to uncivil behaviour should be proportional. Parties should be informed that there is a problem and should be given an opportunity to address their behaviour. Before an adjudicator makes an order, they should explain what it is and why they feel it is necessary. Adjudicators should document the steps they have taken in a written decision or direction.

Section 23(3) of the SPPA says that a tribunal may exclude from a hearing anyone who is representing the party, other than a person licenced under the Law Society Act. This does not mean, however, that lawyers are immune from being excluded. *Universal Workers’ Union (Labourers’ International Union of North America, Local 183)* v*. Laborers’ International Union of North America* established that, while lawyers cannot be excluded for reasons of competence, they can still be excluded for reasons other than competence.

In *A.M.* v*. Michener Institute*, the Tribunal had the power to exclude counsel for failing to follow the instructions of the Tribunal. While excluding a lawyer is an exceptional remedy, it is available for use. *R* v*. Romanowicz* established that unlicensed representatives may also be excluded if it is necessary to protect the proper administration of justice. However, in *Hansen* v*. Toronto (City)*, it was important to consider the more informal nature of administrative tribunals, which allow for a more participatory and inclusive process than criminal courts. Unlicensed representatives should not be held to the same level of competence as licenced representatives.

Tribunals have the power to protect against abuse of process. Rule A8.2 of the SJTO Common Rules allows a tribunal to find that a person is a vexatious litigant in order to prevent abuse of the tribunal's process. This authority followed from the decision in *Drenic* v*. Governing Council of the Salvation Army*, and is affirmed by the Divisional Court in *Dai* v*. Presbyterian Church in Canada*.

Tribunals are to give access to justice while ensuring there is no abuse of process. In extreme cases adjudicators may make use of the ultimate sanction: staying a case for contempt.

Avoiding a Reasonable Apprehension of Bias

Mr. Wilton returned the audience to the *Groia* case to discuss reasonable apprehension of bias, the test for which is found in the *Committee for Justice and Liberty* v*. National Energy Board* decision. He set out the four bases that could give rise to a reasonable apprehension of bias:

1. Where the Tribunal actively intervenes and examines witnesses unfairly
2. Where the Tribunal makes a series of one-sided procedural rulings that exhibit an unbalanced approach towards a party
3. Where the Tribunal demonstrates a hostile attitude by its questions
4. Intemperate language which reveals feelings of antagonism and hostility towards a party

Mr. Wilton discussed a 2007 hearing in which interventions of the hearing panel resulted in a finding of a reasonable apprehension of bias. The panel interfered with the examination of witnesses, intervened fifty-six times, cross-examined witnesses during direct examination, and expressed incredulity during the examination of a witness. Such conduct by a hearing member is inappropriate and stressful to the parties and their representatives, who may hesitate to point out that the adjudicator is creating a reasonable apprehension of bias.

However, not every opinion an adjudicator expresses will give rise to a reasonable apprehension of bias. Mr. Wilton noted that it is acceptable to express disbelief during submissions, but not to a live witness or before all evidence is given. Adjudicators should reserve comments to closing submissions and preserve the appearance by being conscious of the tenor of any interventions they make during the hearing.

In trying to control the tribunal process, adjudicators must be careful not to be hostile or push back too hard. In fact, making conclusions and stating outright that a lawyer has actually breached the Rules of Professional Conduct because of their incivility may lead to a finding of a reasonable apprehension of bias.

Role-playing Incivility: Redux

The panel concluded the session by returning to the role-play. Mr. Wright, as the Small Claims judge, began with an introduction that respectfully set expectations. Mr. Wilton, representing the respondent, made rude comments while seeking an adjournment. The judge asked him to focus on the issues, but counsel for the respondent commented on the judge's competence.

With some patience and directness, Mr. Wright finally got Mr. Wilton to pin down the actual reason for the adjournment. When counsel for the plaintiff objected to the adjournment, Mr. Wilton interrupted her. Mr. Wright directed Mr. Wilton to address the issues and to address Ms. Bickley as "his friend".

The panel concluded by having the audience analyze the role-play. The audience noted that it is more work for the adjudicator to address issues early on and set expectations. It is similar to parenting. Mr. Wright kept directing Mr. Wilton back to the issues rather than trying to characterize Mr. Wilton's behaviour as being rude. Mr. Wright did not complain about Mr. Wilton's conduct and did not try to personalize it—he just tried to change it by refocusing on the issues.

If the language gets really offensive, as in the case of Mr. Wilton using sexist language, then the adjudicator might need to show their teeth. An adjudicator needs to have thick skin, but thinner skin for the other party being harassed by the uncivil lawyer or litigant. It is important to speak up on behalf of the injured party.

An audience member asked at what point should an adjudicator threaten costs? Mr. Wright joked that he was new to this power and that he is not a fan of threatening costs. It is his last resort. Mr. Wilton noted that it is difficult to threaten costs before a finding has been made. If an adjudicator is concerned there is wrangling between counsel, such as leading irrelevant evidence for days, then the adjudicator can put both lawyers on notice that there might be costs if they do not manage their time appropriately.