

## Plenary B: Staff Issues Blast 2012 – Ask the Experts

**Moderator:** Grace Knakowski, Law Society of Upper Canada  
**Speakers:** Mary Camacho, Ontario Civilian Police Commission  
Justice Edward Ormston, Consent and Capacity Board  
Richard Steinecke, Steinecke Maciura LeBlanc, Barristers & Solicitors

### Mary Camacho

Ms. Camacho shared two events that she was involved in. Both times, experienced professionals lost control of their emotions. Even the most trained individual, regardless of his or her skills and background, can get emotional when a heated issue is debated. This can happen even when the individual should know better. As an adjudicator or a member of staff, you need to be prepared for these types of reactions.

Ms. Camacho pointed out that we must always remember that tribunals fulfill a critical role in providing a transparent and accessible means of dispute resolution. Tribunals exist solely for their users. They cannot fulfill their function unless they are accessible to the people who want to use them. Justice must not only be done, but also be seen to be done. Finally, tribunals have to facilitate quality participation. Facilitating quality participation may be challenging, however parties have to feel that they are being heard throughout the process.

Ms. Camacho listed some recommended strategies:

- Provide proper training for staff. For example, training on how to deal with difficult behaviors, workplace violence prevention programs or crisis response training.
- Use plain language in all communications.
- Manage party expectations. Ensure that they understand what they can expect from the tribunal.
- Treat individuals with the same level of respect and professionalism regardless of their behavior.
- Treat each conversation as though you are being recorded.
- Maintain a principled evidence-based approach with a focus on objective issues.
- Use active listening. Ask probing questions when appropriate.
- Be flexible by using the best method of communication available. Choose the method on a case by case basis.
- Develop a plan on the most effective way to deal with an individual. For example, precluding oral communication may be appropriate in some cases.
- Train staff to consult with a manager to determine an appropriate response and the level of security required.
- Document all interactions, particularly contentious ones, including:
  - The nature of the communication and any challenges.
  - Quote what the person said, refer to the actual behavior if possible.
  - Record the names of potential witnesses who may have seen or heard your communication.
- Develop an information brochure that sets out the following:
  - Who does what and when in the adjudicative process.
  - A list of possible motions and timelines.
  - Information about resources for legal aid.
- Create and maintain a clear website.

### **Justice Edward Ormston**

Justice Ormston explained that he has a background of working in the mental health field and dealing with mentally ill individuals. From his perspective, the key to supporting individuals with mental illness is the staff.

He says that, as a profession, we must be more attuned to these types of issues. The baby boomers are reaching a critical age where dementia and Alzheimer's will take center stage and given the current economic conditions, the likelihood is that reductions to government budgets will be ongoing.

Justice Ormston commented that hiring the right staff and training them appropriately is paramount. He stated that staff needs to understand the social problems that are at the core of the legal issues. When hiring your staff, look for empathy, respect for dignity and understanding of mental illness. Staff need to have an empathetic approach.

Staff need to be aware of the fact that there is still a considerable stigma attached to mental illness. Additionally, they need to be prepared to deal with individuals who are often lonely and isolated.

Mental illness is a chronic illness, just like diabetes. You don't let it rule your life, but you work around it and manage your way through it. At the Consent and Capacity Board, they do a lot of staff education on these issues.

Staff members are taught that sometimes they have to communicate slowly in efforts to accommodate patients who speak English as their second language. Additionally, they are taught that they must accommodate the needs of the patient. For example, a patient may need to take frequent breaks.

At the Consent and Capacity Board, the stakes are high and the timelines are tight. When a person makes an application, he or she must get a hearing within seven days. A decision is released within a day. At the end of the day, we must remember that the person that we are focusing on is the patient. This person is detained against his or her will. On arrest, one is given a bail hearing the next day. Psychiatrists have a greater power to detain than policemen do. If you are deemed to be a danger to yourself or others, you will be detained for three days.

At the Consent and Capacity Board, members are instructed that they have to look at the issues through the lens of equality to evaluate the experience of the person with a mental illness. Members are instructed to facilitate the active participation of the parties. They are trained to ensure positive rights (these include: the right to be heard, the right to know the case against you and the right to have representation).

He stated that it all starts with your own mental health. Staff members need to be aware of their own mental health issues. Assess yourself continually as many people suffer from anxiety, post traumatic stress disorder or depression. Remember that a physical disability may be resolved or dealt with quickly in some cases but a mental disability can be trickier and may take longer to resolve.

## **Richard Steinecke**

### Self-Represented Litigants

Richard Steinecke began by addressing how administrative tribunals can support self-represented litigants. He identified several useful strategies that have succeeded in practice.

Mr. Steinecke advised that the tribunal develop a relationship with a legal aid clinic. Creating such a link benefits both the tribunal and the unrepresented litigant by saving time and resources spent searching for counsel.

Another helpful strategy is to require mandatory pre-hearing conferences. In addition to helping the self-represented litigant understand tribunal procedures, pre-hearing conferences enable a tribunal to narrow down legal issues, which lessens the complexity of the hearing to the self-represented litigant.

Mr. Steinecke also noted how important it is for a tribunal's written resources to be in plain language. Such resources include forms, checklists, and documents answering "frequently asked questions". The self-represented litigant may be disadvantaged if such documents are written in legalese. Further, Mr. Steinecke noted that tribunals should consider assisting self-represented litigants to fill out various forms. However, he cautioned that assistance in filling out forms should not cross the line over to assistance in preparing arguments.

Continuing on the theme of clarity of legal communications, Mr. Steinecke noted that scripts prepared for tribunal Chairs should be in plain language, both at the beginning and at all stages of a hearing.

Mr. Steinecke stated that it can be useful to refer the self-represented litigant to the lawyer for the other party. Also, he noted that Independent Legal Counsel can be a useful resource to explain the process to a self-represented litigant.

### Case Management vs. Adjudication

Next, Mr. Steinecke discussed adjudication and case management.

Mr. Steinecke noted that pre-hearing conferences can be used to manage cases and prepare them for adjudication. Pre-hearing conferences can be used both to plan the overall direction a hearing takes as well as to negotiate agreements and commitments among the parties. However, Mr. Steinecke cautioned that it is only the tribunal members that should be the ones giving directions to the parties and making orders for the hearing. Also, Mr. Steinecke stated that only the outcomes of a pre-hearing conference should be reported to the public. That is, discussions between the parties during the conference should be kept confidential.

Also, Mr. Steinecke discussed the importance of rules of procedure to case management. Thus, he noted that tribunals should take care to have well developed rules that deal with topics such as bringing motions, disclosure obligations, taking evidence before a hearing, vulnerable witnesses, and written/electronic hearings.

Other useful case management tools identified by Mr. Steinecke include: time estimates and time commitments made by counsel, entering evidence in chief via affidavits, having expert witnesses testify at the same time, having expert witnesses submit a joint report of agreements and disagreements, and requiring full mutual disclosure by the parties.

### Parties with a Mental Health Illness

Next, Mr. Steinecke spoke about how to effectively and respectfully provide service to parties with a mental health illness. He discussed two cases in relation to this topic: *Riad v. Health Professions Appeal and Review Board*, 2012 ONSC 2728 and *Gligorevic v. McMaster*, 2012 ONCA 115.

*Riad* held that, to accommodate a disability, it was proper to convert from an oral hearing to a paper hearing. *McMaster* held that ineffective representation amounts to unfairness.

Mr. Steinecke then discussed strategies that can be utilized when providing legal services to parties with mental health illnesses. These include: assisting with paperwork, referring the person to community support persons, encouraging legal/paralegal or friend/relative assistance, and informing the tribunal of the possible need for a “friend of the court”.

### Conclusion

Mr. Steinecke concluded by stating that no over-arching best practice exists in administrative law. Rather, “best practices” vary with the context. Nevertheless, Mr. Steinecke noted that good examples can be found in the case law, scholarly literature, advisory board studies, regulatory and government websites, and law firm websites.

### **Questions and Answers:**

1. A question was asked regarding whether it is appropriate for administrative tribunals to inform litigants where they can go to obtain monetary compensation.

Ms. Camacho noted that she is hesitant to provide litigants with specific directions as to which forum they should bring their complaints to. She added that her response would be to tell the person to attempt to find representation or obtain legal aid if necessary.

2. The panelists were asked about what administrative tribunals can do to handle violent respondents.

Justice Ormston noted that administrative tribunals are mandated by law to be given the same respect as judges in court. Thus, he stated that respondents who disrespect tribunal members should be reported.

3. A question was raised about how tribunals can reconcile the need to be empathetic to respondents with the need to serve the public.

Justice Ormston stated that the tribunal needs excellent staff that can handle the various requirements placed on them. Further, he added that it is vital to always maintain empathy for mentally ill respondents.