







toronto

Training of Discipline Committee Members

- A Tribunal retains ILC to provide its members with legal advice as required.
- ILC are to provide accurate and impartial legal advice.
- ILC must respect the role of the Tribunal. ILC's role is purely advisory; the Tribunal is the decision maker.
- In order to ensure a successful hearing, ILC provides training to the Tribunal
 - Pre-hearings
 - Motions
 - Discipline hearings
 - Reasons for Decision (guidance within the limits set by the courts)
- ILC is also available to assist the Tribunal and, in particular, the Chair of the panel during the course of a hearing with:
 - (a) the proper procedure to be followed; and
 - (b) legal advice.

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Importance of the Chair of the Panel

- Given the responsibilities of the Chair, the Chair should be chosen from amongst the most experienced panel members.
- The role of the Chair generally is to act as a moderator for the hearing.
- The Chair also acts as a spokesperson for the panel in stating decisions of the panel on the record.
- The Chair continues to act as a moderator during deliberations and finalization of written decision and reasons.
- Chair sets the Tone for the Hearing.
- These are quasi-judicial proceedings, and the panel must behave, and be seen to behave, like judges.
 - Must have, and be seen to have, an open mind.
 - Must be seen to take proceedings seriously
 - Must dress and act in a manner that reflects the seriousness of the proceedings and the role of the Chair of the panel.
- The Chair plans the Hearing.

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

- The Chair should decide in advance of the hearing which member of the panel should:
 - Keep track of exhibits
 - Keep detailed notes
- Chair decides in conjunction with the panel who will take primary responsibility for preparing the first draft of the decision and reasons
- The Chair must be familiar with the Order of Proceedings in order to properly direct the hearing
- The Chair swears or affirms the witnesses
- As exhibits are tendered, the Chair confirms (unless there is an objection) that the exhibit has been entered.
- When objections are made, the Chair directs the order of the parties making submissions and confers with the panel when making a decision, which the Chair then communicates to the parties on the record.
- The Chair should ensure appropriate breaks during the course of the day to allow the court reporter to rest.
- The Chair needs to be able to deal with the unrepresented member and/or holder
- The Chair requests the advice of ILC as needed

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Advice on Evidence - Admissibility and Weight

Role of ILC During the Hearing

- ILC should be asked for advice, even when it appears that the parties are in agreement on a point of procedure or law.
- ILC will not give advice unless asked.
- ILC's legal advice must be given on the record, and the parties must be given an opportunity to respond.

Evidence

- The findings of panel should be based exclusively on evidence admitted before it.
- Accordingly, a panel cannot take account of its own expertise to reach a conclusion about which there is no evidence before it
- Panel members can use their expertise to assess and understand the evidence, but the evidence must be before them before they can assess it.

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Admissibility of Evidence

- Relevant
- Material
- Not offend any Exclusionary Rule

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Weight to be given to Evidence

- Believability
- Reliability
- Credibility
- Informative
- (Probative Value)

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Assessing Credibility

- Panel members must rely upon their common sense and experience to decide whether an individual is telling the truth.
- The courts have held that where a decision maker makes a finding of credibility, the reasons for that conclusion must be stated.
- Criteria for assessing can include:
 - (a) Appearance and demeanor of the witnesses;
 - (b) The witnesses' manner of testimony;
 - (c) The witnesses' opportunity to observe events;
 - (d) The witnesses' capacity to remember;
 - (e) The probability or improbability of the evidence - "Does it ring true?"
 - (f) The witnesses' prior inconsistent statements, if any;
 - (g) Whether the witnesses' testimony has been contradicted by other(s) considered to be more credible;
 - (h) The witnesses' interest in the outcome
 - (i) The witnesses' partisanship

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Importance of Well Written Reasons

The Importance of Reasons

- At the conclusion of every hearing, the panel has an obligation to prepare a written decision with reasons which is then provided to the parties.
- The purpose of written reasons may be summarized as follows:
 - a) To ensure that the Association and the applicant have confidence that the panel carefully considered the matter in light of all of the relevant evidence.
 - b) To ensure that anyone who reads the decision will understand why and on what basis the Registration panel made its decision.
- The best reasons are written with the "losing party" in mind. Both parties - but especially the losing party - should have confidence that the panel carefully considered the matter in light of all the relevant evidence.
- The panel's written decision and reasons will be used as a basis for any appeal or judicial review.

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

- Deference is extended to decisions of panels for two reasons:
 - The panel heard and saw the witnesses and was therefore in the best position to make the findings, and
 - The panel has a special expertise and is best equipped to determine whether the member engaged in conduct in breach of professional standards.
- Failing to give adequate reasons may, *in and of itself*, be sufficient grounds for a successful appeal or judicial review.
- Thorough reasons, which outline not just the evidence but the use of the panel made of the evidence, is crucial.
- "A Board's decision deserves deference where it has furnished adequate reasons to a court from which the court can satisfactorily determine the basis on which the Board arrived at its decision and the extent to which it brought its own expertise to bear. A recital that evidence of the parties and their arguments has been considered, without any statement as to specifically what evidence the Board accepted or rejected, is but a rote assertion, deserving of little weight." *McGuire v. Royal College of Dental Surgeons*.

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Importance of Well Written Reasons

Contents of Written Reasons

- Reasons must contain a review of the evidence and the significance attached by the panel to the various matters considered by the panel.
- It is not necessary to summarize the evidence in minute detail, but significant evidence should be reviewed.
- Where there are disputes over the facts, the panel should make specific findings of fact indicating which evidence has been accepted and which has been rejected and why.
- Reasons for findings of credibility should be stated.
- Reasons should address all the points raised by the parties.
- Reasons *must* disclose the reasoning process used by the panel to arrive at its conclusion.

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Deliberation and Preparation of Outline of Reasons

- It is recommended that a panel develop a written outline of its decision during deliberations.
- The person who will write the decision (this person does not have to be the Chair) should act as a secretary to record conclusions made by the panel.
- The outline should contain in point form all of the relevant information concerning the panel's decision and reasons with respect to all of the issues, including findings of fact, findings of credibility, assessments of expert opinion, etc.
- While the Chair may moderate and guide deliberations, the Chair must ensure that all panel members have the opportunity to fully participate.
- No one other than the panel members - not even ILC - may participate in the deliberations.
- If panel requires submissions on a point of law in order to assist with the deliberations, the panel can request the advice of ILC.
- ILC's legal advice will then go on the record, and the parties must be given an opportunity to make submissions.

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org

toronto

Contact Information

 Christopher Wirth
Keel Cottrelle LLP

T: 416-367-7708
E: cwirth@keelcottrelle.on.ca

 © CLEAR
Council on Licensure, Enforcement & Regulation
www.clearhq.org
