



**Regulation Matters:
a CLEAR conversation**

Episode 19: Addressing Mental Health Concerns in the Investigative Process

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Line Dempsey: Welcome to our podcast, Regulation Matters: a CLEAR conversation. I'm your host, Line Dempsey. I am currently the Chief Compliance Officer with Riccobene and Associates here in North Carolina. I'm on the CLEAR Board of Directors as well as the current chair of the National Certified Investigator Training committee and vice chair of the annual conference program committee with CLEAR. As many of you are aware, the Council on Licensure, Enforcement and Regulation, or CLEAR, is an association of individuals, agencies, and organizations that comprise the international community of professional and occupational regulation. Our podcast is always a chance for you to hear about the latest and greatest in our community.

And today, I'm joined by the presenters for a session in the compliance and discipline track at CLEAR's Annual Educational Conference occurring this September in Minneapolis. We'd like to give you a sneak peek at what's in store for this session. The session is entitled "Addressing Mental Health Concerns in the Investigative Process." I welcome first Mark Piore and Jenna Smith; they're both with the College of Registered Psychotherapists of Ontario. And Dean Benard with Benard+Associates. We're glad have you with us today.

Guest speakers: Thank you. Thanks very much; glad to be here.

Line: Well great, well I really do appreciate you guys joining me. First, let me turn to Mark with this question. Mark, can you provide some general background on the issue of accommodating mental health in investigations?

Mark Piore: Of course. Mental health is a far-reaching issue in society. Globally, one in every six or seven people have a mental or substance use disorder. Mental health also has numerous implications for professional regulation. Some of these include asking about conditions or disorders at entry to practice, accommodating needs during exams, and incapacity of registrants or licensees during a discipline hearing. Mental health may be relevant to limiting the disclosure of health records held by third parties. Also, when determining penalty, mental health challenges may be a mitigating factor.

Another area which I have found perhaps has received less attention is during complaint investigation. When a regulator is in the process of obtaining statements and documentation following receipt of a complaint, various issues relating to mental health can arise. It's some of these issues we're going to talk about today. We won't have time to cover all scenarios or strategies, but they can involve having to adjust one's approach to interviewing, managing behavior of witnesses or registrants, deciding whether to use written versus oral communication, employing sensitivity and flexibility, and handling mental health records appropriately.

Line: Great, well, let me then turn this to Dean. Dean, where and how might mental health be relevant in the work of a frontline regulatory investigator?

Dean Benard: Well thanks, Line. As Mark already indicated, mental health is a component really in all walks of life, and of course, regulatory investigations is no different. Mental health issues that we see in regulation can range from behavioral issues, comprehension challenges, the way people present information--all of this can be an issue for us as investigators to deal with. And in addition, it can also be the core of what is being investigated.

So we certainly see these types of issues in a lot of ways, and I think it's important for investigators to understand that mental health issues can arise, as I said, in any number of ways. Any of the people we deal with, including complainants, licensees, and witnesses, can potentially display symptoms of mental health conditions, and so mental health issues can impact the investigator's ability to obtain information. And because of this, investigators can run into things like a lack of co-operation, situations where the party they're dealing with is providing information that might be unreliable, and investigators need to be able to recognize these situations quickly and adjust their approach. So in cases where mental health issues are a key aspect of what's actually being investigated, investigators should be aware and educate themselves through appropriate consultation, so they can understand the best evidence to obtain as well as where and how to obtain it. And consultation can also be very useful if you know you're going to be dealing with someone who has a particular diagnosis or displays known behaviors. In these cases, the investigator can obtain assistance or guidance with strategies for communications that will best apply in the circumstances.

Line: Yeah, from my 16 years of work with the Dental Board, we certainly ran into this scenario all the time, although it was very rare for me to know ahead of time. That would have made things a lot easier. Let me ask this of Jenna then: From a regulator's perspective, what issues can arise when a participant in the investigation may have a mental health challenge or condition, from a regulator's side?

Jenna Smith: Yeah, so I'll start with an issue that can occur at the beginning of the process. Most regulators have a standardized process for receiving complaints and it usually involves the submission of a complaint form in writing. So the complainant is usually asked to detail their experience in the form of a coherent story. For someone struggling with mental health, the process of reliving difficult experiences can be triggering, re-traumatizing, and potentially unsafe. Furthermore, thoughts specific

to the events in question may not translate into a fluid story. Staff and investigators are then faced with the challenge of fleshing out the issues to be investigated and determining the appropriate method to do so.

Another issue we have observed is the need for constant contact with staff. People struggling with mental health might ask more questions than usual, call frequently seeking emotional support, or submit excessive documentation. This can be onerous on staff time if appropriate boundaries are not set.

A final issue to consider is staff safety. Please note that safety concerns may arise separate and apart from mental health issues, and most people with mental health challenges don't pose a risk to themselves or others. However, if a participant is engaging in threatening or verbally abusive behavior, the college [regulatory body] should have a safety plan for addressing communication with that particular person. This is especially true if the person is threatening to attend the college's office unannounced.

Line: That's good advice, for sure. Back to Mark, I guess. What legal principles apply to these situations?

Mark: Thanks. There are two main areas of law, I'd say, likely to be relevant to accommodating mental health in complaint investigations. The first is Human Rights Law, or civil rights or anti-discrimination law. The second area is procedural fairness, or natural justice or due process. In terms of human rights law, I'll use Ontario, Canada as an example. Under the Ontario Human Rights Code, service providers, including self-governing professions, must accommodate the needs of individuals with mental health disabilities to the point of undue hardship. To give an obvious example, it could amount to discrimination not to investigate a complaint for reason that it was made by a person with a mental disability. While this may sound straight forward, it becomes more complicated if it seems the complainant is filing numerous complaints that don't have obvious merit. Ultimately the right to have a complaint considered should be limited only in the clearest of cases. It could also be discriminatory to insist on a written complaint from someone whose disability does not allow them to sufficiently express their concerns in writing, as Jenna was alluding to.

While discrimination could lead to a human rights complaint, a lack in procedural fairness could result in the complaint decision being overturned by a court or tribunal. One component of procedural fairness is having unbiased decision-makers. Stereotypes and stigma surrounding mental health may relate to how affected individuals might behave as well as their memory and perception of events. It is important always to look at actual evidence or actual behavior and not rely on assumptions about how a person's disability may impact their behavior or credibility.

Another component of procedural fairness is for the parties to have a meaningful opportunity to be heard. In the context of regulatory investigations, this could mean asking if any accommodations are required, granting time extensions, holding interviews instead of relying on written correspondence or

vice versa, or going to the witness to collect a document rather than waiting for it to be sent.

Another application of procedural fairness is in disclosure of documents. Sometimes the respondent licensee will have a concern about allowing the complainant to view the respondent's response to the complaint and the documents investigated. These documents could include the complainant's own health record held by the respondent. The respondent might believe disclosure could adversely affect the complainant's mental health or even pose a risk of harm to the complainant, respondent, or others. So on one hand, procedural fairness may require the complainant to have an opportunity to tell their side of the story by commenting on the complaint response or on their own health records. On the other hand, however, the regulator needs to respond to legitimate safety concerns. Questions to ask in this scenario could include, does the complainant have a history of threats or violence; are they acutely ill; are they likely to misinterpret information; are they in close contact with the respondent or other witnesses; is there any expert evidence on file regarding the complainant's condition? By asking such questions, a regulator is more likely to make a decision based on evidence and strike an appropriate balance of fairness among those concerned.

Line: That's excellent advice. But let's face it, issues are gonna happen. I guess Jenna, going back to you, what strategies or solutions can regulators adopt to resolve dilemmas that arise for regulators when you're dealing with some type of investigation like this?

Jenna: Yeah, great question. So, creating solutions is really about creating equity. In other words, how can the regulator ensure all participants have a fair opportunity to engage in the process? In terms of specific solutions, don't be rigid... Be creative.

Circling back to my first example, complainants may require assistance to complete the complaint form. In one case, we arranged for one of the investigators to sit down with a potential complainant to help complete the form together. The investigator acted as a scribe and an unbiased party to assist in organizing the complainant's thoughts. The complaint process can be grueling for the participants, and it's often perceived as bureaucratic and impersonal. Making simple changes, such as using "I" instead of "we," can go a long way.

Creating stability in the regulator's relationship with that participant will also assist in building trust and a positive rapport. For example, we have assigned specific staff people to be a direct point of contact for individuals who may require additional support. This means that a complainant or registrant with mental health challenges can call the College and expect to speak with the same person every time.

Staff have also made changes to assist in the disclosure of information throughout the complaints process. For example, staff might place a phone call before disclosing sensitive information, to explain to recipients that the information they are about to receive might be difficult to read. This affords the recipient the opportunity to decide whether they want to receive the documents. Staff have also accommodated requests to send materials on a specific day of the week so the recipient can read and

process and materials in a safe place with their support team. In one case, staff obtained the appropriate written consent to send complaint documents directly to the recipient's new therapist.

It's important to be mindful that distributing information to participants at the end of the day or right before the weekend may leave them feeling unsupported and abandoned. Staff do not send sensitive materials on Friday afternoon if they have not had a chance to speak with the recipient directly. If staff are aware that a person's mental health has diminished with the progression of the complaint file or if a person has been hospitalized for reasons related to their mental health, staff might choose to redact sensitive information, provide a summary, or proceed without disclosure if the response is not necessary for the panel to make a decision.

While colleges aim to be as accommodating as possible, it's also important to create boundaries in communication. If the person is being verbally aggressive over the phone, you might choose to limit contact to email communication. If you have potentially unsafe or unpredictable participants who are threatening to attend the office of the regulator unannounced, it might be wise to notify your receptionist or have a policy for walk-ins.

Line: Those are all great strategies. I appreciate that. Well, Dean, in what ways can investigators accommodate a witness when dealing with mental health difficulties? We can see how it goes for a regulator there, as Jenna described. But I guess for those going in the field or maybe meeting with these individuals, how can they handle that or accommodate them the best way?

Dean: Now, that's a great question, Line. And in fact, you touched on one important point earlier when we were starting this discussion, and that was that in the majority of cases, investigators are likely not going to be aware of a problem 'til they're in the midst of it. And so, because of this, investigators need to utilize communication skills and techniques that promote calm, concise, and uncomplicated approaches to interviewing. And I would argue that this applies to all those we interview, not just people who pose a challenge or who we suspect might have some degree of mental illness or incapacity. Just because a person might have a mental illness doesn't mean that they're going to display any symptoms or behavior that poses a problem. On the contrary, we sometimes run into people who aren't known or perhaps don't have any particular diagnosis of any kind of mental illness that can pose massive problems.

Line: Right.

Dean: So, it's important for investigators to be ready all the time. We have to be aware that obstructive or difficult behaviors that we see are not always rooted in mental health issues. And determining if they are, quite honestly, might be a waste of time and effort, particularly when you're in the field, in the moment. Instead, we have to have a large tool box of de-escalation techniques and effective communication strategy so that we can counter any difficult behavior we face, regardless of its root cause. So in some instances, mental health issues can lead to withdrawn behavior, and the skills required to accommodate that are gonna be very different than the skills we use to de-escalate

embellished emotional outbursts or even threats. So those are certainly some considerations.

As well, I would say environment is another important consideration for accommodation. For some, they want less private, and others want a more private space. I've had people say to me, "I won't meet you anywhere but in a public cafe" or something along those lines, which can pose other problems related to things like confidentiality and stuff like that. So we have to be able to work with people and find that happy medium. And so, in this regard, sometimes a good strategy is to give some control to the people who we're dealing with or at least let them have some input on location, for example. Also it's, I think, a good strategy to allow interviewees to ask questions at the outset of their interview because this can help address issues that are playing on their mind. Again, mental health issues notwithstanding, sometimes dealing with these things that people are thinking about at the front end of the interview can alleviate early their concerns, and this can result in avoiding problems later in the interview.

Some interviewees might display erratic behavior, displaying multiple emotional responses. And investigators have to be very patient and calming in their approach, using communication techniques that will allow for reasonable and useful communication. And once again, as I mentioned in my earlier answer to you, it's important that investigators get assistance to understand the nature of the accommodation that might be required. If they're fortunate enough to know beforehand what they might be dealing with, then get some help, get some advice. A lot of investigators--in fact, I would argue, the majority of investigators--are certainly not mental health professionals. And so if you have access to that kind of support, I think it behooves investigators to access that support and be as prepared as they can be for circumstances where they might know in advance what's going on.

Line: Right, perfect. Well I think this has been a really great discussion and I think it's a great lead-in to our conference session that we're having. I guess, as we wrap things up a little bit here now, Jenna, let me ask you this. Is there a takeaway, if you would, for this for the upcoming session?

Jenna: Yeah, I think the main takeaway in processing complaints involving individuals with mental health challenges is to be patient and take a more personal human approach. When these issues arise, it's really important to the college to be sensitive to potential triggers and to have a system which ensures all staff are aware of any special requests or accommodations made by the complainant or registrants.

Line: Perfect. And Mark, any homework people should do prior to the conference?

Mark: Yes, we would welcome listeners to email us (complaints@crpo.ca - you could put subject line: CLEAR conference) and send us any requests to focus on particular aspects or questions relating to this topic in advance of the Annual Educational Conference.

Line: That'll be great. Well, I appreciate you offering that as an option. Well, I wanna thank both of you, actually all three of you-- Mark, Jenna, and Dean--for your time and being a part of this podcast.

It's a wonderful way to have the time to share and talk about these things and especially getting a sneak peek, if you would, of your session that's coming up at the Annual Educational Conference in September. So again, thank you for speaking with us. And thank you, our listeners, for joining us. We'll be back with another episode of Regulation Matters: a CLEAR conversation very soon. Please subscribe to our podcast on Podbean, iTunes, Apple podcast, Google podcast and Google Play, Stitcher, Spotify or TuneIn. We're available in a lot of different media.

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Finally, I'd like to thank our CLEAR staff, specifically Stephanie Thompson, our content coordinator and editor for this program. Once again, I'm Line Dempsey and I look forward to speaking to you again very soon.

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