

Protecting your Investigations from Allegations of
Impropriety or Incompetence

Presented by: Dean Benard, Benard + Associates
Bonni Ellis, Ellis Smith Mendicino LLP
Marco Mendicino, Ellis Smith Mendicino LLP



Council on Licensure, Enforcement & Regulation
www.clearhq.org
© CLEAR 2013

Audience Question

Do you feel that investigators and the
investigation process are under greater
scrutiny now than ever before?

- A. Yes
- B. No

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

© CLEAR 2013

Why?

- New investigation techniques
- Greater complexity in cases
- Continuing evolution of rules, case law and legislative requirements
- More serious cases with greater stakes
- Sometimes there is little or no defense on the merits of the case
- Investigators are human and make mistakes

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

© CLEAR 2013

Key Areas of Concern

- Bias/Conflict of interest
- Breach of confidentiality/privacy
- Abuse of Process
- Incompetence
- Institutional Delay
- Misconduct
- Tips on Testifying

© CLEAR 2013

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

Reflect

- Take a look at your practice and ask yourself:
 - Do I cut too many corners
 - Have I dodged a lot of bullets
 - Do I worry when some of my cases are being reviewed for prosecution
 - Am I lazy sometimes
 - Can I justify my decisions and choices

© CLEAR 2013

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

Conflict of Interest

- Conflict of interest can arise when an individual is, or is perceived to be, in a position to make a decision/take action that could directly or indirectly benefit them or someone they know
 - Financial benefit (perceived or real, actual or potential)
 - Other benefit (perceived or real, actual or potential)

© CLEAR 2013

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

Bias

- Bias is the absence of neutrality, impartiality and objectivity
 - Connection to participants
 - Prior knowledge of case/member
 - Professional/personal connection to a party or witness
 - Impetus to decide case/issues/credibility in favour of or against one party
 - Strong connection to issues raised by case
 - Real or perceived, actual or potential benefit

© CLEAR 2013

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

Bias



© CLEAR 2013

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

Conflict of Interest vs. Bias

- In most cases, an individual in a real or perceived conflict of interest will be deemed to have a reasonable apprehension of bias.
- An individual can be deemed to have a reasonable apprehension of bias for reasons other than a conflict of interest.

© CLEAR 2013

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

COI- Audience Questions

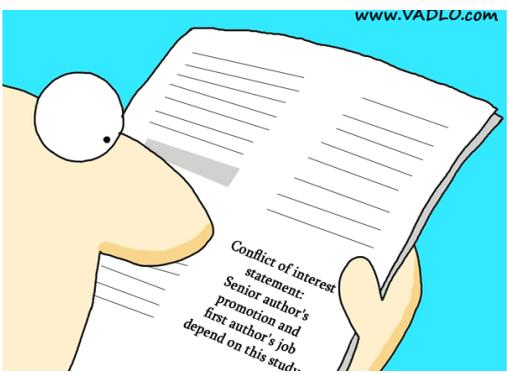
You have been assigned to investigate a registrant who was a friend when you attended school together. You always had a very good relationship with the registrant.

Is this a potential conflict of interest?

- A. Yes
- B. No

Allegations of Conflict of Interest

- Failing to declare potential conflicts
e.g. You have a connection to a party to the process
- Allegation you are bought and paid for
- An in-house investigator assigned to investigate another in-house staff person or committee member



Avoiding COI Allegations

- If you have any doubt about whether you may have a conflict, report it to the appropriate person
- It doesn't have to be real to be a problem - it's about perception and potential too
- Avoid investigating individuals you have some connection to or report any such connections to the other side

© CLEAR 2013

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

Four Sources of Bias

- Relational bias: inclination to favour one side due to relationship
- Informational bias: inclination to favour/disfavour one side due to prior information
- Attitudinal bias: personal feelings on an issue
- Operational bias: procedures that result in unfairness to one side

© CLEAR 2013

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

Allegations of Bias

- Racial/gender profiling
- Influenced by past history
- Language bias
- Failure to consider alternative theories
- Aligning yourself with the position of a particular party
- What you include/don't include

© CLEAR 2013

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

Bias - Case Study

- At a hearing the defense attorney brings a motion that the case should be thrown out since it was referred for a hearing based on skewed and biased information provided by the investigator.

Bias - Case Study

The lawyer points to several excerpts from the investigator's report:

- "The registrant admitted he didn't like the complainant."
- "The registrant laughed at the victim."
- "The registrant has a history of aggressive behavior."
- "There is clear evidence to demonstrate the complainant's allegations."
- "The investigator questioned the registrant again as his credibility was in question."

Bias - Case Study

- In cross-examination, the defense attorney asks the investigator to comment on the following notations, which appear in the margins of his handwritten notes:
 - "He's lying"
 - "yeah right"
 - "credible witness - presents well"
 - "dirt bag" (this one is crossed out but can be read if paper is held up to the light)

Bias - Legal Test

- In Canada, need to demonstrate “closed mindedness” at investigative stage, and not just a reasonable apprehension of bias, before proceedings will be prohibited.

Bias - Audience Question

After the regulator receives a complaint, the registrant is provided with a copy of the complaint and an opportunity to respond. The registrant’s response is then sent to the complainant for commentary. This represents the end of the process: the registrant is not provided with any further opportunity to respond to the complainant’s commentary. A registrant challenges this process on the basis of “operational/institutional bias”.
Do you agree that this process suggests bias?

- A. Yes
- B. No

Bias - *Slaeman Case*

- Accusation that investigator had “rushed to judgment” regarding subject’s guilt before the investigation was complete.
- Investigator had authored draft letters, concluding that the subjects had allowed others to use their passports.

Slaeman v. Canada (A.G.), 2012 FC 641(CanLII)

Bias - *Samborski Case*

- Biased alleged against investigator on several grounds, including:
 1. Failure to include two interview transcripts in copy of report sent to member
 2. Inclusion of newspaper clippings in the report
 3. Tone of interviews with complainants
 4. Pursuit of evidence irrelevant to complaint
 5. Failure to offer member chance to tell his side

Samborski v. B.C. College of Teachers [1997]
B.C.J. No. 2753 (QL)

© CLEAR 2013

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

Bias - *Samborski Case (cont.)*

- Putting to witnesses conclusions he had drawn
- Sought agreement from subjects in a leading manner
- Suggested that member had done “a pretty good hatchet job” on one subject
- Suggested that the member “might fire her too” to another subject
- Suggested that “authority, even when found out, can carry on”.

© CLEAR 2013

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

Bias - *Samborski Case (cont.)*

- The issues, taken together, were found to constitute “operative bias” against the member.

© CLEAR 2013

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

Avoiding Bias Allegations

- Take fulsome notes during interviews
- Avoid comments that reflect your own views or that could be misconstrued
- Ask neutral, non-leading questions
- Ask questions near the end such as, “is there anything else you can tell me that might help me better understand the situation”

© CLEAR 2013

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

Avoiding Bias Allegations

- Always document what you did do as well as what you didn't do and why
- Be very careful of the language you use in reports
- Think in terms of what information is relevant to the issues and not only in terms of what will prove the case
- Prepared to be challenged about your neutrality and objectivity whenever you testify

© CLEAR 2013

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

Breach of Confidentiality vs. Privacy

- Breaches of confidentiality: disclosing information that you have obtained in the course of the investigation to those not entitled/required to receive that information
- Breaches of privacy: obtaining information about individuals that you are not entitled to receive

© CLEAR 2013

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

Allegations of Breach of Confidentiality/Privacy

- Providing inappropriate information about the subject with other witnesses
- Providing confidential documents to others
- Losing documents or failing to secure them properly
- Allowing others to hear what is being said
- Attempting to obtain information that may not be relevant to your case

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org



“Somehow your medical records got faxed to a complete stranger. He has no idea what’s wrong with you either.”

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

Confidentiality/Privacy - Hooper case

- Hooper was terminated from her employment related to incidents of professional misconduct
- The investigator requested her Occupational Health File and it was provided
- The registrant argued there was no authority to provide/receive the file on the basis that it contained health information
- Regulator trying to use professional misconduct regime to obtain incapacity information

Hooper v. College of Nurses of Ontario, [2006] O.J. No. 2696 (Div. Ct.)

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

Confidentiality/Privacy - Hooper case (cont.)

- The court disagreed with the registrant and stated the investigator had the authority based on the following:
 - Her powers of investigation under the statute
 - The documents sought were relevant to the subject matter of the investigation
 - Public interest takes precedence over protection of a person's personal health information

Breach Confidentiality/Privacy - Legal Ramifications

- American and now Canadian courts both recognize the tort of intrusion into an individual's seclusion or solitude
- Admissibility of evidence in proceedings
- Confidentiality provisions in governing statute
- Jurisdictional challenges

Avoiding Allegations of Breaching Confidentiality/Privacy

- Know the various privacy legislation that applies to your investigative work
- Understand your organization's interpretation of that legislation and how your powers of investigation may be impacted - both what you can obtain and what you can share
- Know what can and cannot be shared in the course of your duties

Avoiding Allegations of Breaching Confidentiality/Privacy

- Consider a personal policy of sharing information on a “need to know basis”
- Ensure the appropriate level of privacy when interviewing
- Keep information appropriately secured
 - Evidence and other materials

Confidentiality/Privacy - Audience Question

The investigator asks the following question of a witness, who is a colleague of the subject:

“During your colleague’s termination meeting, she said that you and the other staff have been out to get her from the start. She said that the complaints you have all lodged with the regulator were unfounded, particularly the one about her being “spacey” at work. She said that the real issue is her epilepsy, which is not her fault. What do you know about that?”

Any breach of confidentiality/privacy?

- A. Yes
- B. No

Abuse of Process - General Principles

- Courts should only interfere where evidence of bad faith / improper motive where it violates conscience of the community, unfair and indecent to proceed
- Courts should be careful before they attempt to “second-guess” state’s motives.
- Exceedingly rare cases where courts should interfere

Misrepresentation - Examples

- Concealing facts or evidence
- Concealing facts about evidence
- Manufacturing evidence
- Lying in a report
- Lying to a client or supervisor...
- Perjury

© CLEAR 2013

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

Case Study - Misrepresentation

- An investigator writes a report and in it states that there were no other witnesses who corroborated the statement of the subject
- The investigator missed one witness who was unknown at the time of the investigation
- Defense counsel later produced that witness and alleged the investigator lied in his report and purposely withheld the one person who supported the subject

© CLEAR 2013

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

Avoiding Allegations of Misrepresentation

- Don't lie. This is a no brainer, right?
- There is rarely a reason to lie as part of an investigation with two exceptions (e.g. undercover investigations and interrogation, which are less common in most cases)

© CLEAR 2013

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

Avoiding Allegations of Misrepresentation

- Always ask other interviewees (including the subject) if they are aware of other potential witnesses that may help you understand the facts
- Be careful and aware of how and what you write. It may be subject to “spin” later
- Avoid being in a position where you feel the need to cover your tracks

© CLEAR 2013

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

Incompetence - General Principles

- Incompetence is different than an abuse of process - not about bad faith or improper motive *per se*
- Rather, a **systematic failure by the investigator in showing proper knowledge, skill or judgement**
- Can overlap with allegation of abuse of process e.g., lost evidence vs. discarded evidence

© CLEAR 2013

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

Incompetence - Examples

- Poor Record keeping & note taking
- Poorly handled evidence
- Inaccurate or unclear report writing
- Failure to consider all the sources of information
- Timing - Unnecessary Delays

© CLEAR 2013

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

Audience Question

During an investigation surveillance video is obtained from a store. A full copy of the video was not made, only the part the investigator thought was relevant. The original video is gone and the investigator has no way of knowing whether other times on video were also relevant. The defence argued the evidence was misleading and incomplete. **Do you think it is...**

- A. Negligence on the part of the investigator
- B. Reasonable for the investigator to obtain only what he thinks is needed

Arizona v Youngblood, 488 US 51

“Requiring a defendant to show bad faith...limits the...police’s obligation to preserve evidence to reasonable bounds and confines it to...cases where...evidence could form a basis for exonerating the defendant.

...
We therefore hold that **unless a criminal defendant can show bad faith** on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.”

Incompetence - R. v. La, 1997 CanLii 309 (SCC)

- obligation to preserve evidence arises out of prosecution’s duty to “preserve the fruits of the investigation”, which helps ensure appropriate disclosure.
- Where evidence lost, Court will assess for negligence by looking at:
 - relevance of the evidence; and
 - circumstances of the loss and **whether reasonable steps** taken to preserve the evidence.

R. v. La (cont.)

- police not expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future.
- *even* the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable.
- **BUT as relevance of evidence increases, so does degree of care for its preservation**

© CLEAR 2013

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

Incompetence - Summary

- Recap: allegation of incompetence or abuse of process will depend on the factual circumstances of the case and what (if any) motives can be inferred from those circumstances
- Incompetence can be pled as an alternative to an abuse of process

© CLEAR 2013

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

Incompetence: Investigator Delay

- Delay can arise out of different circumstances
- Some are within your control, others not
- Individual investigator delay - within your control
- Institutional delay - typically outside of your control

© CLEAR 2013

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

Avoiding Investigator Delay

- Set clear investigative objectives
- Move investigation forward diligently
- Maintain contemporaneous notes
- If investigation stalls, seek and clarify instructions / reassess your objectives

© CLEAR 2013

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

Avoiding Investigator Delay

- Understand your mandate and powers and stay within them at all times
- Follow evidence collection procedures
- Implement case management and prioritize

© CLEAR 2013

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

Avoiding Other Allegations of Incompetence

- Ensure you have a backup for documentation in the event of it being misplaced
 - Scanning
 - Extra copies
 - A log to enter all interviews and documents gathered

© CLEAR 2013

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

Institutional Delay

- Institutional delay: delay that is generated as a result of case volume and backlog
- In Canada, ss.7 of the *Charter* guarantees due process:
 - “The right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice”

Institutional Delay

- *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII)
- Applying s.7 to the regulatory / administrative law context
- Regulatory body exercising statutory authority are bound by the *Charter* even though independent of gov’t

Blencoe (con’t)

- Regulatory body exercising statutory authority are bound by the *Charter* even though independent of gov’t
- Where state caused delay interferes with “profoundly” personal choices of an individual, s.7 “security of person” rights may be triggered

Blencoe (con't)

- These cases will be exceptional
- security of the person guaranteed by [s. 7](#) protects the psychological integrity of an individual.
- psychological harm **must** result from actions of the state and it must be serious

© CLEAR 2013

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

Blencoe (con't)

- there must be a **sufficient causal connection** between the state-caused delay and the prejudice suffered
- Even if causal connection established, individual reputation is not a free-standing right. Neither is freedom from stigma.

© CLEAR 2013

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

Blencoe (con't)

- In order for security of the person to be triggered, impugned state action **must have had a serious and profound effect** on the respondent's psychological integrity.
- Bottom line: cases where s.7 due process rights will be triggered by state caused delay will be exceptional

© CLEAR 2013

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

Misconduct

“There is no crueler tyranny than that which is exercised under cover of law, and with the colors of justice ...”

- *U.S. v. Jannotti*, 673 F.2d 578,
614 (3d Cir. 1982)

© CLEAR 2013

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

Allegations of Misconduct

- Coercion
- Threats
- Extreme prejudice (knowingly being biased)
- Intimidation
- Surveillance abuse
- Lying or fabricating evidence

© CLEAR 2013

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

Case Study - Misconduct

- An investigator is on the stand and being cross examined
- The defense counsel asks, “Isn’t it true that you threatened my client and said if he didn’t come clean - you would bury him”
- He goes on to say, “but when that didn’t work you then convinced my client that if he just admitted his involvement the whole thing would go away”

© CLEAR 2013

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

Avoiding Allegations of Misconduct

- Obviously don't do things that you know are questionable
- Consider taping interviews to protect against false allegations
- Be careful when asked questions such as:
 - What is the likely outcome of all this
 - Am I in big trouble here
- Never make promises of any kind

Avoiding Allegations of Misconduct

- Understand the laws and your organization's policies regarding surveillance
- Establish some standard responses to questions you know you will receive frequently
- Be consistent in your approach as much as possible
- Seek advice when questionable moments arise

Tips For Testifying

- Speak slowly and clearly
- Don't be afraid to think before you answer - Don't rush
- Look at the triers of fact when answering questions
- Be yourself, but avoid using jargon or slang
- Ask the lawyer if you can/should review your notes/materials before testifying

Tips For Testifying

- Provide succinct answers that are responsive to the question
- Do not answer more than what you have been asked
- Ask for breaks when you need them
- Remember the cornerstones of your role:
 - Neutrality, impartiality, objectivity, and professionalism

© CLEAR 2013

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

Tips For Testifying (Cross Examination)

- Don't be defensive/lose your temper
- Be aware of your facial expression/body language
- Listen carefully to what is being asked
- Don't be afraid to say "I don't know," "I don't recall," or "I don't understand the question," if that is the case
- Own up to any errors/shortcomings

© CLEAR 2013

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

Tips For Testifying (Cross Examination)

- Provide succinct answers that are responsive
 - Don't over-answer the question
 - Don't try to anticipate where the questioner is going
 - Don't slip in the "dirt" if the question does not call for it
 - Remember - if necessary, the prosecutor will get to ask you follow-up questions

© CLEAR 2013

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

Summary

- Be aware that the investigator can be investigated
- Reflect on your practice and your limitations
- Work at improving in those areas
- Consider peer review where possible
- Remember we are all human and we make mistakes. Own up to them. Don't jeopardize your integrity & credibility

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

Audience Question

This was the most awesome presentation you have ever had the privilege of attending...

- ① True
- ② Definitely without a doubt
- ③ You guys Rock!!

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

Thank-you for your time!!

Dean Benard
dbenard@benardinc.com
www.benardinc.com



Bonni Ellis
bonni@esmlp.com
www.esmlp.com



Marco Mendicino
marco@esmlp.com
www.esmlp.com



© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org