

## COMMUNITY CARE AND ASSISTED LIVING APPEAL BOARD

### THE EVIDENCE: Proving Your Case Through Witnesses, documents and other evidence

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#### What is Evidence?

In an oral hearing, each party has the right to present evidence to support their case. "Evidence" is the material that is presented to the Panel to prove or establish the facts that the Panel needs to make a proper decision on the appeal. The Panel cannot consider any information on an appeal, unless it has been presented to the Panel by the parties either by way of materials submitted to the Board in advance of the hearing and entered as exhibits, or through witnesses and/or documents that are heard and received by the Panel at the hearing.

Evidence in a hearing usually consists of the documents contained in the licensing Appeal Record, any additional documents the appellant wishes to submit, as well as the oral testimonial evidence of the appellant and the respondent and any other witnesses that the parties may present at the hearing. Other types of evidence can include sworn affidavits, letters, photographs, video or audio tapes, demonstrations or some other physical object, etc. that is relevant to the issues on the appeal.

"Evidence" does not include argument or submissions made by a partying their opening or closing statements for the purpose of persuading or convincing the Panel to decide the case in a particular way.

Although extensive "rules of evidence" have been developed for the courts, these technical rules do not apply, and should not be applied, to hearings before the Board. Administrative boards are not bound by the formal rules of evidence. This is confirmed by section 40(1) of the *Administrative Tribunals Act* (ATA) which states that "The Tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law."

The ATA also states, however, that the board may exclude anything that is unduly repetitious. The Panel may also exclude evidence that is of minimal relevance, is unreliable, may confuse the issues or prejudice the other party. Before any evidence is excluded by the Panel, parties will be offered an opportunity to explain why the evidence they are seeking to introduce is relevant and should not be excluded.

All evidence admitted during the hearing will be assessed by the Panel to determine what weight, if any, should be given to the evidence. Generally speaking, evidence that is not sufficiently reliable for the Board's purposes will be given less weight when the Board is deciding the appeal.

## **Witnesses may be required to wait outside**

Except for the appellant and respondent, the Panel may ask the witnesses to wait outside the hearing room until each witness is called to give their evidence. This may be done on the Panel's own initiative, or at the request of one of the parties.

## **Solemn promise**

When a witness (including a party to the appeal) is called upon to testify, the Panel chair or official recorder will ask the witness to sit in the witness chair and to solemnly promise, affirm or swear to tell the truth.

## **The witnesses' evidence**

If you are the witness, you must sit in the witness chair and solemnly promise to tell the truth. If you have a lawyer or advocate assisting you at the hearing, they will ask you questions to elicit your evidence. If you are unrepresented, you will give your evidence by simply telling the Panel your story.

If you call a witness, they will give their evidence by answering your questions. This is called the **direct examination**. Once a witness has testified on your behalf, the rules of fairness dictate that the other party has the right to cross-examine or question the witness as well.

## **Cross-examination**

After a witness tells their story, the Panel will ask them to answer questions asked by the other party or their lawyer or agent. This is called 'cross-examination'. Cross-examination is generally used to support your own case, to weaken the other party's case, or to discredit the witness. You are allowed wide latitude in the types of questions you can ask when cross examining the other party's witnesses. For example, leading questions that suggest the right answer are allowed in cross-examination, but are generally not allowed when you are asking questions of your own witness. An example of a 'leading question would be: "When you arrived at the daycare, the baby monitor was turned on in the upstairs bedroom, wasn't it?". When asking questions of your own witness you would not normally use a leading question but something more open-ended, for example, "Tell me what you saw when you went into the upstairs bedroom".

If you disagree with something that the other party's witness said when they were giving their evidence, or you believe that they only told part of the story, cross-examination is your chance to test their answers and ask questions that will get at the whole story, or support your version of the events. Keep in mind however that you cannot simply disagree with a witness, or give your own version of the events, you must try to elicit the evidence you want by asking specific questions of the witness.

For example:

Question: "You didn't actually hear the conversation between the parent and the staff member did you? And you only heard the parent's version of the conversation, correct? And, you didn't ask the staff member involved, or the other staff member who was present what was said did you? So, you can't really be sure exactly what was said, right?"

## **Reply**

After the other party has finished cross-examining your witnesses, the Panel will ask if you have any more questions for that witness about new matters that were raised in cross-examination. These questions are called the 'reply'. If you are the witness, you can make a few more comments regarding anything new that was brought up in the cross-examination by the other party's questions.

## **The Panel's questions**

The Panel members may also ask the witness some questions to make sure they understood the evidence. When the Panel is finished asking their questions, the parties will be given a chance to ask any questions that are connected to panel member's questions.

## **Objections**

If a party believes that the Panel should not accept certain evidence, or wishes to object to a particular question in the hearing, that party may raise an objection. You can tell the Panel you object to certain evidence or questioning by interrupting the proceedings and saying, "I object" in a courteous fashion. The Panel will ask you why you object. The most common reasons are that the information does not relate (is not **relevant**) to the case, or that the other party is not actually asking questions of your witness but just making statements or giving their own evidence.

After you have had a chance to say why the information or question should not be allowed, the other party will be asked to explain why it should be accepted or allowed. You will be given a chance to respond to what the other party has said.

After listening to what the parties have to say, the Panel will "rule" on the objection – that is – decide whether to accept or keep out the evidence, or whether to allow or disallow the question that has been objected to.

## **Calling Witnesses from the "other side"**

Each party (the appellant and the respondent) has control over how they present their case and what witnesses they will call to prove their points. If you wish to question someone from the 'other side', for example a specific licensing officer or other licensing staff member, you cannot assume that the other party will necessarily call that person as a witness in their own case or have them available for questioning at the hearing. If there is a specific

person you want to question at the hearing you must confirm with the other party whether they will be calling them or not, and if not, you may wish to put them on your witness list and call them yourself as part of your own case. If you feel that person is important to your case you may wish to call them yourself in any event as the other side can always decide at the hearing not to call a specific witness who was on their witness list. It is up to each party to arrange for the attendance of the witnesses they want to call. If you are unable to get the person to attend to give evidence in your case voluntarily, you can issue a Summons to require their attendance.

### **New Documents as evidence at the Hearing**

If a party will be referring to a document that was not provided to the Board and all other parties prior to the hearing, sufficient copies of the document must be brought to the hearing for each member of the Panel hearing the appeal, all other parties and the official recorder (usually 6 copies). If sufficient copies are not brought to the hearing, it is the responsibility of the party submitting the documents to arrange for, and pay for, copies to be made during the hearing.

The party must introduce the new documents through a witness who must identify the document. It will then be entered into evidence and marked as an "exhibit" to the hearing.