

Executive Functioning

A Newsletter for Senior Leadership in Organizations Providing Human Services

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Bearing Witness

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There is growing recognition of the value of the knowledge held by professional support workers in criminal court cases that involve victims or perpetrators with intellectual disabilities. Staff who provide support through developmental service agencies may be called upon to testify as witnesses for either the Crown or the defense in such cases. This article is intended to assist agencies to be prepared for this occurrence, to know their responsibilities when their staff are called upon to testify, to support their staff to fulfil their duty to the court, and to ensure that the people the agency provides service to are appropriately informed about what may be said about them in a court of law.

There are generally two types of testimony that a support staff might be asked to provide. The first is testifying to an aspect or aspects of the crime, such as what the staff saw and heard, what he/she knows about the crime, what was reported to him/her and/or what their statement was to the police at time the crime was investigated. These staff witnesses may be able to corroborate the testimony of the person with an intellectual disability with regards to details related to the crime. The second type of testimony support staff may be asked to provide is information about the person with an intellectual disability. The staff may be asked to share examples from their experience with the person that shed light on the person's abilities and limitations, their character, their ability to tell the truth, and their communication needs. Attorneys may look to staff to help identify supports the individual requires to participate as fully as possible in the court process. Alternatively, information from the support staff may be used to help a victim with intellectual disabilities avoid difficult questioning if he/she is suffering from significant trauma or anxiety, or if the experience of being in a court room with the accused would be highly distressing. Where staff are testifying in support of a person with an intellectual disability who has been accused of committing a crime, information they provide may be used to help determine if there are mitigating factors that might influence sentencing.

Agency Responsibilities when a Staff is Asked to Testify

When an employee of an agency is subpoenaed to testify, the agency must allow the employee time off to attend court without penalty of losing their job or a reduction of seniority. In most cases a subpoena will be issued regardless of whether the person receiving services from the agency is the victim or the accused. However, it is not mandatory for a subpoena to be issued if it is the defense counsel who wishes the staff to testify; instead the defense may simply ask the staff or the agency if he/she would be willing to testify in

support of the accused. While agencies are not mandated to pay staff when they attend court, if the subpoena or request is in relation to a situation involving a person receiving services from the agency, and the staff is testifying in support of that person, it is common practice to pay the employee their usual wage. The staff may also be asked to take time away from work to meet or talk with the Crown attorney or defense lawyer - whichever side called him/her as a witness – prior to the time he/she is required to testify to review the evidence.

The subpoena may indicate that the staff are to bring any documents related to the case and may or may not specify which particular documents are required. It can be helpful to speak with the Crown attorney or defense lawyer (again depending on which side has issued the subpoena or request) to clarify which documents should be brought to court. If the staff subpoenaed no longer works for the agency that holds the documentation requested by the court, another subpoena will be issued to a current employee of the agency (usually a manager or director) requiring him/her to bring the requested documents to court and to give testimony in relation to those documents. Anytime documents are brought to court they should be copies, not the originals, as it may take a long time to get them back or they may be destroyed after the proceedings.

Attorneys from either side can also make an application to the judge for records pertaining to the person with an intellectual disability. When records are requested by the court, there are processes in place to ensure that the individual whose personal information is contained in the records is informed and that their right to privacy is protected. There are a number of rules related to having records containing personal information released and produced in court; if you are interested, you can take a look at the Criminal Code for the details. For the purposes of this article, it is important to know that the person whose information is contained in those documents has a right to legal counsel of their own to ensure that their rights regarding the release and use of that information are protected. Where the person whose information is being requested is the accused, their defence lawyer is their legal counsel; but where personal information about the victim is being requested, the victim is entitled to have their own legal counsel appointed and paid for by the court (separate from the Crown attorney) to represent their interests to the judge who ultimately decides what information must be provided to the court. This counsel will assist the judge to vet the request for records, helping to determine what specific information will be heard in court, what will be seen by counsel, and what will be allowed to be presented as an exhibit and, therefore, seen by the jury. The counsel will also make recommendations to the judge regarding any special conditions to be met such as, for what purposes the information can be used, and what happens to it once the court proceedings have concluded. This vetting process is a closed process, meaning that no one other than the lawyers and the judge are present. Ensuring that the individuals our agencies support have their own counsel before we hand over documents containing personal information is in keeping with our responsibility to ensure the privacy of those we support.

There is more to say about the sharing of personal information in court regarding what the people we support need to know, and how our documentation policies and practices can influence the way that information is used in court, in the sections below.

Being Prepared – The Importance of Good Policies and Practices

Much of what an agency can do to ensure that it fulfills the responsibility to provide good support to those it serves and employs, and to effectively aid in the justice process, when their staff is called on to testify, occurs

long before any subpoena is issued or even before any crime has occurred. There are, of course, very important steps to take in the prevention of crimes where the people we support are either victims or perpetrators, but I will focus on what we need to do to ensure that we are prepared when such crimes do occur.

Confidentiality, Privacy and Consent

Most of the time when we discuss issues of confidentiality, privacy and consent with the people we provide service to, we offer assurances that what they say will be held in confidence within the agency, and will not be shared without their (or a substitute decision maker's) consent. Sometimes we remember to add a caveat that there are exceptions to such confidentiality, one of which is documents subpoenaed by a court. Rarely, however, do we let people know up front about the possibility that support staff may, in certain situations, be called upon to speak about them, their activities, their capabilities, and their character in front of a courtroom of people. Even if we have thought to inform those we support about this possibility in general terms, it will be very important to speak with the person about it in specific terms should an agency staff be called upon to testify about the person, or if the court makes a request for the person's records. The person should be informed about the possible questions the staff will have to answer about him/her, and he/she should know who will hear the staff's testimony directly (i.e. the jury, the judge, the attorneys, the perpetrator, family members, the media, etc.). It can be helpful to speak to the relevant attorney for clarification to ensure that your understanding of this information is accurate. Where the person supported is the victim, there is very likely to be a publication ban in place preventing the victim's name and any identifying information about him/her from being reported outside of the courtroom. Having information related to one's involvement in a crime, as either the victim or the perpetrator, in open court is likely to be difficult for anyone, regardless of disability. However, in addition to testimony directly related to the crime, it is very possible that the staff witness will be asked questions about the person's intellectual functioning, understanding of concepts, and ability to tell the truth – having such details discussed and scrutinized in front of a courtroom of people, and possibly reported in the media (even without a name attached), could potentially be very upsetting. The person has a right to know that this could happen ahead of time.

Documentation

The lives of people with intellectual disabilities are heavily documented; records are kept of everything from behaviour to bowel movements. Staff write about them in log notes, incident reports, behaviour charts, support plans, etc. every day. Rarely do the people we support have the opportunity to read what is written about them, nor do they get to correct, dispute, or add their own perspective to the records of their lives that we create. Perhaps we need to rethink the way that we engage in such record keeping and begin to include those we support in the writing and vetting of our records. At the very least, we should have policies that ensure people know what is being documented about them; it is unfair for the person to find out for the first time that records have been kept of their daily activities, their compliance with rules, or their social interactions, in the public arena of a court room. It is even more unfair if these records paint a biased picture of the person that reflects the mood or assumptions of the author rather than presenting an accurate and unbiased portrayal of the subject.

We must also ensure that our staff are conscientious about what and how they write about people, knowing

that these records could be presented in court one day. How are people with intellectual disabilities portrayed in our records? What language is used to describe them? What presumptions are made about their behaviour or their intentions that come through in what is written? The use of words and phrases such as making up stories, lying, attention-seeking, manipulative, playing games, etc. can later be very damaging to a person with an intellectual disability who is trying to establish their credibility in a courtroom. The words written about the person will be used to judge whether he/she can be believed, if the individual is trustworthy, and what kind of human being he/she is.

Responding to Witnessed and Alleged Crimes

There has been legislation in recent years in some Canadian provinces that clearly defines how a report or observation of a crime involving a person with an intellectual disability is to be handled by developmental service agencies. This legislation ensures that the investigation of a crime is conducted by the police and that agencies are not conducting their own investigations prior to deciding whether or not to report an incident to the authorities. Regardless of whether such legislation is in place in your province, there is a need for clear agency policies that direct staff in how they are to respond when they observe a crime involving a person they support or have an allegation of a crime reported to them. Policies and staff training should provide specific direction in policy and training regarding what staff say, who they talk with about the incident, the timeframe within which they must respond, and how the incident is documented. It is very likely that staff who witnessed or heard an allegation of a crime will be called to testify about their response, and what they say in court is likely to have a direct influence on the outcome of the trial. If the staff asked the person involved leading questions, neglected to document the incident properly or waited too long before calling the police, these things could be used to discredit the testimony of the staff or the person with an intellectual disability.

Respectful Language and Countering Stereotypes

Courtrooms are not places where political correctness abounds or where everyone is aware of how certain ways of speaking about people with intellectual disabilities perpetuate and reinforce harmful stereotypes. There can be a tendency by attorneys on both sides to infantilize people with intellectual disabilities by comparing them to children through the use of phrases such as “She has the mind of a six year old” or “You wouldn’t expect a child to understand that, how could you expect him to understand?” Staff witnesses may even be asked to frame their own testimony in terms of such stereotypes by being asked what the ‘mental age’ is of the person they support. Other stereotypes that may come up are that people with intellectual disabilities are either asexual or hypersexual, that they tend to make things up for attention, or that they are incapable of understanding basic concepts. There may be an opportunity for staff to counter these stereotypes and to provide an example to those in the court system of alternate ways of talking about people with intellectual disabilities. These opportunities can occur while giving testimony or during the conversations staff have with attorneys when preparing for court. It is important to ensure that staff witnesses use language when talking about the people they support that conveys their needs and vulnerabilities accurately without relying on stereotypes or compromising the person’s dignity, adulthood or individuality. The expectation that staff be adept and consistent at using such language and avoid stereotypes is something that should be incorporated into the culture of the agency so that staff are prepared and confident in their ability to provide respectful testimony in the courtroom.

Supporting Staff Who Testify

Having to go to court to testify is stressful. Staff who are called upon to do so in support of a person with an intellectual disability have a very important role to play in ensuring justice for the people we provide service to, and they deserve the support of their employers. Such support may look different in each situation, and at different points throughout the time leading up to, and including the day they testify. Support should include an acknowledgement of the fact that it can be anxiety-provoking to be asked to speak in court about events that are likely quite upsetting that involve a person the staff cares about. Often there is a requirement that a staff who will be testifying about an incident not speak about that incident with the victim or accused. This can be a difficult aspect of the process, particularly if the staff continues to work directly with the person and if he/she has previously had the type of working relationship where important things in the person's life have been discussed with that staff. The person may trust the staff and so may initiate conversation about the incident, perhaps not understanding why the staff does not seem to want to talk with him/her. It is important that other members of the team are aware of the limits regarding to whom, and about what, the staff who will be testifying can talk. The other team members can then be available to support the victim or accused and help him/her understand why the staff who will be testifying cannot talk about the incident. It can take a long time for a case to get to court and the staff who must testify may find this wait adds to their stress. An understanding supervisor can be an important support during this time, and opportunities to talk about their concerns or stress regarding their impending day in court may be useful. On the day the staff goes to court, it may be helpful to have a supportive co-worker or supervisor attend court with him/her or to provide the staff with an opportunity to debrief when he/she is finished giving their testimony. Asking the staff what he/she needs is a good way to be sure that support offered is in fact helpful.

Conclusion

Whenever a staff member at a developmental services agency is required to testify in support of a person with an intellectual disability who was involved in a crime, it is essential that the agency know their responsibilities to the court, to the staff and to the individual receiving service. Fulfilling those responsibilities means being prepared with knowledge about court processes, the rights of all involved, and having solid policies and practices that will enable the staff to provide respectful, effective and accurate testimony.

Useful Resources:

Victims of Violence provides free publications and information via its website relating to victim services, providing support and assistance to victims, what to expect when testifying in court, the stages of a criminal court process, and definitions of terminology. These resources can be found here:

http://www.victimsofviolence.on.ca/rev2/index.php?option=com_content&task=view&id=4&Itemid=6

References:

Benedet, J., & Grant, I. (2007). Hearing the sexual assault complaints of women with mental disabilities: Consent, capacity, and mistaken belief. *McGill Law Journal*, 52, 243. Available from http://www.lawjournal.mcgill.ca/userfiles/other/8790295-1219609936_Grant_Benedet.pdf

Deal, W. & Kristiansson, V.(n.d.). Victims and witnesses with developmental disabilities and the prosecution of sexual assault. The Voice: American Prosecutors Research Institute, 1(12). Available from http://www.ndaa.org/pdf/the_voice_vol_1_no_12_2007.pdf

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Archives Index:

Vol 1 Issue 1: Executive Functioning and Evidence-Based Decision Making, June 2014

Vol 1 Issue 2: Deliberate Indifference: Understanding the Legal Ramifications of Risk, August 2014

Vol 1 Issue 3: Informed Medical Consent. Is there a Role for Agencies and Their Staff? December 2014

