

# Civil Litigation

CIVIL LITIGATION SECTION / SECTION DU LITIGE CIVIL

## Recent Cases on Immunity for Independent Medical Examiners: The Gates Are Still Closed

Adam Little\*

*"Time and again, persons frustrated by the opinions and findings of professionals in litigation, or similar adversarial proceedings, have sought to claim damages on various bases, including negligence, negligent misrepresentation, fiduciary duty and others. Uniformly they are turned back at the gates when the only relationship with the defendant arises out of the litigation. Such a relationship can rarely, if ever, be the basis for legal liability."*

Lane J. in *Lowe v. Guarantee Co. of North America*<sup>1</sup>

The independent medical examination has been a hallmark of personal injury and insurance litigation for years. However, the principle of immunity for expert witnesses in a judicial proceeding has application to most areas of civil litigation.

Our courts have consistently held that a physician or other health professional conducting such an examination does not owe a duty of care to the examinee apart from a general duty not to cause injury in the course of the examination. Despite the jurisprudence, this issue continues to find its way before our courts in a variety of circumstances.

There are two basic reasons why an action against a health professional for the performance of an independent medical examination is likely to fail:

- (i) absolute privilege over the contents of the examiner's report; and
- (ii) the very limited duty of care owed by the health professional.

### Absolute Privilege

It has long been held that evidence given by a witness in a court of justice is absolutely privileged.<sup>2</sup> In fact, the absolute privilege afforded to witnesses in a proceeding extends far beyond the testimony given in the witness box.

In *Lincoln v. Daniels*,<sup>3</sup> the English Court of Appeal held that the absolute privilege which covers proceedings in or before a court of justice could be divided into 3 categories. The first category covered all matters done *coram judice* or before the court, including everything said in the course of proceedings by judges, parties, counsel and witnesses and including the contents of documents put in as evidence.

The second category covered everything done from the inception of the proceedings onwards and extended

Volume 12, No. 3  
January / janvier  
2004

### In this Issue:

Recent Cases on Immunity for Independent Medical Examiners: The Gates Are Still Closed

Discovery of Non-Parties

Ten Baby Steps to Marketing a Litigation Practice

Upcoming Section Program

Upcoming CLE Programs



---

to all pleadings and other documents brought into existence for the purpose of the proceeding.

The third category extended the privilege attaching to evidence given in court to the precognition or proof of that evidence taken by a solicitor. The English Court of Appeal followed the House of Lords decision in *Watson v. M'Ewan* and held that it was immaterial whether the proof was or was not taken in the course of proceedings. In other words, an interview between a solicitor and an intended witness, in which the solicitor reduces to writing the evidence which the witness was about to give, is also covered by absolute privilege. This third category was created to avoid the absurd result of an action based not on what a witness said in the witness-box, but based on what the witness told the solicitor she was about to say in the witness-box.

In *Fabian v. Margulies*,<sup>4</sup> the plaintiff brought an action in malpractice against a physician who had conducted an independent medical examination in a motor vehicle accident action. The Ontario Court of Appeal upheld Justice Labrosse' (as he then was) finding that the independent medical examination and the ensuing report were prepared in the ordinary course of judicial proceedings. The report was absolutely privileged and the defendant physician was not liable in law for its contents. Justice Labrosse noted that the physician was required by the provisions of s. 52 of the *Evidence Act* to prepare his report and the absolute privilege extending to the oral evidence of the doctor would be rendered illusory if he could be sued for the same statements made in a report he was statutorily required to prepare in order to give his oral testimony.

There appear to be good policy reasons for maintaining absolute privilege in these circumstances. It is easy to imagine the nightmarish re-litigation of cases that might occur if an expert witness could be sued for her opinion given in the course of proceedings. Without protection, experts may well avoid litigation retainers altogether for fear of being sued themselves. As Justice Lane stated in *Lowe v. Guarantee Co. of North America*:

The principle that no witness is liable to anyone for what has been said in the witness

box, or in preparing to testify, or in the examination of a party, or in a report for use as evidence, is essential to protect the judicial system which depends upon the willingness of witnesses to appear and testify. It is also an essential safeguard against the endless re-litigating of cases that have already been decided.<sup>5</sup>

### Limited Duty of Care

Where a patient is not treated by an independent medical examiner, no duty of care is owed apart from a general duty not to cause injury in the course of the examination. As Justice Labrosse noted in *Fabian v. Margulies*, the examiner's involvement is solely for a medical-legal purpose. Such limited involvement provides no basis in law for an action in malpractice. The independent medical examiner is not a treating health practitioner and has no contractual or other professional relationship with the person being examined. The only relationship between the physician and the examinee is created by the litigation.

In *X (minors) v. Bedfordshire County Council*,<sup>6</sup> the House of Lords held that a physician does not, by examining a patient at the request of an insurance company, come under any general duty of medical care to the patient. The physician is under a duty not to damage the patient in the course of the examination, but beyond that her duties are owed to the insurance company and not to the patient.

Despite the clear authority, a number of attempts have been made by plaintiffs over the last few years to distinguish the established jurisprudence and find a cause of action against an independent medical examiner for alleged negligence or intentional acts.

### Recent Cases

In *McLennon v. Furlong*,<sup>7</sup> the Ontario Court of Appeal determined that a physician performing an assessment pursuant to the order of an arbitrator in a statutory accident benefits proceeding does not give rise to a physician-patient relationship and "clearly falls within the scope of the absolute privilege that attaches to quasi-judicial proceedings." Although the factual matrix in

*McLennon v. Furlong* occurred in the context of a dispute regarding statutory accident benefits and not in a judicial proceeding, the differences were insufficient to distinguish *Fabian v. Margulies*. Not only did absolute privilege apply to judicial proceedings, but also to quasi-judicial proceedings.

The limited duty of care likewise applies in situations where a person's employer has arranged for an independent medical examination to determine whether an employee is fit and capable of performing a job. In *Branco v. Sunnybrook & Women's College Health Sciences Centre*,<sup>8</sup> Justice Spence concluded that the primary duty owed by the examining physician was not to the plaintiff, but to the plaintiff's employer who had retained the physician. Once again, the only duty the physician owed to the plaintiff was not to harm him in the course of conducting the independent medical examination.

In *Lowe v. Guarantee Co. of North Company*, the plaintiffs attempted to distinguish their case from the jurisprudence based on the involvement of a Designated Assessment Centre under the statutory accident benefits regime. The plaintiffs argued there was a legal relationship between the DAC and the insured as a result of the statutory requirement of neutrality and the inherent requirement of competence. The plaintiffs contended that the duty owed by the DAC was the same as the duty owed by a physician to his patient. Justice Lane dismissed the plaintiffs' arguments and noted:

Here, the only relationship between the plaintiffs and the moving parties is the assessment of, and report on, each of the plaintiffs by one or both of the defendants. This took place in the context of a litigious situation where the dispute resolution process required the defendants to intervene as they did. The cases show they cannot be sued for carrying out their statutory duty because their duty of care is not owed to the plaintiffs. They cannot be sued for malpractice because their contact with the plaintiffs was not sufficient to create a medical duty of care to the plaintiffs. They cannot be sued for breach of fiduciary duty because the assessment relationship lacks the element of expectation

that the assessor will act in the interests of the plaintiff and so does not give rise to a fiduciary duty in favour of the plaintiffs, and such a duty would be inconsistent with their neutral position. They cannot be sued for what they say in their reports because such reports are absolutely protected by witness immunity.<sup>9</sup>

Even an intentional or deliberately inaccurate independent medical examination report will not likely ground a cause of action in malpractice. In *Johnson v. State Farm Mutual Automobile Insurance Co.*,<sup>10</sup> Justice Taliano granted a summary judgment motion and dismissed the plaintiff's action against a physician based on deliberate or negligent misrepresentation, interference with economic relations and conspiracy. The plaintiff also alleged that the physician was negligent in the conduct of the examination and had arrived at an erroneous conclusion in his report. In Justice Taliano's view, whether the defendant physician was alleged to have acted negligently or intentionally did not matter. Following *Fabian v. Margulies*, there was no duty of care owing to the plaintiff and there could accordingly be no liability against the physician for any of the plaintiff's claims.

### **The Future - Can *Fabian v. Margulies* be distinguished?**

It remains to be seen whether circumstances will arise in which *Fabian v. Margulies* can be successfully distinguished. Plaintiffs continue to bring actions against health professionals and assessment facilities in various contexts for both negligence and intentional acts, without success. There are clear policy issues in favour of protecting expert witnesses from the revolving door of litigation based on their reports prepared during the course of judicial or quasi-judicial proceedings. However, the issue of immunity for independent medical examiners and other expert witnesses will not likely be put to rest without another decision from the Court of Appeal.

\* *Adam Little is an associate lawyer at Lerner LLP in Toronto. He practices civil litigation, in particular personal injury, medical malpractice and insurance litigation.*

<sup>1</sup> [2003] O.J. No. 3345 (S.C.J.).

<sup>2</sup> *Watson v. M'Ewan*, [1905] A.C. 480 at 486-489

(H.L.).

<sup>3</sup> [1962] 1 Q.B. 237.

<sup>4</sup> (1985), 53 O.R. (2d) 380 (C.A.) leave to appeal to SCC dismissed (1986) 57 O.R. (2d) 576.

<sup>5</sup> *supra* at 6.

<sup>6</sup> [1995] 3 All E.R. 353 (H.L.).

<sup>7</sup> [2001] O.J. No. 890 (C.A.).

<sup>8</sup> [2003] O.J. 3287 (S.C.J.).

<sup>9</sup> *supra* at 6.

<sup>10</sup> [1998] O.J. No. 3139 (Gen. Div.).

---

## Discovery of Non-Parties

*James Morton\**

### Discovery of Non-Parties

Although the entitlement to discover parties arises at Equity and probably lies within the inherent jurisdiction of a Superior Court, absent a rule or statute, there is no right to examine a stranger to an action.<sup>1</sup> Six Canadian jurisdictions provide for the examination for discovery of non-parties. In Nova Scotia and Newfoundland any person may be examined without leave, although the court may limit unnecessary examinations.<sup>2</sup> In Ontario, Prince Edward Island, British Columbia, New Brunswick and Federally, non-parties may be examined with leave of the Court.<sup>3</sup>

The limitation on examination of non-parties is designed, of course, to limit examinations to those actually necessary and to avoid inconvenience to persons not actually bound by the litigation process.

The caselaw is fairly clear that in order for leave to be granted to examine a non-party, there must be evidence that there is relevant information to be obtained from the non-party and efforts to obtain that information from other sources have failed.<sup>4</sup> Before an order allowing for the examination of a non-party is made, the Court must be (1) satisfied that the information sought may relate to matters in issue, (2) that there are no compelling reasons why the order ought not to be made, (3) that the examination is not a mere “fishing expedition”, and (4) that the order is not sought to embarrass or harass but is sought to obtain probative evidence.<sup>5</sup> In effect, examination of a non-party must be a last resort. The recent Report from the Discovery Task Force has recommended making examinations of non-parties significantly easier, but would still leave such examinations a last resort and available

only if information required cannot be obtained from a party.<sup>6</sup>

The use of transcripts of examination of non-parties is limited. Unlike examinations of parties, the transcript of a non-party cannot bind the plaintiff or the defendant and the admissibility in evidence of an examination of a non-party is not any different from that of an out of court statement. The examination of a non-party sets out facts but does not provide evidence for trial.

The testimony of a witness cannot be read into evidence at trial but may be used to impeach that witness at trial.<sup>7</sup>

### Scope of Examination

While the scope of the examination of a non-party can be limited by the order allowing for the examination, generally, no such limit is imposed by the rules. The scope of examination can range over all matters generally relevant between the parties.<sup>8</sup> Issues arising on third party claims can also be properly examined on.<sup>9</sup> Both fact and law may be examined on.<sup>10</sup> As the Court noted in *Sinclair*,<sup>11</sup> “[l]iberal interpretation of discovery rules applies to non-parties so as to eliminate the element of surprise at trial.” That said, examinations of non-parties are usually limited to discrete areas where information cannot otherwise be obtained from the parties.

### Production from Non-Parties

As with the examination for discovery, outside of the rules or statute, there is no entitlement to production of documents from a non-party. At trial, of course, non-parties may be compelled by subpoena to attend to give testimony and

to produce relevant documents.<sup>12</sup> Such late production at trial may lead to unfortunate surprises. Accordingly, all jurisdictions<sup>13</sup> provide for production from non-parties with leave. The Ontario Rule is typical in this regard.

30.10(1) Order for Inspection – The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

- (a) the document is relevant to a material issue in the action; and
- (b) it would be unfair to require the moving party to proceed to trial without having discovery of the document.

Production from non-parties is not a matter of course.<sup>14</sup> It should only be ordered when necessary.

The Ontario Court of Appeal considered production from non-parties in *AG v Ballard*<sup>15</sup> and concluded that a motions judge ought to consider six factors in determining whether or not to order production:

1. The importance of the documents in the litigation;
2. Whether production at the discovery stage of the process, as opposed to production at trial, is necessary to avoid unfairness to the applicant;
3. Whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate, and if not, whether responsibility for that inadequacy rests with the defendants;
4. The position of the non-parties with respect to production;
5. The availability of the documents or their informational equivalent from some other source that is accessible to the moving parties; and
6. The relationship of the non-parties from whom production is sought to the litigation and the parties in the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true “stranger” to the litigation.

If these factors are met, then production may be ordered.

As with the examinations of non-parties, the production of documents from non-parties does not automatically lead to admissibility at trial. Each document produced must still be properly proven at trial. As a practical matter, the parties may well agree as to the authenticity of documents produced from non-parties

### Costs of Transcripts

The costs of preparing a transcript of the examination of a non-party are to be paid by the party seeking the examination. That party has to order and pay for copies of the transcript for adverse parties unless the Court makes an order otherwise.

\* *James Morton is a partner with Steinberg Morton Frymer in Toronto. He practices civil litigation and is Past Chair of the OBA Civil Litigation Section.*

<sup>1</sup> *Guarantee Trust v Fleming* [1946] O.R. 187

<sup>2</sup> N.S. Rule 18.01 Nfld Rule 30.01

<sup>3</sup> Ont. Rule 31.10; PEI Rule 31; BC Rule 28; NB Rule 32.10; Fed. Rule 238

<sup>4</sup> *Bayside Towing v CPR* (2000) 187 FTR 247; *Snook v Cape* (1999), 165 FTR 151

<sup>5</sup> *Preus v Miller* (1986), 69 BCLR 104

<sup>6</sup> Report on Discovery Task Force Report, (AG Ontario) November 2003, Task Force Report, page 6

<sup>7</sup> *Claasen v McNiece* (1983), 146 DLR (3d) 376

<sup>8</sup> *Sinclair v March* (2001), 3 CPC (5th) 363, aff'd 2002 BCCA 65

<sup>9</sup> *Yemen Salt v Rhodes-Vaughan* (1977), 3 BCLR 98

<sup>10</sup> *Sinclair, supra*

<sup>11</sup> *Sinclair, supra* at 369

<sup>12</sup> See, for example, Ontario R. 53.04(1)

<sup>13</sup> Alta. Rules, 209, 216.1; B.C. Rule, rule 26(11); Man. Rule, rule 30.10(1); N.B. Rule, 31.11(1); Nfld. Rule, 32.07(2); N.S. Rule, 20.06(2); Onta. Rule, 30.10; P.E.I. Rule, 30.10; Sask. Rule, 236; Fed. Rule, 233.

<sup>14</sup> See *Morse v Zellers* (1997), 10 CPC (4th) 390

<sup>15</sup> (1995), 26 O.R. (3d) 39

---

# Ten Baby Steps to Marketing a Litigation Practice

Stephen J. Ruben\*

“Don’t do to others what you wouldn’t have them do to you. That is the Torah; all the rest is commentary. Now go and learn it.” Rabbi Hillel.

Unlike Rabbi Hillel, I don’t have a simple answer. But there are basic questions and fundamentals issues that one must address.

For decades, I have been referring work to litigators and have been on the other side of litigation in a consultative capacity. In my experience, there is no other group of lawyers who individually better understand or misunderstand what marketing is all about. So I have the challenge in a few short words to introduce you to some preliminary concepts.

Firstly, there is no such thing as **one kind of litigation practice** and therefore no “one size fits all” answer to every litigation marketing question. Each litigation practice, be it insurance defense, plaintiff personal injury, intellectual property, commercial, municipal, corporate, real estate, estates, tax, etc. has different answers but there are **similar questions** that need to be posed in any litigation firm or practice group, regardless of its size or litigation orientation.

Let me start with my stiff and academic definition of what marketing is:

Marketing is: ***“The process of planning and executing the conception, pricing, promotion and distribution of ideas, goods and services, to create exchanges that satisfy individual and organizational objectives”***

O.K. let’s try this

***“If the circus is coming to town and you paint a sign that says, Circus Coming to the Fairground Saturday, that’s advertising. If you put the sign on the back of an elephant and walk him into town, that’s promotion.***

***If the elephant walks through the mayor’s flowerbed, that’s publicity.***

***If you can get the mayor to laugh about it, that’s public relations.***

***And if you planned the elephant’s walk, that’s marketing.”***

Marketing is a process that speaks at every level of performance. It is not a department. It’s your business. It is not effected in a vacuum. All marketing efforts should be consistent with and measured against clearly stated goals and objectives. You must be able to fulfill the expectations that you create. So here are 10 things you need to consider in marketing your practice.

1. Know who you are. What are your strengths and weaknesses? Underestimate yourself. Assess your service, harshly, brutally right from the outset. Are you in the right business, organized properly, with the right people doing the right jobs (give or take a few thorns in everyone’s side)? I’m not talking about your competence or scholarship. I mean your service. Your people. You have a job that is earning you a living so you must be doing something effectively, but don’t be smug. Be honest. Underestimate yourself!

2. Are you giving your clients what they need or what they love? Ask them. Ask them periodically and post-matter and any time else you can think of...but don’t you ask them. Have a **third party** ask your clients what they like about you. Only survey orally, either in person or by phone. **Never** in writing. Both the written questions and the answers are more open to varying interpretations. Besides, the response rate is very low. Some marketers will disagree, but they aren’t writing this article. Never...means never.

3. You may think your clients are companies but each of your client contacts thinks he is a person. So how do you utilize that? Be personable. For some, that is difficult. But you must learn to do it

---

or stay away from your clients and do what you do best or are only capable of doing. Nothing will harm a marketing effort more than a super competent litigator who lacks relationship skills. You must understand your client before you can satisfy him. Being competent is just as important not more important than being popular. You may keep your clients by being competent, but may not get as many referrals as if you might if you were perceived to be a good person.

4. Your employees must also be marketers, since every act is a marketing act. For example, your receptionist and your assistants are no less important and may be even more important than you in building client relationships. Do you expect your clients to tolerate the inefficiencies in your telephone or fax communication systems or the learning curves of your students or juniors?

5. No matter who are parents are, we have an obvious interest in the outcome of each of their matters and more importantly, in our parents' level of contentment. Are you dealing with your client as if he were your mother or father? Is that level of commitment too much to demand of yourself? Not if you want to win the marketing game.

6. As the sardonic American humorist, Fran Lebowitz once wrote of people who wear sweat shirts with messages: "People don't want to hear from you, so what makes you think they want to hear from your sweatshirt?" People are interested in themselves. Your existing clients and prospective clients don't care what kind of work you like to do, why your firm is better than another one, or how you attract the best new talent to your firm. So stop talking and **start listening** to what your client says she wants. But don't just listen. Make a point of remembering what your client has said. Know what keeps each client up at night! Isolate your client's needs and make it a point to address them. Stop assuming you know what your client needs. Maybe what your client needs is a bombastic trial lawyer, maybe it's a litigation avoidance consultant, a risk manager, a smart mediator, a cost containment advisor. Ask your client and then listen to the answer! Because if a client is not getting what

she needs from you she's either looking around, or even thinking of doing it in house where she can exercise more control.

7. Identifying your target clients is an extremely useful exercise. It forces you to know not just who you are and what you do but also what other skills you have that you can utilize. Be open minded (but realistic) about not only who might be your potential target clients but also what other litigation-based work you might be able to offer your existing clients to meet **their** existing or future needs.

8. Prior to reading this article, many of you may have defined marketing as **only** a process to acquire new business. You already know that there are marketing benefits in writing articles and giving speeches, if you have the correct audience in mind. But here are some examples of other tactics that will help you attract and acquire new business. Understand that there are always marketing opportunities available to you if you look for them. Marketing is not what you do it's who you are:

i) For insurance defence and construction law lawyers; In addition to joining industry related organizations which are teeming with lawyers, join and attend the meetings of industry-specific organizations where you have a good chance of meeting senior executives of companies that self-insure and where you may be able to write for their newsletter;

ii) For real estate litigators: Opportunities abound. By way of example there are a number of real estate driven national weekly newsletters circulated via the internet to the real estate industry about commercial real estate; about major developments in the industry, who are the players etc. Do you think a weekly litigation avoidance or litigation management article under your name would fall on deaf ears?

iii) Circulate the writing that you do and the promotion material for your speaking sessions to targeted readers, including potential and

---

existing clients, with whom you want to be 'top of mind'. Follow up with a phone call or at least an e-mail. Think of yourself as a marketer every day .

iv) Make yourself a welcome resource to those lawyers who know little about your work and need help or questions asked or guidance. The best litigators I know, to whom I refer work, always take calls and questions with a cheerful and helpful manner. You never know when an important file will land on your desk from a lawyer referral you met and helped, particularly in light of the recent Law Society Rule allowing referral fees.

v) Get out of your office and have a face not just a voice. Networking savvy is half the battle. Be seen. Press the flesh. Circulate and create opportunities to promote your practice. Listen to what people are telling you and remember what you've been told. Write it down if you have to. You might argue that all these efforts are beneath you, that you're not running for office.....Oh really!

vi) If you practice in a large municipality get to know firms in smaller municipalities and vice versa. You never know when a small local matter may wind up in the Court of Appeal or when a large client may need some fast local knowledge....You want them to think of you first.

9. Branding is the ability to remember your name. Positioning is what they say about you after you leave the room. According to Al Ries and Jack Trout the authors of *Positioning*: A) You must position yourself in your prospect's mind. B) Your position must be one simple message. C) Your position must set you apart from your competitors D) You must sacrifice. You can't be all things to all people; you must focus on one thing. I know you are your partners will be reluctant to narrow the focus. But you have to remember that **one strong perception is better than a number of moderate ones...**and I'll bet you know the firms who do and don't follow this guiding principle. By the way, being positioned as small firm or practice group can translate into responsive and attentive so don't be afraid of who and what you are.

10. Service quality is invisible (Harry Beckwith: *Selling the Invisible*). So get it right but for marketing purposes - attracting and keeping clients-service is only what prospects and clients perceive it to be. So never forget it is they who must perceive the quality and you must drive the creation of that perception.

11. Exceed all of your clients' expectations (ergo 11 rather than the titled 10 baby steps). Never create expectations you cannot meet; which does not mean that you should always minimize success for fear of disappointing your client later. Be honest with what you can and cannot do. Say thank you to the people who send your kids to summer camp and provide you with a renovated kitchen or trip to Rome. No, it's not you who make it happen. It's them! You can't thank them enough. So just keep it up. Take an interest in your client's business but also their family, health, holidays. Write or phone to say I'm thinking of you. Maybe it will even encourage you to really think about them. And don't despair. There is much to learn from failed marketing efforts and rejection.

If you think conscientiously about anything in this paper, you will be on your way to beginning the process of successfully marketing your practice. Those of you who wish to fulfill your potential will be more aware of marketing beyond giving clients hockey tickets and fancy dinners. Many of you won't bother because the practice has always been very good to you; you've always done it your own way and you've made it work; or you just want to be left alone to do your 'work'. I understand.

Smart marketing can benefit everyone but is not for everyone. Some of you have no interest in marketing, even though you should. If that's o.k. with your financial dependents, it's o.k. with me too. In *Decision Traps*, Russo and Shoemaker tell the amusing story of the Spanish lottery winner who chose the number ending in 48 because for seven days he woke up thinking of the number seven and seven times seven is 48. We all act like that lottery winner at times. We mislead ourselves attributing our successes and failures to things that barely influenced the result. Often in marketing we assume that a tactic which does not achieve instant results has failed only to learn

---

years later that the tactic worked slowly and unpredictably, but ultimately successfully. I hope this article will get you started.

*\* Stephen J. Ruben is the President of Valuelaw Consulting Inc. ([www.valuelaw.com](http://www.valuelaw.com)) which provides law firm clients with strategies for controlling legal costs. He is also a Director of the Professional Services Marketing Association and a member of the Legal Marketing Association, New York City Chapter*

## Upcoming Section Program

On February 18, 2004, at 8:00 a.m., there will be a joint breakfast session involving the ADR Section and the Civil Litigation Section.

The topic will be “The Mediation Dance” and will focus on three areas.

1. Top 10 tips to picking a mediator;
2. Who should the lawyer bring as his dance partner to the mediation;
3. How to play your tune (advocate) at the mediation.

This program will be very interesting and appealing for civil litigators, and because of the interactive nature will also be of value to mediators.

Participants should not only be interested in the use of mediation during civil litigation, but should bring along tales of their own experiences, good or bad, in selecting mediators, deciding which clients to bring, and how to best present their cases at the mediation.

Book now! There is limited space around the boardroom table at this unique breakfast session with Paul Jacobs, Q.C., C.Med., C.Arb. of the ADR and Civil Litigation Sections and Peter Henderson of the Civil Litigation Section.

## Upcoming CLE Programs

### **Your First Civil Trial: Practical Tips from Top Practitioners (YLD)**

Wednesday, February 25, 2004  
9:00 a.m. to 1:00 p.m.

### **Priorities, Practice and Problems Under the PPSA**

Thursday, February 26, 2004  
9:00 a.m. to 4:00 p.m.

### **Health Law & Medical Malpractice: Essential Decisions**

Tuesday, March 30, 2004  
9:00 a.m. to 4:00 p.m.

### **Collections: Streamlining the Process**

Monday, May 3, 2004  
9:00 a.m. to 4:00 p.m.

### **Estates and Trusts Conundrums in Cognition – Legal Issues in Capacity (YLD)**

Monday, May 17, 2004  
9:00 a.m. to 5:00 p.m.

### **Litigation in the World of E-Commerce – “Toto, I’ve a feeling we’re not in Kansas anymore”**

Thursday, May 20, 2004  
9:00 a.m. to 5:00 p.m.

### **It’s Your Option: The Use of “Options” in Commercial Transactions**

Friday, May 28, 2004  
9:00 a.m. to 5:00 p.m.

### **Sharpening Your Advocacy Skills (YLD)**

Monday, May 31, 2004  
9:00 a.m. to 5:00 p.m.

*For further information, please contact the CLE Department or visit our Web site: [www.oba.org](http://www.oba.org).*

---

*The articles, which appear in this publication, represent the opinions of the authors. They do not represent or embody any official position of, or statement by the OBA except where this may be specifically indicated; nor do they attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.*

## Section Executive 2003 - 2004

Chair: **Orlando Da Silva**

Borden Ladner Gervais LLP (416) 367-6106  
odasilva@blgcanada.com

Past Chair: **James C. Morton**

Steinberg Morton Frymer (416) 225-2777  
JAMES@smflaw.com

Vice-Chair: **Ben V. Hanuka**

Goldman, Sloan, Nash & Haber LLP  
(416) 597-6489  
hanuka@gsnh.com

Secretary (Sections): **Paul H. Voorn**

Andriessen & Associates, Barristers  
(416) 620-7020 x23  
pvoorn@andriessen.ca

Newsletter Editor: **Neil P. Wheeler**

Lerners LLP (416) 601-2384  
nwheeler@lerners.ca

Bench and Bar Subcommittee and  
Technology Liaison: **Robert A. Shour**

Law Chambers, University Centre  
(416) 977-4492  
ralshour@on.aibn.com

AGR Liaison: **Hugh M. Pattison**

Law Chambers (416) 410-0232  
hugh.pattison@sympatico.ca

CLE Liaison: **Ria Tzimas**

Ministry of Attorney General  
(416) 326-4930  
ria.tzimas@jus.gov.on.ca

Regional Coordinator:

**Brett-David Moldaver**

Miller Thomson LLP (416) 595-2642  
bmoldaver@millerthomson.ca

Member-At-Large: **Steven Bellissimo**

(416) 362-6437  
steve@sblaw.ca

Member-At-Large: **Judy L. Chan**

Blake, Cassels & Graydon LLP  
(416) 863-3260  
judy.chan@blakes.com

Member-At-Large: **Helen A. Daley**

Wardle Daley LLP (416) 351-2770  
hdaley@wardledaley.ca

Member-At-Large: **Michael G. Emery**

Simpson, Wigle LLP (905) 639-1052  
emerym@simpsonwigle.com

Member-At-Large: **Derek R. Freeman**

(416) 595-9935  
df@freemanlaw.ca

Member-At-Large: **Ryder L. Gilliland**

Blake, Cassels & Graydon LLP  
(416) 863-5849  
ryder.gilliland@blakes.com

Member-At-Large: **Karen B. Groulx**

Fraser Milner Casgrain LLP  
(416) 863-4511  
karen.groulx@fmc-law.com

Member-At-Large: **Peter Henderson**

Kramer Henderson (416) 601-6820  
pthenderson@kramerhenderson.com

Member-At-Large: **Kenneth G. Hood**

Glaholt LLP (416) 368-8280 x119  
kgh@glaholt.com

Member-At-Large: **Kathleen J. Kelly**

Kelly ADR Services (416) 365-1528  
kellyadr@bellnet.ca

Member-At-Large: **Eugene Meehan, Q.C.**

Lang Michener LLP (613) 232-7171 x132  
emeehan@langmichener.ca

Member-At-Large: **A. Jeffrey Radnoff**

Radnoff Law Offices (416) 203-3641  
jradnoff@radnofflaw.com

Member-At-Large: **Jamie K. Trimble**

Hughes, Amys LLP (416) 367-1608  
jtrimble@hughesamys.com

Member-At-Large: **Michele A. Wright**

Cassels Brock & Blackwell LLP  
(416) 869-5300  
mwright@casselsbrock.com

Staff Liaison: **Pamela Santa Ana**

Ontario Bar Association  
(416) 869-1047 x312  
psantaana@oba.org

**Editor:**

Neil P. Wheeler

**Copy Editor:**

Vickie Rose

**Graphic Designer:**

Samer Husseini