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Dear Sirs/Mesdames:

Re: Professional complaints against assessors

We are writing on behalf of an Ontario Bar Association ("OBA") working group that has been established to address the growing issues surrounding court and tribunal appointed assessors who are the subject of inappropriate complaints to their professional colleges. Given our mutual interest in this issue, we are looking for an opportunity to work together to address this problem.

There are several contexts in which courts, boards and tribunals appoint assessors to assist them in determining the facts of a case. Custody and access assessments in family law and medical assessments in workplace safety and insurance cases are among the most emotionally charged circumstances in which assessors are appointed and, therefore, these two examples give rise to a significant number of complaints. There are few, if any, other professional retainers that create as much motivation and incentive for inappropriate complaints to regulators. Parties who are dissatisfied with the assessor's recommendations file complaints in an attempt to undermine the credibility of the assessor and the recommendations and to delay the resolution of the issues in the case.

In terms of the threat of inappropriate complaint, the independent assessors are put in a riskier position than both professionals acting in a clinical setting and professionals who act as expert witnesses in other legal contexts. This is true for several reasons, including:

- (i) there is no doctor/patient or other pre-existing relationship with the subjects of the assessments and, therefore, no significant opportunity to build a trusting relationship that may prevent frivolous complaints;
- (ii) in motor-vehicle-accident ("MVA"), medical malpractice and other contexts in which each side retains its own experts, a party who disagrees with the report of a professional retained by the other party registers that disagreement by filing a contradictory expert report, which has equivalent evidentiary status. However, in the independent assessment context, rightly or wrongly, parties do not necessarily believe that their own expert reports can compete with the special status of the independent assessors who have been appointed by the court or tribunal itself. Therefore, parties look for other ways to undermine the credibility of the assessors; and
- (iii) the legal contexts in which independent assessments are frequently ordered coincide with areas of the law, such as family and workplace safety and insurance law, where there are high levels of unrepresented parties. In other cases where experts are frequently retained, such as MVA and medical malpractice, lawyers are usually involved. These unrepresented parties are often in stressful situations and do not have the benefit of lawyers to advise them of the inappropriateness and consequences of an ill-motivated complaint. In the workplace safety and insurance context, unrepresented parties may also have psychological issues that impair their judgment.

In addition to being a drain on your colleges' investigative and disciplinary resources, these ill-motivated complaints raise very serious issues for the administration of justice and clients. Independent assessments are very useful both in terms of ensuring the quality of the final decision and in providing some guidance for early settlement of cases. The prevalence of inappropriate complaints in this context, however, has a chilling effect and makes it increasingly difficult to find professionals willing to conduct assessments. This, in turn, leads to;

- (i) increased costs for the justice system and the parties; and
- (ii) delays in legal proceedings, which can have a serious impact on the lives of children and families.

Aside from reducing the supply of available assessors, the threat of complaints may make assessors more tentative or equivocal in their findings and recommendations, thus reducing the value of their reports both as a guideline for early resolution of issues and as expert assistance for the ultimate decision maker.

While we recognize that there are procedures for dispensing with complaints at various stages, targeted professionals are still subject to a great deal of cost and stress in responding to inappropriate claims. Even claims dismissed without the necessity of a full hearing have a chilling effect and the attendant negative impact on the administration of justice.

The unique importance of, and risks to, independent court-appointed assessors calls for unique approaches, as was recently recognized by the Health Professions Appeal and Review Board in the *Leonoff* case where the Board recommended that:

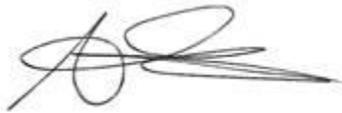
The College considers investigating and implementing a specific policy that recognizes the issues associated with the Child Custody and Access Assessments conducted by its members.

Our OBA working group is comprised of lawyers with expertise in college disciplinary processes and in the substantive legal areas in which independent assessments are ultimately used. We would like to work with your colleges to develop the guidelines recommended by the Board and other solutions that work in both the context of the colleges' role in protecting the public and in the context of those proceedings that rely on independent assessments.

Please contact Elizabeth Hall, the OBA's Director of Government and Stakeholder Relations at ehall@oba.org to discuss ways in which we can work together on this issue of mutual importance.

We look forward to hearing from you.

Yours very truly,



Steven Benmor
(OBA Family Law Section Executive)



Dan Revington
(OBA Workers' Compensation Section Executive)



Valerie Wise
(OBA Health Law Section Executive)