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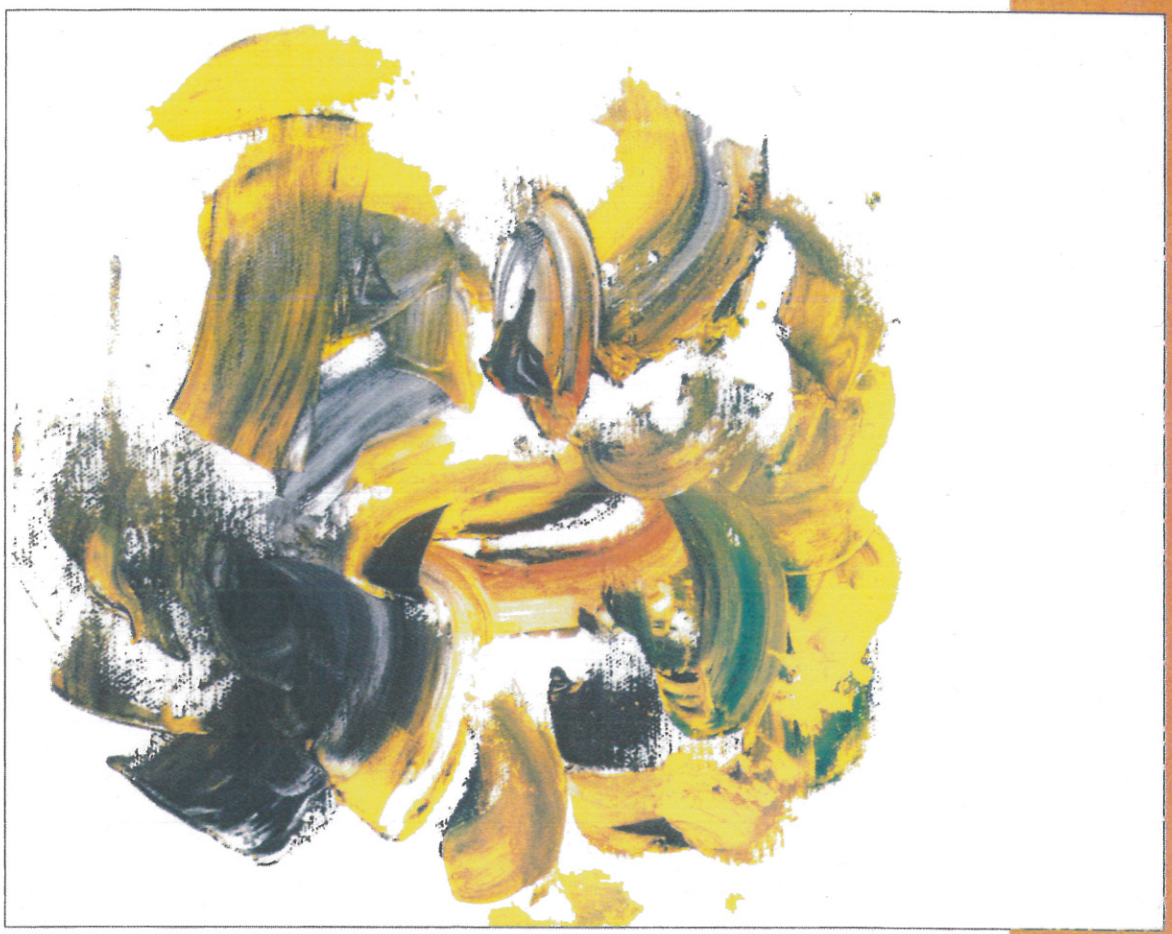

Preserving the art of advocacy: Why we need to change how we practise law

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The legal profession in Ontario is at an interesting juncture in its history. The confluence of an unprecedented global economic downturn with a relentless stream of law school graduates has resulted in an inevitable tension between cost-cutting behaviour on the part of law firms and their clients and a need to create sustainable employment for newly minted lawyers.

However, flowing in the undercurrent of this troubling development is an equally disturbing trend: lawyers in Ontario are suffering from an ever-increasing shortage of vital courtroom experience. Lately we have seen a steady drumbeat of complaints from judges and senior counsel about the conduct and practices of "junior" advocates.

Being a young lawyer myself, I am unable to draw upon my own personal knowledge in order to distinguish the current legal landscape from that which existed 20 or 30 years ago, when trials were apparently far more common. However, there is abundant literature to show that the "litigation explosion trial implosion" phenomenon is very real, both in Canada and in the United States. Consequently, fewer and fewer young lawyers are going to court. Why is this happening?

My hypothesis

Money, money, money

The big-box business model that has taken hold in other sectors of the economy has spilled over into the practice of law. Many firms now operate like multinational corporations: they continue to grow larger and are driven by an overarching concern for bottom-line financial results. This evolution has made billable targets the Holy Grail for recent generations of lawyers. The result is that associates fear straying from their timers, lest they suffer the ignominy of being at the bottom of their firm's monthly "sunshine list" e-mail circular. Consequently, young lawyers are not taking advantage of opportunities to advocate outside of their firms, such as pro bono and volunteer work.

Litigation is too expensive

This problem is really an outgrowth of the first. Billable hours have become the opioid of our profession, and our constant running of the clock exponentially increases the cost of litigation, making clients less willing to place their expensive legal investments in the hands of younger associates. Yet, experience cannot be gained without experience. And, while small claims court was once the breeding ground for aspiring litigators, the combination of current billing practices and increases in the court's monetary jurisdiction means that even "minor" litigation matters can be prohibitively expensive for clients. The comments of Justice Robert Spence in *Marsh v. Gibson* are illustrative:

> [T]hese two parties incurred more than $75,000 in costs to determine the issue of child-care expenses which was argued in a one-hour hearing. Frankly, I find this to be a startling amount of money. I am prepared to acknowledge that my troubled response to these expenditures may be unwarranted; for it may well be that these enormous costs represent a reality that has taken hold in the legal profession in the last number of years. If that is in fact the case, it would explain why approximately 70% of the litigants who appear in the Ontario Court of Justice at 47 Sheppard Avenue East in Toronto cannot afford legal representation.[1]

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Mentor? What mentor?

The myth of "the mentor" continues to thrive. While I have no doubt that there are many wonderful mentors working throughout Ontario, my personal experience has been that meaningful mentorship is not prevalent. For many of my colleagues with whom I have discussed this issue, "mentorship" has consisted, at best, of being summoned on the morning of a hearing to tag along and take notes, or being dispatched to conduct a trivial motion that their "mentor" would rather avoid. Certainly, such an experience is not valueless – it provides one with an opportunity to participate in the litigation process – but is it really productive? Does a young lawyer really learn how to advocate if he or she is not involved in meeting with witnesses, devising litigation strategy, preparing cross-examinations and marshalling evidence?

Indeed, technology has greatly accelerated the pace of practice and this leaves much less time to fuss over the futures of junior associates. Surely, though, there is a better way of teaching the fundamentals of litigation than the current method of broadcasting online seminars. As the late John Sopinka once wrote:

> Those privileged few aspiring barristers who are trained by one of the leaders of the Bar have no need to resort to a text which deals with the tools and techniques of a trial lawyer. Unfortunately, for the rest, the legacy of experienced trial lawyers in Canada has not found its way into print.[2]

If, as Caesar said, "Experience is the teacher of all things," then there are a lot of things we are failing to teach.

The threat to advocacy

Justice David Brown recently mused that far too many lawyers in the Toronto bar would rather not waste time litigating the merits of a matter "when the shiny apple of an interlocutory motion

beckons."[3] In a subsequent decision, Justice Brown goes on to say that "judges, as a collective, are losing the will and ability to move cases along to trial because we are led (wrongly) to believe that trials represent a failure of the system."[4] According to Justice Brown, "Such a state of affairs reflects an unacceptable failure on the part of our civil justice system."[5]

If I had to venture a guess as to the root cause of this so-called aversion to litigation, I would say that it has to do with both the tremendous cost of trying a case, which is, in turn, attributable to the astronomical hourly rates charged by law firms, and the fact that there are fewer and fewer lawyers who actually know how to conduct a trial. Under the prevailing business model, every new generation of lawyers will have less experience than the last and thus will be increasingly incapable of properly and effectively trying a case.

To some, that is not necessarily a bad thing. Litigation is invariably protracted, highly acrimonious and often frustrating. The adversarial process is taxing, both emotionally and financially, and there is a growing belief that client resources would be better spent on less onerous methods of resolving disputes. At the same time, we cannot forget that the adversarial process is essential to our concept of justice and fairness. Furthermore, some cases simply cannot be settled, and by no means is that a failure of our civil litigation system or of the lawyers who practise within it. In fact, one could plausibly argue that a less expensive legal system, wherein a greater number of lawyers possess the requisite skills to conduct fast and efficient trials, is more desirable than one in which parties typically settle not because they want to, but because the rates charged by their lawyers make it financially impossible for them not to settle.

What to do about it

Complaining accomplishes nothing. And while I do not claim to have all the answers, I respectfully offer the following ideas.

Make trials a reality

Our civil justice system can create economies of scale and foster effective advocacy by pushing more matters to trial. More specifically, the threat of a trial pressures litigants to carefully and honestly assess the merits of their case. Under stricter deadlines, parties will be compelled to spend their time and resources on litigating the merits of their case, not on "tactical" motions or other forms of preliminary manoeuvring. Furthermore, by ensuring that cases move promptly to trial, courts can lower the cost of litigation by reducing delay, encouraging meaningful mediations and pre-trial conferences and minimizing the potential for duplication of work.

Have less tolerance for delay

In order for cases to move through our courts more quickly, judges and masters must be less tolerant of delay. For instance, parties who continually and without justification fail to deliver documents or fail to answer undertakings on time, or who, as is often the case, litigate from status hearing to status hearing, should not be afforded the luxury of gumming up the system without consequence. It seems that far too often timely litigants are having to spend large sums of money in an effort to compel non-responsive opponents to act, and far too often those litigants are not recovering their costs and are being rewarded for their diligence with further delay in the form of extended timetables and adjournments. Litigants who do not treat the civil litigation process seriously and who cavalierly disregard the rules of procedure – rules that have been designed for the express purpose of securing the most "just, most expeditious and least expensive determination of every civil proceeding on its merits"[6] – ought not to be allowed to continue.

Work smarter, charge less

If the principle of proportionality is the driving force behind our current system of civil litigation, then effective advocacy means getting to the heart of the matter as quickly and efficiently as possible. This may sound trite, but clearly we are not getting the message. The answer, in my view, is to work smarter. Litigation is serious business, but not every lawsuit is epic, notwithstanding what our clients might tell us. Actions that are typically less complex, such as wrongful dismissal suits, do not warrant seemingly endless pleadings motions and motions for particulars, documents and answers to undertakings. Deficiencies in pleadings, particulars or documentary production should be taken up at trial. Parties who fail to comply with their obligations under the rules of evidence and civil procedure should suffer the consequences set out in the relevant legislation, including losing the ability to lead evidence during trial.

> **"History tells us that waiting for change is like leaving the front porch light on for Jimmy Hoffa."**

In a similar vein, successful parties should receive costs awards that properly compensate them for the time and resources spent litigating "tactical" claims and defences that they might otherwise have challenged by way of a preliminary motion. In order for this to occur, however, our courts must incentivize trial by using cost penalties to steer counsel down the path of efficient litigation. A party needs to be assured that, if it overlooks the sheen of the interlocutory apple and soldiers on to trial, it will be fairly compensated if and when it succeeds. To that end, less time wasted should mean lower costs for litigants.

Ask not what your associates can do for you; ask what you can do for your associates

It seems that more and more firms are viewing their associates not as future advocates, but as profit centres. Law firms appear to be fixated on the earning potential of their employees, not on honing their advocacy skills. Whatever the case, aspiring advocates should not be tethered to their desks; rather, they should be encouraged to seek out opportunities to develop their skills, such as through pro bono and volunteer work. They should also be encouraged to seek out opportunities to assist other lawyers with their trial work, even if the time is not billable. Similarly, senior lawyers should make a concerted effort to include young advocates in all aspects of the litigation process. This may not always be profitable, but is

it not in a law firm's best interest to ensure that its young advocates evolve into skilled trial lawyers? No doubt, a law firm must remain profitable if it is to survive, but how profitable must it be, and at what expense? Is it not true that, in the long run, skilled advocates are more highly sought after than those who are not, and that these skilled advocates will therefore attract a greater number of clients, much to their firm's benefit?

Pessimism never won any battle

I hesitate to be overly cynical about the profession I have chosen and love, but history tells us that waiting for change is like leaving the front porch light on for Jimmy Hoffa. Human nature is to react, not to prevent. The short run is always more tantalizing than the long run. Nevertheless, I am optimistic that, as younger advocates graduate into partnerships and take on more influential roles within the bar, they will bring with them new ideas and new business models capable of preserving the integrity and rich tradition of our profession. Here's hoping.

Notes

1. 2011 ONCJ 276 (CanLII) at para 20.
2. John Sopinka, Donald B Houston & Melanie Sopinka, *The Trial of an Action*, 2nd ed (Markham: Butterworths, 1998), Preface.
3. *196303 Ontario Inc v Glen Grove Suites Inc*, 2012 ONSC 758 (CanLII) at para 18.
4. *York University v Michael Markicevic*, 2013 ONSC 4311 at para 9.
5. *Ibid* at para 11.
6. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 1.04(1).