

Have you noticed it's cold outside?!

Welcome to first *Legal Observer* for 2003. In this issue, we consider two topics that will be near and dear to clients - contingency fees and being a witness. While most people are familiar with these subjects, generally information has been gleaned from that ever popular law school - American television.

Although contingency fee arrangements have long been an acceptable way to cover the cost of litigation, they are still relatively new to Ontario. In *Contingency Fees*, we explain contingency fee arrangements as well as the rules that the Law Society of Upper Canada has put in place.

Many people will never have to testify in court during their lifetime. However, for those of you who will, we provide two articles explaining how to be an effective witness.

Finally, here's to an early Spring!

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Contingency Fees

“... Clearly contingency fees are in the public interest because they provide greater access to justice, and that means helping to make legal services more accessible to people in need.”

**Professor Vern Krishna, Treasurer
Law Society of Upper Canada**

One of the most commonly-asked questions of personal injury lawyers is whether they will work on a contingency fee basis. While injured clients may not have a great familiarity with the legal process, one concept they are familiar with is contingency fees.

A contingency fee arrangement is an agreement whereby the lawyer agrees to accept a percentage of the final monetary award obtained by the client. In addition, the lawyer agrees to accept the

risk of receiving nothing if the lawsuit is unsuccessful.

Although contingency fees have long been accepted in the United States and in some of the other provinces, until recently they were essentially considered illegal in Ontario. One of the purported reasons behind this ban was that if lawyers had a vested interest in the outcome of litigation, improper conduct might occur.

Despite contingency fee arrangements not being permitted, Ontario lawyers were allowed to enter into quasi-contingency fee arrangements. In essence, legal fees would be deferred until the claim was resolved, at which time the exact amount of the fees and how they should be calculated would be determined.

Contingency fees are now available in Ontario as a result of a decision of the Ontario Court of Appeal in the fall of 2002. Contingency fees have always been something that were desired by both lawyers and clients, however they were never approved by the Law Society of Upper Canada or the legislature by way of the *Solicitors Act*.

On October 31, 2002 the Law Society approved a change to the *Rules of Professional Conduct* which had suggested that contingency fees were prohibited by law. The rules committee did not specify a maximum percentage that clients and lawyers could negotiate, but simply said that contingency fees must be fair and reasonable. Under the new rules, a lawyer and client may enter into a contingency fee arrangement provided it:

- is in writing;
- is signed by the lawyer and the client;
- contains a statement of the method by which the fee is to be determined, including the percentage that may accrue to the lawyer in the event of settlement, trial or appeal; and
- includes a statement that the client may appeal to a Superior Court Judge for a determination of whether the fee is fair and reasonable.

In including these conditions the Law Society has attempted to structure a contingency fee system that is fair for both the lawyer and the client. They have also

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On Being a Witness

Witnesses are an integral part of the trial process. It is largely through the testimony of witnesses that trials, both civil and criminal, are resolved. By relating the facts as they recall them, witnesses help the judge and/or the jury get to the truth of the issues.

While the prospect of being a witness may be a scary one, with a little preparation and information, you will find that your five minutes in the spotlight will go relatively smoothly.

Advance Preparation

Prior to coming to court, you will receive a “summons to a witness.” This summons is sometimes referred to as a subpoena. A summons is a court order which requires you to give evidence. Ignoring it may lead to contempt of court charges and possible arrest.

Before appearing in court, take time to think about the events that you witnessed and that you are being called to testify about. It is important that you try to remember dates, times, descriptions, actions and words that were said.

The lawyer who intends to call you as a witness will usually spend some time going over your testimony and preparing you for your day in court. In addition to reviewing the questions that he or she

will be asking you, the lawyer will also prepare you for cross-examination. Lawyers do understand that this may be your first experience with the court system and they want you to be comfortable with the process. Therefore you should feel free to ask any questions you might have.

The Trial

The summons gives you the date that the trial begins, as opposed to the date you will be testifying. You should speak to the lawyer who has called you, to find out when you will actually be called to testify.

On the day you are to testify, you should be sure to arrive on time. Having said that, come prepared to wait. While the court appreciates how valuable your time is, there are many different things that can and do occur during a trial and which can result in lengthy delays.

In order that their testimony not be unduly influenced, witnesses are often excluded from the court room until after they have testified. Therefore you may have to stay in the public waiting area until your name is called.

Prior to giving your testimony, you will be asked to take either an oath or an

affirmation. When taking an oath you swear on a bible to tell the truth. When affirming you give your solemn promise to tell the truth.

The lawyer, who called you to testify, will question you first. This is called examination-in-chief. Once he or she is done, it is opposing counsel’s turn to test your recollection of events by cross-examining you on your testimony. You should not be nervous or defensive. Answer questions honestly and succinctly. Remember, the point of both examination-in-chief and cross-examination is to bring out the truth about the facts as you, the witness, know it.

While you are giving evidence, if one of the lawyers objects or the judge interrupts, you should immediately stop speaking. Once the judge has ruled on the objection, you will be instructed whether to answer the question.

If something is bothering you during your testimony or if you have a question you address yourself to the judge. The judge should be addressed as “Your Honour”, “Sir” or “Madam”.

We often see witnesses on television taking “*the fifth*” when they are con-

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included other requirements which further protect the client, specifically

- that the fee arrangement does not require the lawyer’s consent to discontinue or settle the claim;
- that the client is free to change lawyers or end the lawyer/client relationship at any time; and
- a specific reference that contingency fees shall not apply to family or criminal matters.

The Rules also suggest that a contingency agreement should take into account a number of factors and that the written fee

arrangement should specifically refer to factors such as:

- the likelihood of success;
- the nature and complexity of the claim;
- the expense and risk of pursuing the claim; and
- who is to receive an award of costs.

Contingency fee arrangements will allow for greater access to justice, particularly to lower- and middle-income earners. If you have questions about contingency fees, or would like to discuss a contingency fee arrangement please feel free to contact one of our lawyers. 

Tips for being an effective witness

1. Forget everything you learned from TV. - Remember, television's main purpose is to entertain and therefore it is not uncommon to see witnesses who argue with opposing counsel, who act glib and who try to one-up the lawyer. None of these behaviours work well in the real world.

2. Be calm, be polite. - Don't get angry since this makes you appear prejudiced and your evidence may be considered less believable. Don't argue with opposing counsel - you will lose. Don't be flip or try to be funny.

3. Speak loudly and clearly. - Everyone has a right to hear your evidence. In addition, the court reporter, who is recording the proceedings, must be able to hear what you are saying.

4. Think before you speak. - Don't just blurt out an answer. This is particularly important during cross-examination.

5. Answer questions truthfully, don't guess. - "I don't know" and "I don't remember" are acceptable answers. Don't try and answer questions based on where you think the line of questioning might be going.

6. Pay attention. - It may be stating the obvious, but you must be attentive when you are on the witness stand.

7. Don't be afraid to ask for clarification. - If you do not understand a question say so. Don't guess at the meaning of a question that is not clear to you.

8. Less is more. - Answer what you are asked. Don't volunteer information. Don't exaggerate.

9. Stick to your guns. - If you are certain of your evidence, say so, don't be badgered into giving an answer you did not intend. If your answer requires more than a simple yes or no, say so and ask that the question be reworded.

10. Be objective. - The best way to "help" your friend or family member is to give your evidence as objectively as possible.

11. Be yourself. - While it is important to come to court prepared, you should not try and memorize your evidence. ☞

Paul Muirhead

In this issue we profile the third litigation partner, Paul Muirhead.

Paul Muirhead joined Williams McEnergy in 1989 following his call to the Bar. Prior to joining the firm, Paul attended Dalhousie University in Halifax where he obtained his law degree. He articulated in Hamilton with a boutique civil litigation/criminal firm.

Since 1989, Paul has built a successful litigation practice that focuses on insurance defence, personal injury and medical malpractice. Over the years, he has conducted a number of jury and non-jury trials as well as appeals. His trials have covered a diverse spectrum including:

- fire losses,
- wrongful dismissal,
- personal injury,
- property damage,
- wrongful detention and
- a variety of provincial offences.

In addition to the law, Paul has long been interested in the field of health care. In 1993 Paul took a sabbatical year at McGill University where he studied at its Centre for Medicine, Ethics and Law. He received his Masters of Law with a Specialization in Medical Ethics.

He not only has a busy litigation practice, but also lectures and teaches on medical ethics and other topics related to the medical/legal field. He has spoken at national conferences or meetings in Victoria, Calgary, Toronto, Charlottetown and Ottawa. He is member of the Children's Hospital of Eastern Ontario's Research Ethics Board and conducts teaching rounds in neonatal, emergency and cardiac care at CHEO. Paul lectures at the University of Ottawa law school as well as being a sessional lecturer for the Law Society of Upper Canada's Bar Admission course.

In his "free" time Paul enjoys competitive hockey, skiing and can often be found trying to run away from it all along the canal at lunchtime. However, at the end of the day he looks forward to spending time with his children - Lauren age 9 and Ian age 6.

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cerned that their answer might tend to incriminate them. Since "the fifth" refers to the fifth amendment of the American Constitution, a witness obviously cannot do this in Canada. However, you should know that pursuant to the *Canadian Charter of Rights and Freedoms*, a witness who testifies in any proceeding has the right not to have any incriminat-

ing evidence used to incriminate him or her in any other proceeding, except in a prosecution for perjury.

Although nerve-racking, appearing in court is an experience that most people rarely experience. If you are called to testify in court, just think about the stories you will be able to tell. ☞



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