



ONTARIO  
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CIVIL LITIGATION

# Newsletter October 2022



# Message from the Editor



On October 3, 2022, the Ontario Superior Court of Justice held its annual opening of the courts. The justices reminded us of all they have done to drag the courts into the 21st century, and laid out our path towards a post-pandemic future. As always, the event is a time of reflection and renewal, of celebration and anticipation. But it is also a deeply anachronistic institution, reminding us of a time when courts simply closed for three months of the year out of tradition. Today, the idea of closing courts for a quarter of the year sounds insane, but commemorating that we did so with a speech about radical change is perfectly normal.

This newsletter explores that duality, as we remain in that liminal space between a post-pandemic future and the lingering past. We start with interviews with four leaders of legal organizations in the second year of the pandemic: Karen Perron, President of the Ontario Bar Association; Deborah Palter, President of The Advocates' Society; Teresa Donnelly, Treasurer of the Law Society of Ontario; and Jennifer Gold, President of the Women's Law Association of Ontario. We ask them about the projects they pursued during their terms, how the profession has changed, and the changes they are hoping are still to come.

This newsletter also represents a new start for the new civil litigation executive. To that end, our Chair and Vice Chair, Rachel Migicovsky and Moya Graham, introduce us to our themes for the upcoming year.

Last, there is an article by Stuart Rudner on the mediation in the post-pandemic world.

As you read, a few themes will emerge. First, moving to virtual practice has improved efficiency in a number of ways, but also came with serious costs. For many lawyers, it has been isolating. The problem is compounded for young lawyers, who have lost some of the best opportunities to build their professional network. Thankfully, the OBA, TAS, and the LSO provide a number of opportunities to get back to that life. More difficult to address is the harm done to access to justice for those without access to computers or reliable internet connections, and for self-represented litigants trying to navigate not only the law but also rapidly-changing procedures. The government, the courts, and legal aid organizations will be dealing with the fallout for the foreseeable future.

## Articles

Interview with Karen Perron | 4

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Interview with Deborah Palter | 7

---

Interview with Teresa Donnelly | 11

---

Interview with Jennifer Gold | 14

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Letter from the Chairs of the OBA Civil Litigation section | 16

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Mediation in the Post-Pandemic World by Stuart Rudner | 17



# Message from the Editor

Second, legal organizations are finally taking meaningful steps to address diversity. That should not come as a surprise to anyone in light of some of the biggest news stories during the pandemic: the Black Lives Matter protests in 2020, the public's (re)discovery of residential school mass graves in 2021, and Dobbs in 2022. But the number and scope of projects is significant, as befits a problem of this scale. There is so much more work that needs to be done.

Third, there is a lot of optimism about the future. About courts becoming more efficient and more accessible. About refocusing our priorities on the concerns of the most vulnerable. But at the same time, there is a consistent concern about the defunding of legal aid. It is only through increased recognition and support of legal aid that all of this optimism can be realized.

Finally, this newsletter would not be possible without lots of support. David Milosevic was the guiding force behind the revitalization of the format over the past two years and the person who came up with this topic. David, Rachel, Terrine Bird, and Emily Sinkins made the transition and publication process effortless. Ranjan Das is making connections to interviewees. And Crystal Park is doing the graphic design. Thank you all so much!

**Adil Abdulla**  
October 10, 2022

INTERVIEW WITH

# KAREN PERRON



(Interview conducted by David Milosevic in June 2022.)

**Q: Good afternoon, President Perron. Thank you so much for joining the OBA civil litigation section. Before we explore the substantive questions, could you tell us a little bit about your practice and how you came to be involved with the OBA?**

A: I'm a partner in the disputes group at BLG's OWA office. I have a pretty broad commercial litigation practice, which includes a focus on insolvency and banking litigation.

As a first gen lawyer and also the first to pursue post-secondary studies, I didn't know any other lawyers and I actually had very little insight into the actual practice of law. So when I was called to the bar, I wanted to find ways to grow my network, enhance my profile, and also gain insight into the profession. One of my colleagues suggested I join the OBA and the YLD section executive.

From then I went on to be elected to OBA council, joined committees, and was elected to a number of board positions, which ultimately led to my presidency. Overall, I think my OBA journey has not only fulfilled my original goals of expanding network and my profile, but it has also helped me stay on top of practice trends and developments, and provided me opportunities to build leadership abilities and collaborate with lawyers and stakeholders across the province to do good in our communities.

**Q: During your term as OBA President, what issues particularly motivated you?**

A: As a Francophone lawyer, from Northern Ontario, also practicing in Ottawa, I have strived to ensure that lawyers across the province have equal access to the tools they needed to succeed, and could access and leverage those connections that I had valued so much through my OBA network. Building on that theme was important to me as president. Also, my term coincided with us hopefully emerging from the pandemic, when it was really important to increase connections amongst the profession again.

To that end, I introduced OBA Link, which is designed to ensure that every member of the association, no matter where they're located physically in our province, can capitalize on the expertise and the support of the OBA community. The new OBA Link app is a one stop shop for need-to-know news and a new way for us to connect to each other. You can download it on Apple and Android. It's a free app for all members, where you'll find the latest news on the justice sector, OBA programs, podcasts, and various forums. We've also developed specific programs and tools to identify regional concerns.

Another theme that was important was continuing to drive equality, diversity, and inclusion in law. I built on our Not Another Decade initiative, launched in 2020 under Charlene Theodore's presidency, which is the OBA's commitment to advancing equality in our justice sector. Our first year focused on the number of legal workplaces with feasible EDI plans. For my year, my focus is on pay equity. I'm working with experts to devise a tool that will help employers close the gender wage gap and devise a more equitable compensation model by reexamining how lawyers' contribution is recognized, valued, and rewarded.



**Q: Has the shift to more virtual meetings and e-filing helped regions other than Toronto and Ottawa?**

A: One of the silver linings to the pandemic has been that we are all connected in the same way. We're not seeing meetings held in person in one area with other people dialing in by phone or joining by virtual means. We've all been equalized. In that sense, it has enhanced those connections across provinces, and nationally and internationally as well.

**Q: How do you feel that we as a bar and the OBA as an organization have responded to the challenges posed by COVID, court closures, and the move to electronic hearings?**

A: I think that collectively the bar, courts, and other justice stakeholders did a great job at responding to the many challenges posed by COVID. While no one could have foreseen the pandemic or its impact, the OBA was already looking ahead when it came to modernization, and we were already in year 1 of a 5-year Innovation Plan (introduced under President Colin Stevenson) when COVID struck.

This enabled us to respond rapidly, providing Zoom conferencing to the Superior Court, co-chairing a task force on best practices for electronic hearings, offering an [Online Case Search Tool](#) for quick and efficient searches in civil and criminal litigation, and developing the [Courts Reopening webpage](#) with updates from the courts and the Ministry of the Attorney General.

**Q: How has legal practice changed as a result of the pandemic? Have those changes been positive? Are there any negatives?**

A: Without question, the landscape has changed significantly for litigators, and our entire profession. I don't think any of us could have foreseen a day when we'd be so concerned about what our zoom backgrounds looked like, or that we'd be wondering how to get readjusted to commuting into our offices.

The increased use of technology and the advent of remote hearings has brought a lot of benefits, but also a few concerns. Some of the advantages include enhanced access to justice, such as ease of access to the courts, preservation of court time, and savings of time and money for participants in the justice system. Many have also found an increase in efficiency in respect of advancing proceedings.

Some of the challenges are problems accessing reliable technology in certain parts of our province which create access to justice issues for some self-represented litigants, “Zoom fatigue” and its implications for court proceedings, and challenges to maintaining decorum of court proceedings, and fostering collegiality amongst members of the bar, including providing opportunities for more junior members of the bar to make connections within the legal community. As we emerge from the pandemic, there are also concerns of court backlogs and how to adapt to hybrid models.

**Q: If you look forward to the challenges for the bar as practice evolves, what do you think the challenges will be over the next 5 to 10 years?**

A: First, we need to keep driving forward and take this opportunity to reevaluate some of the more traditional aspects of our profession. We need to continue providing lawyers with tools to modernize their practices, to improve how we work, find ways to work more efficiently, and improve communications and connections, which ultimately will allow us to better serve our clients. The OBA is doing that with the [Innovator in Residence initiative](#) and CaseLines training.

Second, we need to continue to find a way for the justice sector to be more diverse and more representative of the clients that we serve. The OBA is doing that with the Not Another Decade initiative, the [Work that Works podcast](#), and the ADR section’s [neutral diversity report](#).

Third, we need to continue to commit to providing lawyers with opportunities to give back to their communities, to provide pro bono services. The OBA is doing that with the [Speakers Bureau](#) and our annual [Make a Will Month Campaign](#).

Fourth, we need to continue to lawyers’ mental health and wellness. The profession has started to discuss and engage on that issue. Now we need to continue that discussion and implement programs and resources to support lawyers being well and healthy. The OBA is doing that with the [Wellness Hub](#), the [Parent and Caregiver Network](#), and the [Unite and Support Network](#).

**Q: What kind of changes would you like to see in the civil justice system?**

A: I think the challenges of the past two years have given us an opportunity to ask ourselves many questions about our civil justice system: What is truly necessary for finding truth, for evidencing the legitimacy of documents, for assessing fairness, for being accessible and efficient? We need rethink notions such as whether there is a relationship between formality of proceedings and credibility. We need to strive to eliminate processes that are not necessary for the goals of justice. We have a huge opportunity here to improve our civil justice system. Through our collective efforts and forward-thinking, I think we can and we will get there.

**Q: Having thoughtful and dedicated leaders is of crucial importance, and we were lucky to have you in the role of OBA President this year. Thank you for your leadership, and on behalf of the OBA Civil Litigation section, thank you for your time in speaking with us today. ■**

INTERVIEW WITH

# DEBORAH PALTER



(Interview conducted by David Milosevic in June 2022.)

**Q: Good morning, President Palter, thank you so much for joining the OBA civil litigation section. Before we explore some of the substantive questions, could I ask you to just introduce yourself to our readers? How did you come to be involved with The Advocates' Society?**

A: I'm a partner and commercial litigator at Thornton Grout Finnigan. My firm has a long history of being involved with The Advocates' Society. I attended Advocates' Society education and social events early in my career and was invited to act as faculty as a more seasoned lawyer.

**Q: How do you end up running for president of The Advocates' Society?**

A: In terms of process, the first step is to apply to The Advocates' Society board of directors. (Invitations to apply are sent to TAS members by e-mail and posted on the TAS website in the fall of each year). The executive committee consists of four directors on a ladder: a secretary, treasurer, vice-president, and president. Each year, the existing executive committee consults with the board of directors and recommends the election of a new director to the executive committee. Subject to the board's approval, that director joins the executive committee and begins the four-year ladder to the presidency.

In terms of what prompted me to run, I was very committed to and enjoyed being involved in the work of the Society, whether it was teaching advocacy skills or moderating education panels, or working on interventions and policy submissions. Joining the board was an opportunity to give back to the profession by working in an organization whose mission and values around the importance of access to justice aligned with my own. I will also say there was a social and community aspect to my involvement with the Society. Advocates take on the responsibility of being a voice for others in an adversarial process. Working closely with other lawyers who understand the unique pressures, challenges and rewards of this type of legal work appealed to me. The presidency was a significant opportunity and responsibility to continue working with our board, our membership and the judiciary toward our common goal of enhancing the administration of justice for the public we serve. It's certainly been a great honor and privilege to serve as president.

**Q: During your term, what issues have been of particular importance to you?**

A: I began my term in June of 2021. It was a time when advocates had largely adapted to working on remote platforms, but how we would practice long term was still evolving and is still evolving.

In this context of ongoing significant change, there were two issues of particular importance to me. One was advancing access to justice initiatives as we entered a world where optimal use of both remote and in-person advocacy would be possible. The second was maintaining a very strong, connected, and inclusive community of advocates in circumstances where physical distancing measures had kept us apart for so long.

**Q: How do you feel that we as the bar and The Advocates' Society as an organization responded to the challenges posed by COVID, court closures, and the move to electronic hearings?**

A: I think we responded quickly, effectively, and collaboratively. The pandemic required a sudden and dramatic shift to a remote platform that brought much needed technological advances to our justice system and provided a necessary vehicle for hearing cases when there was no other option. This profound shift was only successful because of the extraordinary effort, creativity, and adaptability of advocates, judges, court staff, and legal staff. It was a team effort of epic proportion.

In the immediate wake of COVID, The Advocates' Society supported the bar in that transition by shifting its programming to remote platforms. We offered a "litigating from home" series on how to use technology to work and litigate effectively from home and provided a starter kit on conducting examinations and remote hearings. It was important to equip the profession for what was a major change in how we were working and living. Those programs are still available for members – free of charge – on the TAS website.

More broadly, The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association established an e-hearings task force to work with the Ontario Superior Court of Justice to expand virtual access to the courts. The task force was a joint effort that served as a consultative forum and liaison between the Ontario bench and bar for the many practice directions and other regulatory changes that were required to implement fair and efficient remote hearings in short order.



Nationally, The Advocates' Society's Modern Advocacy Task Force embarked on its research on the future of oral advocacy in the Canadian justice system. Its final report, [The Right to be Heard: The Future of Advocacy in Canada](#), was released in June 2021, coinciding with the beginning of my presidency. I regard it as a critical inflection point in the evolution of courtroom advocacy arising from the circumstances of the pandemic. The report is intended as a foundational document in the evolving discussion on the optimal use of in person and remote advocacy. It's the product of a rigorous review of legal history, literature, and jurisprudence, and an extensive nationwide consultation process, including town halls. We've received an enormous amount of feedback. I think it's fair to say the report has had significant influence on discussions and determinations regarding optimal use of in-person and remote advocacy going forward, which of course is an ongoing discussion.

**Q: It's an outstanding product. I was struck by how prescient the report really has been and how useful it will be going forward.**

**Reflecting from your position and your experience, how has legal practice changed as a result of the pandemic? Have those changes been positive? Are there any negatives?**

A: We've now reached the point where courts and litigants can benefit from a wider range of options for remote and in-person hearings. The pandemic ultimately brought with it greater flexibility in terms of how our clients can access the courts, and flexibility in how advocates practice before the courts. And that's an extremely positive change that provides opportunities for enhancing access to justice in our courts in a way that I don't think any of us conceived of three years ago.

With that said, I think we have to be aware of the unequal impact of those advances. Not everyone has access to technology and all the supports required for Zoom hearings, including supports that many of us may take for granted like bandwidth and unlimited Wi-Fi. These things affect the ability of all litigants to participate equally in remote hearings.

We should also not lose sight of the ways in which courtroom advocacy provides a level of transparency, understanding and human connection that is important for public confidence in our system. Virtual platforms can provide greater access to our courts, but should not be regarded as a wholesale substitute for the courtrooms themselves. Finding the balance between remote and in person advocacy will be critically important in the coming years. I will also say that prioritizing health and family during such a stressful period has been challenging for many. And while being able to work from home has many advantages, it has also meant that meaningful separation of work life and home life evaporated with the onset of the pandemic.

I think many of us were accustomed to working from home before the pandemic, but we were not running full-time law practices out of our home. We didn't select our home or organize our living arrangements based on any expectation that we would be running our law practices out of our home.

Many of us, including me, did not conceive of that happening so quickly and so radically when the pandemic hit and it required significant adjustment. How to manage that has been a challenge and the subject of important ongoing discussion.

**Q: You know, I hadn't heard anyone quite say it that way. We went to running a law practice from home, not just working from home. I admire my colleagues who did it.**

**If you look forward to the challenges for the bar for young lawyers as practice evolves, what do you think the challenges will be over the course of the next 5 to 10 years?**

A: I'm optimistic about the next 5 to 10 years. I'm hopeful we're entering a period of recovery and connection following a very difficult period for many of us, and we're doing it with more flexibility and tools at our disposal than we had pre-pandemic.

If I were to identify one challenge, I would say we need to continue our work on becoming a more inclusive profession. This is important both for public confidence and to ensure the strength, vibrancy, and continued growth of the bar. There are many reasons why senior advocates stay in this job for so long. One reason includes a sense of belonging and community, and access to support of colleagues and champions along the way. We need to ensure that sense of belonging is widely felt and shared. Having a mentor and being a mentor is very important.

*"...we need to continue our work on becoming a more inclusive profession. This is important both for public confidence and to ensure the strength, vibrancy, and continued growth of the bar."*

**Q: If you look at the justice system, in your ideal world, what kind of changes would you like to see?**

A: I'd like to see an adequately funded and supported legal aid system. I think the efficacy of our justice system ought to be looked at from the perspective of the most vulnerable litigants, and that means access to legal representation. The ability of litigants to understand and participate in legal proceedings is crucial. And the barriers to unrepresented litigants are significant. Litigants should not have to navigate the complexities of the justice system without representation.

I'd also like to see the optimal use of in-person and remote advocacy looked at from the perspective of the public's experience of our justice system and the need for just and timely determinations of disputes. Public confidence in our system must be earned every day in every case. And it is the public's experience of our system that ought to be our guide in making determinations going forward. I hope we will continue that discussion as technology advances and we learn more about what works and what doesn't in a variety of different circumstances.

**Q: Do you have any final advice to young advocates on how to develop their careers?**

A: I would encourage young advocates to take advantage of the education, skills training, and social events out there. But don't try to do everything. Pick what has meaning for you. One observation at a skills training session from an advocate you admire can be something that you carry with you for the rest of your career. One meaningful conversation at a social event can lead to a life-long friendship with another advocate who understands your work and your world. Keep taking chances and try to spend your time on initiatives that energize you – both because I think it will contribute to a personal sense of fulfillment and because it's important for the evolution of our profession at large.

**Q: Well then, President Palter, I must say it's been a great honor for us to be able to speak with you. And I know that our readers are going to benefit greatly from your thoughts on the justice system. I'd like to extend my sincere thanks on behalf of the OBA Civil Litigation Section for your time with us today. ■**



INTERVIEW WITH

# TERESA DONNELLY



(Interview conducted in writing in September 2022.)

**Q: Could you introduce yourself to our readers?  
How did you get involved with the LSO?**

A: I have been a Prosecutor with the Ministry of the Attorney General for 28 years working in the Region of Waterloo and Huron County. As a Prosecutor, I have dedicated my career to providing access to justice for victims of domestic and sexual violence – the majority of whom are women and children. As the West Region Sexual Violence Crown, I was one of seven Prosecutors in the province dedicated to enhancing the quality of sexual violence prosecutions and the victim's experience in the criminal justice system.

As a third-generation lawyer, I believe in the dignity and integrity of the profession, the importance of an independent bar and a self-regulating profession. Those interests in the legal profession and in access to justice caused me to run for bencher in 2015. I was elected as a bencher in 2015 and 2019.

**Q: What was the process for becoming the Treasurer?**

A: In 2020, I was a second term bencher with experience as the Chair of the Audit and Finance Committee, Chair of the Program Review Task Force, Chair of the Human Rights Monitoring Group, and co-Chair of the Entity Regulation Task Force. I believed that I had developed the requisite skills and experience to lead the Law Society. As a result, I ran for Treasurer and was elected for a one-year term and subsequently acclaimed for a second term. I was the fifth woman Treasurer in the 223 history of the Law Society of Ontario.

**Q: During your term as Treasurer, what issues particularly motivated you?**

A: In 2020, when I became Treasurer, we heard the impassioned cries for justice, following fatal encounters between police forces and Black, Indigenous, and racialized individuals.

These cries highlighted the work that we needed to do to end racism and discrimination. Racism and discrimination undermine justice and the rule of law. Legal professionals have clear duties in pursuit of justice and combatting racism and discrimination. That duty encompasses an active effort to make our institutions and justice system more diverse and inclusive. Diverse inclusive legal professions promote the public interest and further access to justice.

In 2021, we saw the tragic uncovering of hundreds of unmarked burial sites of children at former residential schools. These tragedies highlighted the need for the Law Society's ongoing work on implementing the four foundational pillars of our Indigenous Framework: creating and enhancing cultural competency; achieving and improving access to justice; promoting and supporting knowledge of Indigenous Legal Systems; and taking action on Reconciliation.

**At the time this photo was taken, each of these women controlled a major legal organization.**

**From left to right: Jennifer Gold (President, Women's Law Association of Ontario); Karen Perron (President, OBA); Teresa Donnelly (Treasurer, LSO); and Deborah Palter (President, The Advocates' Society).**



I was also concerned about the impact of the pandemic on legal professionals. We navigated and lived through an extraordinary time. We confronted many challenges and uncertainties. We struggled with deaths and illnesses in our families, working from home, home schooling our children, caring for the vulnerable, coping with isolation, and transitioning our work to ensure health and safety of ourselves, colleagues, clients, and the public. As demands on legal professionals increased, I became increasingly concerned about the need to prioritize our mental health and well-being. We need to be healthy and well; to look after ourselves; and look after each other in order to continue our important work in the justice system. In 2021 and 2022, I was honoured to co-host the Law Society's Mental Health for Legal Professionals Summit where lawyers and paralegals shared their experiences and strategies aimed at building awareness, educating and reducing stigma associated with mental illness. The more we have these open discussions, the closer we are to moving from stigma to acceptance and support.

**Q: How do you feel that we as a bar and the LSO as an organization responded to the challenges posed by COVID, court closures, and the move to electronic hearings?**

A: The profound impacts of the pandemic demonstrated the resilience and fortitude within the legal professions. While much of the world came to a standstill in March 2020, lawyers and paralegals worked to continue to serve their clients and the justice system, adapting to an online environment, adjusting their business practices and, for many, working harder than ever. Like many organizations the Law Society acted swiftly to safeguard employees, provide support to licensees, and protect the public interest as we migrated to a new way of working.

We saw unparalleled cooperation, commitment, and resourcefulness at all levels of the justice system including the Attorney General, Ontario's three Chief Justices, the Law Society, the Advocates Society, the Ontario Bar Association, the Federation of Ontario Law Associations and other legal organizations and individuals. Their contributions were extraordinary and were reflective of the finest traditions of the bar.

The Law Society of Ontario with support from the Superior Court of Justice and the Ontario Court of Justice and in collaboration with the Ontario Bar Association, Toronto's Family Law Advice and Settlement Counsel project and others, launched an emergency family law referral phone line to assist people who were self-represented and trying to determine whether their family court matter was "urgent". The emergency service connected self-represented litigants with family lawyers, working on a pro bono basis, who would provide thirty minutes of legal advice. This collaboration was reflective of other outstanding work done by legal organizations and practitioners across the province and the country to ensure that the public had access to the justice system.

**Q: What challenges will the bar face in the next 5 to 10 years?**

A: For 225 years, the Law Society of Ontario has been self-regulated. Self-regulation is closely tied to independence of the bar, which is essential to the rule of law. Changes in jurisdictions in and outside Canada reinforce the importance of maintaining self-regulation and independence of the bar. These privileges are maintained, and the rule of law enhanced, when those given the power of self-regulation do so in the public interest rather than in the interest of themselves.

**Q: What changes would you like to see in our justice system?**

A: A truly accessible justice system. The current system is inaccessible for many. It difficult to navigate for members of the public in part because of the archaic language, traditions, and procedural hurdles. It is expensive. It takes too long. It favours the privileged. And now for the vulnerable – in an increasingly virtual world, are we leaving them behind because they have no access to, or limited access to, technology which prevents them from joining in on-line justice? At the 2020 Opening of the Courts speech – Chief Justice Strathy said that historically marginalized and vulnerable communities in Canada are asking whether our society, our governments, and our justice system, can really deliver on the promise of equity and justice for all peoples including Indigenous, Black, and racialized peoples, 2SLGBTQ+ and people with disabilities. Chief Justice Strathy asked whether the promise was only justice, fair treatment, and prosperity for those privileged by race, colour, or socio-economic status. He envisioned a justice system that was fair for all people. I would like to see a justice system as envisioned by Chief Justice Strathy. Such a justice system includes a strong and vibrant Legal Aid program with sustained, sufficient, and stable government funding.

**Q: Do you have any advice for young lawyers on how to develop their careers in this rapidly changing environment?**

A: Build connections. The pandemic has been isolating. Our in-person interactions have been reduced. Connect with community organizations by engaging in giving back. Join a legal organization and become involved in supporting and developing the legal professions. Join the Coach and Advisor Network through the Law Society of Ontario to connect with a peer and develop your skills. Take advantage of the other supports and resources offered by the Law Society of Ontario. ■

INTERVIEW WITH

# JENNIFER GOLD



(Interview conducted in writing in October 2022.)

**Q: Could you introduce yourself to our readers? How did you get involved with the WLAO?**

A: I've been a Board Member of the Women's Law Association of Ontario since 2016 and was President from 2020 to June 2022. I continue to support the WLAO as Past President. It was a pleasure to serve as President of the WLAO at the same time as the Law of Society of Ontario, Ontario Bar Association, and the Advocates Society were led by women.

I became involved with the Women's Law Association of Ontario after the Trump – Clinton election. It seemed to be a time when incidents of misogyny figured more prominently in the media. I wanted to be involved with an organization that advocated for women's equality in the legal profession. I have a daughter who may want to be a lawyer in the future and wanted to see the next generation achieve equality in the legal profession and not be concerned with harassment, discrimination, or pay inequality.

**Q: What was the process for becoming a Board Member of the WLAO?**

A: There is an application process for Board vacancies. It helps if you have been a volunteer of the association and/or engaged as a member of the WLAO. We are a working Board and seek candidates who have the time to perform some of the work of the organization. Our committees where members can volunteer are Mentorship, Membership, Advocacy, Communications, Programming, and Finance.

**Q: During your term as President, what issues particularly motivated you?**

A: My passion has always been advocacy. Issues that concerned me included discrimination and harassment faced by women and other equity seeking individuals in the profession, the challenges of being a lawyer and parent, parental leave benefits, mental health challenges faced by people in the profession (particularly during lock downs and school closures!), and pay equity.

**Q: How do you feel that we as a bar and the WLAO as an organization responded to the challenges posed by COVID, court closures, and the move to electronic hearings?**

A: I feel that the bar and many legal associations, including the WLAO, responded reasonably well given the circumstances. The WLAO had events focused on parenting through the pandemic, mental health challenges faced by women, and advancing in your career. Our mentorship program continued and we launched our book club during the pandemic. There are always areas that need improvement and I'm optimistic that things will improve. If you see a problem, it's important to raise it.

**Q: How has practice changed as a result of the pandemic? Have those changes been positive? Are there any negatives?**

A: The move to remote work in the legal profession was unprecedented but welcome for many. It proved that flexible work can work. The option to work entirely or partly from home assisted many with obligations to care for others whether children or other family members. Some of the challenges involved adapting to technological changes, learning new software, and cybersecurity. Some of the negatives were faced by those entering the profession. They had to navigate the practice, develop competency in their practice area, and build relationships in a virtual environment.

**Q: What challenges will the bar face in the next 5 to 10 years?**

A: The retention of women in the legal profession remains an issue and may continue to be a challenge in the next 5 to 10 years. It's important that we create a culture in our profession and organizations that creates an environment that is welcoming to women and individuals from equity seeking groups. An inclusive legal profession is important, especially leadership that is diverse and inclusive.

The legal profession will also need to adapt to technology that will change how we practice. New technology will be increasingly attractive to the public where it enhances access to justice. The software that we use now in practice will continue to evolve and we must be ready to learn and adapt.

**Q: What changes would you like to see in our justice system?**

A: I would like to see greater recognition and support for the legal aid system. It would benefit from increased funding in order to help more people. It took one generation of lawyers to create it and it now needs another generation to support it and make it even more meaningful to the public. I would also like to see the commitment to pro bono work be embraced by the profession and part of our legal culture. We are privileged as lawyers and it is important to give back or pay it forward in some way. I volunteer on Pro Bono Ontario's hotline as a way to give back to those who need it most. It's not difficult and I can do it from home.

**Q: Do you have any advice for young lawyers on how to develop their careers in this rapidly changing environment?**

A: In addition to developing expertise in your practice area, it's important to build relationships. I don't mean building relationships only with those that will help you get ahead; but building meaningful relationships with all kinds of people whether it is a student, a colleague, or someone new to Canada. We learn from other people regardless of their "status". We enrich our own lives as we enrich theirs. We become better people. ■





# NEW TERM WELCOME FROM THE CHAIR AND VICE-CHAIR OF THE OBA CIVIL LITIGATION SECTION

The 2022–2023 term has officially begun and Section Chair, Rachel Migicovsky and Vice–Chair, Moya Graham are pleased to extend a warm fall greeting to all members of the OBA Civil Litigation Section.

The past three years have been challenging for everyone. As civil litigators we pivoted and embraced virtual Court attendances, meetings with clients, and meetings between lawyers. Many efficiencies were gained, for example the elimination of travel to attend discoveries and scheduling appointments, by proceeding virtually.

As this new term begins, we see OBA civil litigation members looking forward with clear eyes and gratitude for the improvements and efficiencies that the pandemic brought. However, we also observe that there is work to do to improve connectedness and collegiality amongst our members from across the province and across firms, big and small, and with our valued solo practitioner colleagues.

Our goals for this term are: (1) to support our members as we collectively embrace the adoption of technology in our civil litigation systems, and (2) to foster connection and collegiality in the civil litigation bar. Supporting these goals, three themes will pervade everything we do:

- **Efficiency** – we will look for opportunities to accomplish quickly, even small things that will make an impact on civil justice system stakeholders and promote efficiency;
- **Access to justice** – the civil litigation system has changed a lot in the last few years. Improvements should mean greater access to justice but as we know, it has also meant difficulties that can create barriers to access to justice. We will view those barriers as targets for improvements (e.g. associated costs with CaseLines); and
- **Representation** – we look for ways, big and small, to ensure we speak for a broader segment of the bar – more voices, from more diverse perspectives – each year.

It is a privilege to serve as your Chair and Vice–Chair of the OBA Civil Litigation Section.

Lastly, an invitation. Our best ideas for initiatives and targets for improvement in the civil litigation system come from our members. Reach out!

- Rachel can be reached at: [rachel@tqplaw.ca](mailto:rachel@tqplaw.ca)
- Moya can be reached at: [mgraham@mccarthy.ca](mailto:mgraham@mccarthy.ca)

We look forward to hearing from you.

Rachel Migicovsky & Moya Graham

# MEDIATION IN THE POST-PANDEMIC WORLD

Stuart Rudner  
*Rudner ADR*



As a mediator, I spend a lot of time speaking with counsel about how to win at mediation, as opposed to just settling. In this article, I wanted to discuss mediation in the (hopefully) post-pandemic world; what has changed, how will it look, and what should counsel do to be as effective as possible? While the goal – to get the best possible result for your client – has not changed, I encourage counsel to consider how some of the mechanics and tools available have evolved over time and ensure that they are fully taking advantage of them. My experience is primarily in mediating employment-related disputes, but most of these comments apply more broadly.

## Video Mediation

I have said this many times over the past two and a half years: video mediation works. While I settle the vast majority of mediations I handle, the success rate is even higher for video mediations.

There are a number of potential explanations for this, including that:

- You can always have the decision-makers participate when travel is not involved;
- Some parties, particularly less litigation-sophisticated individuals, are more comfortable in their home than in a skyscraper in downtown Toronto (or similar environment); and
- It is easy to accommodate childcare or other needs through short breaks.

I expect that we will continue to see widespread use of video mediation, with in-person mediations being the exception and not the norm.



### **Modern Briefs**

Your mediation brief in 2022 should not simply be a “carbon copy” (to use a very outdated term) of what it would have looked like in 1995. As a mediator, here is what I want to see:

- Key points up front (for example, in a wrongful dismissal action, include a chart with facts such as the employee’s age, length of service, position and compensation);
- Compelling arguments with evidence to back them up;
- Embedded photos, video or audio, or links to documents so that I can easily click and see what evidence you have to support your arguments;
- Acknowledgment of weaknesses (or perceived weaknesses, if you can overcome them);
- A history of negotiations, so I can understand the context and where things stand; and
- An estimate of the time and cost involved in litigation, so we can realistically assess the BATNA (Best Alternative to Negotiated Agreement)

Remember that the brief is your first opportunity to persuade the mediator of the strength of your position. Why waste it by mindlessly pasting the bulk of your pleading? You also waste the opportunity if you use a shotgun approach and include every possible argument, burying the strong ones.

### **Decreased Use of Joint Sessions**

While every practice area is different and we have seen different practices evolve in different regions, the use of joint sessions is decreasing. Even prior to the pandemic, it was becoming increasingly common in the Greater Toronto Area to have employment-related mediations almost entirely by caucus, without a joint session. In most of my mediations, I like to begin with a very brief

joint session in which I discuss the purpose of mediation and the logistics. However, we do not discuss the substantive issues until the parties are back in their own room. I believe that this will continue, and there will be little or no substantive discussions involving all parties together.

What this means is that I am your advocate in the other room, and if you give me strong evidence to support your position, I can do a much better job and get you a better result. Sending me to the other room with nothing but a bald allegation is not going to be particularly compelling.

### **Use of Digital Evidence**

It is particularly frustrating when I am told that a party will “gather the evidence if they don’t settle today”. This is a wasted opportunity. When I am mediating, I am your advocate in the other room, and I can make your case much more strongly with evidence to back it up.

With respect to evidence, it is no secret that most of the “evidence” we deal with these days is digital. Emails, texts, WhatsApp messages, Facebook Messenger messages, other messages, etc., all provide us with complete records of discussions when downloaded properly. There are apps you can use rather than screenshots, which are messy, easy to manipulate and incomplete.

Everyone has a camera, video and audio recorder with them wherever they go, which means we are also seeing a lot of video and audio recordings, as well as photos, as evidence.

The key is to use all of these records to your advantage at mediation. I love it when counsel embeds a photo, video or audio recording right in the body; that way I can see or hear what happened, as opposed to reading a somewhat biased description of it. If it’s too cumbersome to embed, put a link to the document (which could also be a witness statement) so I can easily find it.

## More Strategic Mediation

With mandatory mediation in some jurisdictions and more widespread use in others, mediation before trial is becoming the norm. I am seeing more strategic discussion of when to mediate, as well as which mediator to work with.

While I am a proponent of early mediation, sometimes you need to wait until after discoveries in order to allow for a proper discussion of the issues. In some cases, I have worked with counsel to split the mediation. For example, in a just cause dismissal case, we have mediated the notional severance package if just cause exists, followed by examinations for discovery and then the continuation of mediation to address the remaining issues and settle the case.

There are many more mediators than there used to be, some with unique backgrounds or approaches. I encourage counsel not to simply use the same ones over and over again; pick the right approach, personality, skill set and expertise for the specific case.

## More Creative Ways to Break the Impasse

It often takes 95% of the time to bridge 5% of the gap between the parties. Sometimes, there is a psychological impediment that prevents one party from accepting the other party's offer, which means that a resolution can never be reached.

In many cases, I use a Mediator Proposal to break this impasse; instead of presenting an offer from one side, I use the information that I have gathered throughout the process about the case and the potential for resolution, and put forward my recommended terms. If both parties agree, then we have a settlement. If not, the mediation is over (although I confess that sometimes it does lead to further offers which then end up in a settlement).

We can also use med-arb or Final Offer Arbitration (often referred to as "baseball arbitration", where each party submits a final offer and the Mediator/Arbitrator must choose one) as well as other creative ways to bring the matter to a successful conclusion, and I am seeing more of this. Many people want to avoid the delay, cost, uncertainty, and lack of subject-matter expertise of the civil courts, so arbitration is also growing in popularity. As I often say, why not choose your judge and design the best process for the specific dispute?

## The Bottom Line

We should not be litigating or mediating the same way that we did twenty or more years ago. As counsel, your job is still the same, however: to get the best possible result for your client. One way to do that is to ensure that you prepare properly and thoroughly for mediation. If settlement is not possible, you can always apply what you have done to help you at trial or arbitration. Using a mediation brief template from 1995, pasting your pleading into it and then promising to gather the evidence if you don't settle at mediation is not the way to advocate on behalf of your client. ■

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Stuart Rudner is a Senior Employment Lawyer with a growing practice as a Mediator.

As a mediator, Stuart combines his knowledge and experience gained over 23+ years as a lawyer and media with his interpersonal skills and problem-solving abilities. In order to ensure that he is well-equipped to help parties resolve their disputes, Stuart has completed an Advanced Alternative Dispute Resolution course and participated in several mediation workshops. While many mediators claim that they don't "keep score", Stuart does, because if there is no settlement, he knows that he has not succeeded. He enjoys a settlement rate over 95%, has received overwhelmingly positive feedback, and has seen that once a lawyer works with him once, they tend to come back again.

Stuart possesses the unique ability to see things from both sides. By acting as an objective third party, he can work with parties and their counsel to achieve a fair result. He has successfully helped many parties do just that, and is flattered by the fact that almost all lawyers that have used his mediation services have continued to recommend and work with him.

Stuart has acted as counsel at countless mediations, and he knows that one size does not fit all. Sometimes, an evaluative approach will be helpful, while other matters require a facilitative approach. In most cases, a mixture is the best recipe. One thing he will not do, however, is act as a “glorified courier”, delivering offers back and forth without working to help the parties reach an agreement. His goal is to help the parties reach a reasonable resolution, and he will adapt his approach to the unique circumstances of each case, and to the people involved, in order to achieve that goal.

Stuart is passionate about finding a resolution, and will work tirelessly and strategically to do so.



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