

Systemic lack of procedural knowledge a major problem, says judge

By Valerie Mutton
Toronto

There are moments every courtroom lawyer wishes had never happened: an improper cross-examination on a transcript, or a time when a business document wasn't introduced into evidence the right way, or a cringe-worthy procedural lapse in front of the jury. It happens to almost every lawyer at some point in his or her career.

Justice Dan Ferguson, of the Superior Court of Justice in Whitby, Ontario, saw a great need for a comprehensive resource that would allow both judges and lawyers to find the answers to the common and not-so-common procedural issues that arise in courtrooms every day. He was astonished to find that senior counsel and judges as well as young lawyers do not seem to have a firm grasp on essential procedure, but realized the problem is systemic.

Although early resolution of cases by alternative dispute resolution is commendable, it's clear that mediation has reduced the numbers of cases going to court. As a result, lawyers don't have as much opportunity to learn by doing. Articling students no longer have as much chance to cut their teeth on small court cases. Judges may not have practised criminal law or civil litigation before being appointed, but find themselves thrust into a courtroom setting. But even more astonishing to Justice Ferguson was that there was no reference book to help advocates and judges deal with the evidentiary and procedural problems that arise unexpectedly and demand immediate resolution.

In response, Justice Ferguson rounded up over 100 of the most experienced litigators and judges in Ontario to contribute to a comprehensive reference manual. *Ontario Courtroom Procedure* (published by LexisNexis Inc., publisher of *The Lawyers Weekly*), a step-by-step manual to procedures in both the Ontario Court of Justice and Superior Court, is now available.

The book covers both civil and criminal procedure, and deals with such wide-ranging and diverse topics as: how to make a proper objection, the role of a judge when dealing with self-represented litigants and using litigation support software in the courtroom. The book will be updated annually, and is available as a CD-ROM. Senior Counsel Roger Oatley said, "I can't imagine that anyone would undertake a civil trial without having it available."

Oatley's expertise is well-known. The Ontario Trial Lawyers' Association established a lecture series known as the "Roger Oatley Lectures in Jury Advocacy" to recognize his contribution to the teaching of jury advocacy to trial lawyers. He was also a con-

tributor to *Ontario Courtroom Procedure*. He agrees that judges and lawyers of all levels of experience will benefit from such a resource. Oatley sees even senior lawyers making procedural mistakes, and worse, sometimes sees judges compound the errors in their rulings. But he thinks young lawyers have the hardest time learning the ropes, as their chance to develop skills on smaller cases is evaporating. "Younger counsel just don't get the trial experience or the opportunity to work with senior counsel who know what they're doing. As litigation becomes more expensive and as legislation becomes stacked

against trying small cases, the result is that small cases don't get heard."

Justice Gloria Epstein, co-chair of the Education Committee of the Canadian Institute for the Administration of Justice, concurs. "Procedural knowledge is not being passed down, nor is the experience in applying the procedures. Law firms are less inclined to take young lawyers to court and write off their time," she says.

"Fewer trials mean fewer opportunities. Young lawyers need opportunities to apply the knowledge they have," Justice Epstein would like to see law firms commit to giving young lawyers

every chance to go to court and hone their skills. "If we want to keep producing new stars, then we have to keep getting them into court."

Justice Ferguson says that without a sound knowledge of courtroom procedure, our traditions and elementary procedures intended to effect fairness and efficacy will be eroded, with the result that neither Bench nor Bar will know what to expect in any courtroom. He worries that procedure is becoming discretionary, resulting in wasted time and cases being reversed on appeal. Justice Epstein also feels that a sound understanding of procedures on the part

of both judges and lawyers is fundamental to the administration of justice. "Just as good fences make good neighbours, good rules make good law. If judges apply the rules consistently and fairly, the public will trust us."

A lack of knowledge of procedure can potentially result in embarrassment and in costs being awarded against a party. Even if you feel confident in your courtroom skills and procedural knowledge, as Justice Epstein says, "all of us run into issues we've never had to deal with before and it would be naive to think we are 100 per cent up to speed on everything."