

## The Osgoode Short Course

# Prosecuting and Defending Professional Discipline Cases

This unique course will give you expert guidance on all aspects of handling professional discipline files, including:

### The Investigation Phase

- The powers of the tribunal and the professional's duties and obligations
- Navigating the maze of documentary production
- Successfully representing your client through examinations, interviews, and inquiries

### Pre-Hearing Preparation and Proceedings

- The proper scope of prosecutorial disclosure
- The effect of the implied undertaking rule
- Pursuing and resisting interim orders
- Thinking through key issues, defences and strategies for the hearing

### The Discipline Hearing

- Effective advocacy in disciplinary proceedings
- Factors affecting penalties
- Costs: considerations and strategies
- Applications for readmittance

### Faculty includes regulators from:

The Alcohol & Gaming Commission of Ontario • The College of Physicians and Surgeons of Ontario • The Ontario College of Nurses • The Institute of Chartered Accountants of Ontario • The Real Estate Council of Ontario



### DATES & TIME

January 30 - 31, 2013

9:00 a.m. - 4:45 p.m. EDT/EST

### LOCATION

Osgoode Professional  
Development Centre  
1 Dundas St. W., 26th Floor  
Toronto, ON

### COURSE LEADERS

Linda Fuerst, Lenczner Slaght  
Royce Smith Griffin LLP

Nina Bombier, Lenczner Slaght  
Royce Smith Griffin LLP

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## The Osgoode Short Course

# Prosecuting and Defending Professional Discipline Cases

**Are you fully equipped to handle these complicated and high-stakes cases?**

**T**he stakes are high in professional discipline proceedings. For the professional, years of education and experience, reputation, and livelihood are on the line. For the licensing body, there's pressure to respond to allegations of misconduct, incompetence or incapacity in a fair and timely manner, and to vigorously protect the public interest.

Whether you are a lawyer defending a professional in disciplinary proceedings, or represent a regulatory body, this *Osgoode Professional Development* short course will provide you with a thorough and current understanding of the essential practical, technical and substantive law issues that you need to master in order to succeed in this unique and challenging litigation specialty.

The course brings together a truly outstanding faculty of defence and prosecuting counsel. They will ensure that you are up-to-date with the very latest legal developments, and will highlight effective strategies, tactics and tips for defending or prosecuting professional discipline cases.

**Don't miss this unique opportunity to have your questions answered by a distinguished gathering of the highest-caliber experts in the field.**

**Register now by visiting [www.osgoodepd.ca](http://www.osgoodepd.ca), calling 416.597.9724 or 1.888.923.3394, emailing [opd-registration@osgoode.yorku.ca](mailto:opd-registration@osgoode.yorku.ca) or faxing 416.597.9736.**

### Course Leaders

**Linda Fuerst, Lenczner Slaght Royce Smith Griffin LLP**

**Nina Bombier, Lenczner Slaght Royce Smith Griffin LLP**

### Faculty

**Raj Anand, WeirFoulds LLP**

**Wendy Berman, Cassels Brock & Blackwell LLP**

**Amy Block, Counsel, The College of Physicians and Surgeons of Ontario**

**Johanna Braden, Stockwoods LLP**

**Lisa Brownstone, Co-Director, Legal Department The College of Physicians and Surgeons of Ontario**

**Alistair Crawley, Crawley Meredith Brush LLP**

**Brian Gover, Stockwoods LLP**

**Aviva Harari, Legal Counsel, Alcohol & Gaming Commission of Ontario**

**Brian Heller, Heller, Rubel Barristers**

**Alix Hersak, Counsel, Professional Conduct Institute of Chartered Accountants of Ontario**

**James A. Hodgson, Norton Rose Canada LLP**

**Sharon E. Lavine, Greenspan Humphrey Lavine Barristers**

**Sean Lawler, Shibley Righton LLP**

**Paul Le Vay, Stockwoods LLP**

**Jaan E. Lilles, Lenczner Slaght Royce Smith Griffin LLP**

**Jonathan Lisus, Lax O'Sullivan Scott Lisus LLP**

**Melissa MacKewn, Heenan Blaikie LLP**

**Andrew Matheson, McCarthy Tétrault LLP**

**Robert Maxwell, Legal Counsel, Real Estate Council of Ontario**

**Karen McGovern, Director, Professional Conduct Ontario College of Nurses**

**W.A. Derry Millar, WeirFoulds LLP**

**Neil Perrier, Perrier Law Professional Corporation**

**Matthew Sammon, Lenczner Slaght Royce Smith Griffin LLP**

**Megan E. Shortreed, Paliare Roland Rosenberg Rothstein LLP**

**Ian R. Smith, Fenton, Smith Barristers**

**Richard Steinecke, Steinecke Maciura LeBlanc**

**Glenn M. Stuart, StuartLaw**

**Caroline Zayid, McCarthy Tétrault LLP**

# Agenda

**Day One: Wednesday, January 30, 2013**

**8:30 Registration and Continental Breakfast**

**9:00 Welcome and Introduction from the Course Leaders**

Linda Fuerst, Lenczner Slaght Royce Smith Griffin LLP

Nina Bombier, Lenczner Slaght Royce Smith Griffin LLP

**PART ONE: THE INVESTIGATIVE PROCESS: KEY ISSUES AND STRATEGIES**

**9:05 Assessing Duties and Powers**

Lisa Brownstone, Co-Director, Legal Department  
The College of Physicians and Surgeons of Ontario

Aviva Harari, Legal Counsel, The Alcohol & Gaming  
Commission of Ontario

Jaan E. Lilles, Lenczner Slaght Royce Smith Griffin LLP

- Delineating and challenging the powers of investigators
  - proper scope of investigatory powers
  - challenging use of the power to summons: *Sazant* (Div. Ct.)
  - challenging *ex parte* investigation orders
- The duties of investigators/College staff
  - duty of good faith, neutrality and reasonableness?
  - duty to provide notice of complaint or investigation: *Volochay* (CA)
- The professional's duty to cooperate
  - in what circumstances and to what extent does the duty apply?
  - availability of protections against compelled testimony
  - cooperating with a power to inquire into and examine: *Gore* (CA)

**10:00 The Paper Chase: Documentary Requests and Production**

Paul Le Vay, Stockwoods LLP

Sharon E. Lavine, Greenspan Humphrey Lavine Barristers

Melissa MacKewn, Heenan Blaikie LLP

- Demands for production
  - preservation and protection of electronic records: dos and don'ts
  - results of internal investigations and privilege
  - PIPEDA obligations and privacy issues
  - limits on the power to inspect
  - considering how production demands might affect disclosure obligations later on (*Biovail*)

- Searches and seizures
  - anticipating when investigators are likely to resort to the power to search and seize
  - what to do when an investigator arrives with a warrant
- *Charter* considerations at the production stage
- Solicitor-client privilege
  - what can be claimed, challenging claims
  - *Blood Tribe* and its implications in this area

**11:00 Refreshment Break**

**11:15 Examinations, Interviews and Inquiries**

Megan E. Shortreed, Paliare Roland Rosenberg  
Rothstein LLP

Ian R. Smith, Fenton, Smith Barristers

- Preparing the client
  - best practices
  - ethical and professional considerations
- Entitlement to pre-examination disclosure
- Prudent practices and planning for the conduct of investigations
- Compelled testimony and the privilege against self-incrimination
  - what are the limits on subsequent use?
  - what is the impact on information sharing with other regulators and police agencies?
  - the distinction between *Charter* and *Evidence Act* protections
- The impact of parallel investigations by police or other agencies on examinations
- *Charter* issues arising at the examination stage
- Written inquiries and responses: strategic considerations

**12:15 Networking Luncheon**

**PART TWO: AFTER REFERRAL TO A HEARING**

**1:15 Preparing for the Hearing, Part 1: Disclosure and Related Issues**

Brian Gover, Stockwoods LLP

Robert Maxwell, Legal Counsel  
Real Estate Council of Ontario

Matthew Sammon, Lenczner Slaght Royce  
Smith Griffin LLP

- The right to counsel and adjournments
- Disclosure to the respondent
  - what *Stinchcombe* requires
  - how to determine if disclosure is complete

# Agenda

- procedures for challenging adequacy of disclosure
- challenging claims of privilege made by the tribunal staff
- the right to particulars: the distinction between disclosure and particulars
- respondent's entitlement under s.8 of the *Statutory Powers Procedure Act*
- obtaining access to third party documents
- information about staff conduct: what can you get, and how?

- The implied undertaking rule: the scope of its application; consequences of breach in the administrative context
- Severance of allegations or respondents: the test and strategic considerations

## 2:30 Refreshment Break

## 2:45 Preparing for the Hearing, Part 2: Critical Issues, Defences, and Strategic Considerations

Alistair Crawley, Crawley Meredith Brush LLP

Richard Steinecke, Steinecke Maciura Leblanc

Jonathan Lisus, Lax O'Sullivan Scott Lisus LLP

- Defence of officially induced error: under what circumstances will it be effective?
- To what extent can the respondent use reliance upon legal advice as a defence?
- Defence of due diligence: *MacLeod* (Fed. CA)
- Delay/abuse of process/breach of s.7 of the *Charter*
  - how long is too long?
  - establishing prejudice
- Alleging bias
  - when should you raise a bias challenge?
  - to whom should the argument be made?
  - the benefits and risks of alleging bias
- Validity and interpretation of the definition of misconduct
- The standard of practice: battle of the experts
- The burden of proof: *FH v. McDougall*

## 4:00 Interim Proceedings: Scope and Strategy

Andrew Matheson, McCarthy Tétrault LLP

Karen McGovern, Director, Professional Conduct Ontario College of Nurses

- Notice issues: circumstances where an order may be made without notice
- Tactical use by tribunal staff: a means of obtaining early disclosure from the respondent?

- Terms of practice pending the hearing; undertakings
- Impact on respondent's ability to defend
- The interim orders powers of the Inquiries, Complaints and Reports Committee under the amended RHPA
- Evidentiary considerations in interim proceedings and negotiations

## 4:45 Day One Adjourns

## Day Two: Thursday, January 31, 2013

### PART THREE: THE DISCIPLINE HEARING

## 8:30 Continental Breakfast

## 9:00 The Discipline Hearing, Part 1: Effective Advocacy

James A. Hodgson, Norton Rose Canada LLP

W.A. Derry Millar, WeirFoulds LLP

Neil Perrier, Perrier Law Professional Corporation

Utilizing specific problem scenarios in the professional discipline context, the panel will explore a variety of substantive and strategic issues that can present challenges to advocates in regulatory hearings. The panel will comment on such issues as:

- Limits on the role of independent counsel to the tribunal
- Persuading the lay tribunal member
- Establishing and assessing credibility
- The importance of oral evidence: *Re KY Ho*
- The use of prior testimony or interviews
- Objections and the importance of the record
- Use of prior decisions of the tribunal
- Differences between advocacy before tribunals and the courts
- Special issues in hearings before domestic tribunals (e.g. IIROC)

## 10:30 Refreshment Break

## 10:45 The Discipline Hearing, Part 2: Penalties, Costs, Settlements, Readmittance

Alix Hersak, Counsel, Professional Conduct Institute of Chartered Accountants of Ontario

Sean Lawler, Shibley Righton LLP

Glenn M. Stuart, StuartLaw

- Settlements
  - pitfalls of settlement and how to avoid or address them

# Agenda

- use of admissions made in other proceedings
- ability of other respondents to obtain access to communications otherwise protected by settlement privilege
- is it possible to negotiate too *good* a deal?
- Assessing the appropriate penalty
  - the usefulness of prior decisions
  - penalty guidelines
  - effective evidence and its presentation
- Costs
  - assessment of costs in disciplinary proceedings; comparisons across tribunals
  - ability of the tribunal to recover or to pay costs and its impact on the conduct of the hearing
  - challenging the tribunal staff's claims for costs – *Donnini*
- Applications for readmittance: is the game worth the candle?

## 12:15 Networking Luncheon

## 1:15 Dealing Effectively with Concurrent Criminal and/or Civil Proceedings

Wendy Berman, Cassels Brock & Blackwell LLP

Johanna Braden, Stockwoods LLP

Brian Heller, Heller, Rubel Barristers

- Which proceeding should go first?
- The impact of parallel proceedings on production, disclosure, and undertakings
- Use of testimony given in other proceedings; self-incrimination and cross-border issues
- Ability to use pre-hearing disclosure in other proceedings and the implied undertaking rule
- Significance and practical import of the Court of Appeal's decision in *R v. Sandhu*
- Potential use of a finding of an administrative tribunal in the courts, and *vice-versa*

## 2:30 Refreshment Break

## 2:45 Court Challenges to Professional Discipline Decisions

Raj Anand, WeirFoulds LLP

Amy Block, Counsel, The College of Physicians and Surgeons of Ontario

Caroline Zayid, McCarthy Tétrault LLP

- Considerations in determining whether to seek judicial review or to appeal

- Prematurity considerations: at what stage can you ask the court to intervene?
- How much deference will be given to findings of fact made by a disciplinary tribunal? Should it differ from other types of administrative decisions? – *McDougall* and others
- Adequacy of reasons and the relationship to “reasonableness” review
- Test for obtaining a stay of proceedings pending review or appeal
- The standard of review: the impact of *Dunsmuir* in this area

## 4:00 Closing Remarks from the Course Leaders

## 4:15 Course Concludes

## Who Should Attend

- Litigators who represent regulated professionals
- Regulators, Members of SRO's
- Professional regulation adjudicators
- Members of Complaint Committees
- Investigators
- Mediators and Arbitrators

## Registration

Please complete all registrant information.

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Sophia Ruddock, Ontario Nurses Association

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### Cancellations and Substitutions

Substitution of registrants is permitted at any time. If you are unable to find a substitute, a full refund (less \$75 administration fee) is available if a cancellation request is received in writing 14 days prior to the program date. No other refund is available.

### Dates & Times

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**9:00 a.m. - 4:15 p.m. EDT/EST**

Please arrive a half hour early for sign-in and material pick-up.

Dress is business casual.

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