



# Keeping Tabs

Monthly News from The Young Advocates' Standing Committee

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## Chair Chat

By: Tony Di Domenico, *YASC Chair*

Happy New Year, everyone! 2013 was a very productive year for YASC in furtherance of its strategic plan. With 2014 upon us, YASC has a very busy line-up of initiatives and events in the works, and in particular, focused on mentorship, building professional relationships and the exchange of ideas

that impact young advocates. So what is coming up soon?

We have an intimate Fireside Chat featuring a live Journal interview with Benjamin Zarnett, the inaugural YASC Debate Club (an evening featuring an intense but fun face off between Anil Kapoor and James Morton) and a Mentoring Dinner focused on "Facing the Fear Factor". Check out this newsletter or TAS website for further details regarding these and other YASC events.

I am also happy to note that YASC is launching a new seminar series focused on the impact of technology on the practice of litigation and on the administration of justice. This series will feature different stakeholders and perspectives, ranging from the impacts of social media to the effective use of technology in the courtroom. Stay tuned for further information.

We look forward to seeing you soon.

Tony

## Trivia Challenge

How many CPD hours do you earn if you attend the February 13 Mentoring Dinner, Facing the Fear Factor?



Tweet your answer to @Advocates\_Soc using hashtag #YASCTriva for a chance to win a \$50 Best Buy Gift Card

Get ready for this year's YASC Trivia Challenge, happening on March 20, 2014. Answer the trivia challenge question in each newsletter for a chance to win great prizes and YASC bragging rights!



**We have moved to a new location:**

2700-250 Yonge Street, P.O. Box 55, Toronto, ON M5B 2L7

Our telephone and fax numbers have remained the same. Please ensure your records are updated accordingly.

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# The YASC Interview: Duncan Ault

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By: Brydie Bethell, *Simcoe Chambers*

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Duncan Ault is a graduate of Queen's law school and was called to the bar in 2007. He litigated at a national law firm in Toronto for five years before recently moving to Ottawa to join *Borden Ladner Gervais LLP*. His practice focuses on civil litigation with an emphasis on corporate commercial litigation including contractual disputes, securities litigation, shareholder disputes, insolvency litigation, class actions, commercial arbitrations, and directors' and officers' liability. Duncan has appeared before all levels of court in Ontario, as well as the Québec Court of Appeal.

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**Why did you become a litigator or advocate?**

A: I contracted the yips at an early age.

**Which do you prefer: litigator or advocate?**

A: Depends on the client.

**What is your year of call?**

A: In Ontario? 2007. But I was called to the bar in Quebec when I was 15 or 16.

**How would you describe your career so far?**

A: A rare delight.

**What is your greatest fear in practice?**

A: Boredom.

**What is your idea of perfect lawyerly happiness?**

A: Successfully concluding a case before Canada Day.

**Which lawyer do you most admire?**

A: Frank Galvin, brilliantly brought to life by Paul Newman.

**What is your favourite journey?**

A: The first tee to the eighteenth green.

**Which words or phrases do you most overuse?**

A: "Absolutely."

**Which words or phrases do you think other lawyers most overuse?**

A: "Flip it to me."

**What would you consider your greatest achievement?**

A: Co-writing and performing *To Good Friends, Vol. 1*. Check it out at [www.togoodfriends.bandcamp.com](http://www.togoodfriends.bandcamp.com)

**Which talent would you most like to have?**

A: Brian Wilson's falsetto.

**Who or what is the greatest love of your life?**

A: Summertime in the Ottawa Valley.

**What is your favourite drink?**

A: My next.

**From whom have you learned the most about the practice of law?**

A: My assistant.

**If you weren't a lawyer, what would you be?**

A: More relaxed.

**What is your most marked characteristic?**

A: A sunny disposition.

**What do you most value in your friends?**

A: Unrestrained mirth.

**If you could have one superpower what would it be?**

A: William F. Buckley's vocabulary.

**If you were to die and come back as a person or thing, and if you could choose, what would it be?**

A: Chevy Chase.

**What is something that you said today?**

A: "You're going to need a bigger boat."

**What is something someone said to you today?**

A: "Hooper drives the boat, Chief. Hooper drives the boat."

**What did you overhear today?**

A: "He's either very smart or very dumb."

**What is your greatest extravagance in your every day life?**

A: Liberally quoting from the movie *Jaws*.

**Who is/are your Judge Crush(es) and why?**

A: American Idol's Jennifer Lopez - for her robust astuteness.

**What is your favourite legal word?**

A: Estoppel, naturally.

**What is your motto?**

A: Onward and upward.



## Mentoring Dinner Series 2014

Thursday, February 13, 2014

6:00 pm - 8:30 pm

Campbell House  
160 Queen Street West, Toronto, ON.

As a junior lawyer, it's natural to feel intimidated by more senior counsel, to feel nervous in a new setting or when presented with new challenges or tasks. Join us for an empowering evening of discussion on how to maintain your composure and hold your own in the office, at discoveries, in negotiations or at hearings using style and grace. To RSVP contact Hilary Spencer at [hilary@advocates.ca](mailto:hilary@advocates.ca)



## Ready, Set, Litigate!

Tuesday, February 25, 2014

9:00 am to 4:30 pm

The Advocates' Society Education Centre  
250 Yonge Street, Suite 2700, Toronto

Judges and Masters answer the questions new counsel are afraid to ask, with candid discussion about what to expect during your early court appearances, and what the bench expects from you.

For more information, [click here >>>](#)

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# No Objection: A Law Geek's Guide to Good Advocacy in Film

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By: Geoff Moysa, *McMillan LLP*

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Could there be anything more annoying than watching a courtroom drama with a litigator? I plead guilty as charged, since I am usually the one yelling at the TV screen about hearsay, admissibility and improper objections to my very patient (and probably profoundly irritated) spouse.

Fortunately there are some very entertaining movies with courtroom scenes that are not only surprisingly accurate, but provide fantastic real-world advocacy lessons.

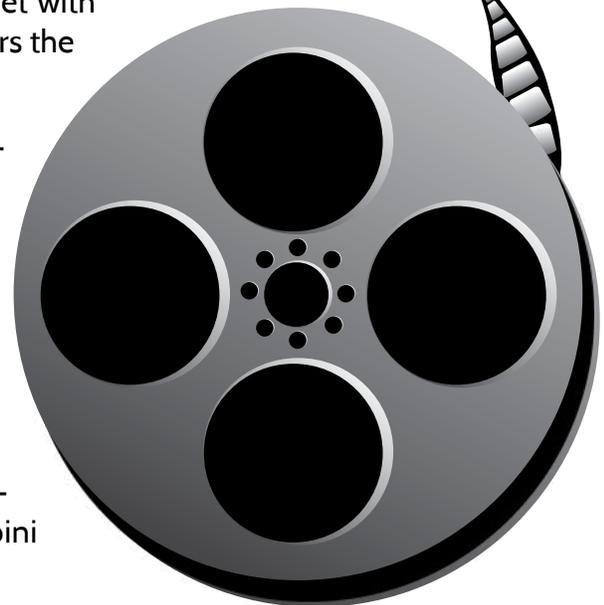
The Coen Brothers' 2010 remake of the western **True Grit** ingeniously introduces one of its main characters through a nearly 8-minute long set of examinations during a criminal trial.

When we first meet U.S. Marshall Rooster Cogburn (Jeff Bridges) he is sitting in the witness chair in a packed courtroom giving his evidence in chief about his shooting of the defendant after an alleged robbery. You barely notice the presence of the seasoned prosecutor guiding the examination with short, non-leading questions, a testament to his skill as an examiner. In the background you hear the defence lawyer pipe up regularly with perfectly valid and non-dramatic objections: hearsay (overruled because it was a dying declaration), speculation, lawyer giving evidence, and leading questions.

Not only is the examination-in-chief accurate but it, and the cross-examination that follows, serve as clever devices for a great deal of exposition and character development. The viewer first sees the gruff, battle-scarred Cogburn through his own version of events, as given in chief. The aggressive cross that follows recasts his straight-shooter image as a trigger happy lawman with a vendetta based on the fact that he has shot other members of the defendant's family (a line of questioning that is initially and understandably met with an objection). This gives the character nuance before he even enters the events of the film.

And then of course there's **My Cousin Vinny**. I had all but forgotten about this comedy until law school, when Professor Hamish Stewart extolled its virtues in his Evidence class. Turns out it is an excellent primer on courtroom etiquette, effective examinations and properly introducing expert evidence.

"When it comes to procedure, I'm an impatient man," warns Alabama Judge Chamberlain Haller during his first meeting with oblivious defence lawyer Vincent Gambini (Joe Pesci). His Honour makes good on his promise, immediately rebuking Gambini for his wardrobe and how he addresses the court before Gambini

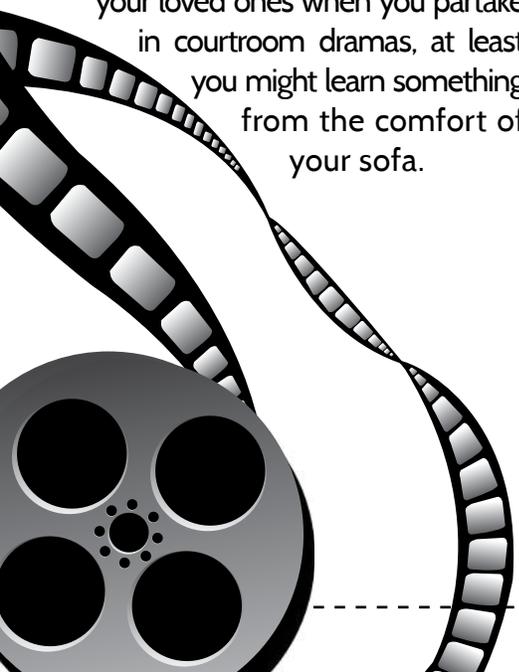


gets more than a word out at the arraignment.

Gambini, a newly-minted personal injury lawyer from New York with zero trial experience, takes on a murder trial for a family member and gets a crash course in advocacy while fumbling his way through rough-edged but increasingly effective cross-examinations. The prosecution, meanwhile, provides an exemplary snapshot of a straightforward and concise opening statement, and good basic examinations in chief.

One of the movie's best teaching points comes late in the trial when the prosecution ambushes the defense with an expert witness on tire tracks. Gambini realizes his fiancée (a former mechanic) might be well-positioned to provide responding evidence, proceeds to qualify her as expert in a voir dire, and introduces exhibit evidence through her testimony.

All of these scenes had me cheering on the couch and marveling at how the writers got it so right. My submission? Although you may annoy your loved ones when you partake in courtroom dramas, at least you might learn something from the comfort of your sofa.



## Pub Night Photos- Irish Embassy, January 16, 2014



[Click here to see more photos from Pub Night.](#)



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# Discovery Plans: To Impose or Not to Impose?

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Jennifer Hodgins, *Sherrard Kuzz LLP*

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Rule 29.1 came into effect with the amendments to the *Rules of Civil Procedure* in 2010, and requires parties to an action to agree on a discovery plan following the close of pleadings. The Rule reflects the theory that discovery should, to the extent possible, be a collaborative rather than an adversarial exercise. It is intended to assist parties to move litigation forward expeditiously and efficiently by requiring them to consider the issues as early as possible, and avoid protracted and costly motions within the discovery process.

But what happens when parties cannot or will not agree to a discovery plan? Does the court have jurisdiction to impose a discovery plan? The *Rules of Civil Procedure* do not appear to address this issue leaving the court to grapple with this apparent void.

## A closer look at Rule 29.1

Rule 29.1.05 states as follows:

On any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs if the parties have failed to agree to or update a discovery plan in accordance with this Rule.  
O. Reg. 438/08, s. 25.

Rule 29.1 therefore sets out some consequences for non-compliance with the requirement to agree on a discovery plan, but nowhere does the Rule give the court the authority to impose a discovery plan. Interestingly, rule 20.05(2) (d) gives the court express authority to impose a discovery plan within the context of a summary judgment; namely, where summary judgment is refused or granted in part, the court may order examinations for discovery be conducted in accordance with a discovery plan established by the court. One could argue this express authority in the context of summary judgment suggests the court has no such authority in regards to any other circumstance. However, as the courts have noted, this interpretation could create a scenario where Rule 29.1 cannot be effectively enforced when parties cannot or will not agree on a discovery plan.

Rule 29.1 is relatively new and so there is not a great deal of judicial comment on it or the issue of whether the court can impose a discovery plan on parties. To the extent courts have been called upon to evaluate the Rule, they have not looked favourably on a narrow interpretation of its application, choosing instead to include in their jurisdiction the authority to impose a discovery plan where necessary.

## How the court has approached the issue

One of the first cases in which a discovery plan was imposed by the court was *Telus Communications Co. v. Sharp*, 2010 ONSC 2878. In that case, Master Short ruled he had jurisdiction under rule 1.04 of the *Rules of Civil Procedure* to impose a discovery plan where the defendant to the action failed to cooperate over a period of months. Master Short noted that while Rule 29.1 did not explicitly give the court jurisdiction to impose a discovery plan, this situation seemed to be “one of those circumstances to which rule 1.04(2) was clearly directed.” Rule 1.04(2) is a general, oversight rule that provides that in applying the rules the court shall make orders and give directions that are proportionate to the importance and complexity of the issues and amount involved in the proceeding.

In *Ravenda Homes Ltd. v. 1372708 Ontario Inc.*, 2010 ONSC 4559, Justice



Henderson was faced with parties who each submitted a discovery plan but could not reach an agreement. While Justice Henderson agreed that Rule 29.1 does not expressly grant a court authority to impose a discovery plan on the parties, he called this an “obvious oversight” and went on to hold that the court “clearly” has the jurisdiction to make orders regarding all of the matters that could possibly be included in a discovery plan. He cited Rule 30, 31, 32, 33, and 35 (the discovery rules) and stated that “at the very least, the authority to make an order on any matter that might be included in a discovery plan is derived from these other rules.”

More recently, in *Dewan v. Burdet*, 2012 ONSC 4465, Justice Kane imposed a discovery plan on parties that failed to move an action along in a timely fashion and where acrimony spilled over to counsel. Justice Kane held that the court should only impose a discovery plan in “exceptional circumstances”, noting that his decision to impose a discovery plan should not be considered authority under Rule 29.1 for the making of such an order.

### Court ordered discovery plans – a good thing?

What are we, as litigators, to make of the apparent willingness of the courts to impose a discovery plan on parties unwilling or unable to agree?

On the one hand, the threat of a court order may encourage parties to agree on a plan sooner than they otherwise would have (if at all). On the other hand, one wonders how a discovery plan assists in achieving its purpose if imposed by the court, rather than agreed to by the parties? Parties to a proceeding would seem to be in a better position than the court to look ahead, determine, and proactively address the issues that may arise during the discovery process. Furthermore, if the parties choose not to, or a party frustrates the process, there are already consequences set out in rule 29.1.05.

An arguably better approach may be one in which the court directs the parties to prepare a discovery plan in accordance with Rule 29.1 by a specified date, failing which the parties must return to court. This approach was recently taken by Master Glustein in *The Cash Store Financial Services Inc. et al. v. National Money Mart Company*, 2013 ONSC 2905. In that case, rather than impose a discovery plan on the parties, the Master imposed a timetable by which a plan was to be agreed upon, failing which the parties would return to court and potentially have one imposed on them.

In my view and experience, this latter approach is to be preferred. Where agreement on a discovery plan cannot be reached and a party brings a motion to have one imposed, in many cases directing the parties to agree on a plan facilitates discussion and ultimate agreement. In contrast, imposing a plan may cause the action to move along a course one or both part(ies) never wished to take. As it is still early in the life of Rule 29.1, it will be interesting to watch how litigation counsel and the courts continue to grapple with this issue.

**Jennifer Hodgins** is a lawyer with **Sherrard Kuzz LLP**. Her practice is dedicated to providing advice and representation to management in many areas of employment and labour law.



## Fireside Chat

Join us for the Fireside Chat Series on January 27th, 2014 at Campbell House in Toronto from 5:30 p.m. to 7:00 p.m.

Come in and sit for a spell at the Winter Fireside Chat Series on Advocacy. Join Stephen Grant, LSM as he conducts the next of his famous Advocates' Journal Interviews live with Benjamin Zarnett, LSM. To RSVP contact Rachel Stewart at [rachel@advocates.ca](mailto:rachel@advocates.ca).

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# Spot The Differences

Can you find the 10 differences between these two pictures?  
Find the answers below.



Differences in second picture: 1. Extra snow pile on top of the wooden fence. 2. Bird has one leg. 3. Missing nail in the wooden fence. 4. Missing bushel of flowers in the front. 5. Single purple flower. 6. White is missing from behind part of the scale. 7. Bird beak colour. 8. Missing flowers from behind the Griffin. 9. Wooden fence pole has shifted. 10. White spot on the Griffin's nose is gone.

## Debate Club

Thursday, February 6, 2014  
5:30pm – 7:00pm  
The Advocates' Society  
250 Yonge St, Suite 2700

Don't miss the inaugural Debate Club! Join other Young Advocates in a fun and informative evening featuring our debaters: Anil K. Kapoor, *Kapoor Barristers* and James C. Morton, *Steinberg Morton Hope Israel LLP*. This event is complimentary for members of The Advocates' Society. For more information please email Rachel Stewart at [rachel@advocates.ca](mailto:rachel@advocates.ca)

## Securities Mentoring

Monday, February 24, 2014  
6:00pm – 8:30pm  
Campbell House  
160 Queen St W

So you are interested in securities litigation? Whether you have been practicing for a few years or are just starting out, we will help you put the building blocks into place and bring you face to face with trusted mentors in a casual and intimate setting. Ask tough questions and get objective answers! This event is open to members and non members. For more information please email Rachel Stewart at [rachel@advocates.ca](mailto:rachel@advocates.ca)

We invite your comments and feedback. E-mail us at: [jessical@advocates.ca](mailto:jessical@advocates.ca).