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LOSS PREVENTION BULLETIN

ISSUE NO. 49 SUMMER 2010

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■ Bulletin # 194

Defining the Standard for Costs Awards against Lawyers Personally

In *Nazmdeh v. Spraggs*, 2010 BCCA (CanLII), the respondent sought and obtained an order requiring the plaintiff's lawyer to personally pay party and party costs. The costs order was made in respect of the respondent's successful applications requiring the plaintiff to provide answers to interrogatories and to compel production of particulars.

On appeal, a full panel of the British Columbia Court of Appeal considered the meaning and application of the rule under which the costs order was made. The relevant rule (Rule 57(37) of the British Columbia Supreme Court Rules) read as follows:

> (37) Where the court considers that a solicitor for a party has caused costs to be incurred without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault, the court may do any one or more of the following:
> (a) disallow any fees and disbursements between the solicitor and the solicitor's client or, where those fees or disbursements have been paid, order that the solicitor repay some or all of them to the client;
> (b) order that the solicitor indemnify his or her client for all or part of any costs that the client has been ordered to pay to another party;
> (c) order that the solicitor be personally liable for all or part of any costs that his or her client has been ordered to pay to another party;
> (d) make any other order that the court considers appropriate.

The issue on appeal was what standard of conduct must be established for the court to exercise its discretion under the rule to order that a lawyer personally pay party and party costs.

The unanimous court found that:

> A plain reading of Rule 57(37) as a whole shows that its purpose is to protect clients from liability for wasted legal costs caused by the client's lawyer. Its function is primarily compensatory....
> Under Rule 57(37), mere delay and mere neglect may, in some circumstances, be sufficient for such an order against a lawyer. Under the Rule there is no requirement for "serious misconduct", the standard required under the court's inherent jurisdiction. The requirement in *Young* and in *Kent* of "reprehensible" conduct applies only in cases of orders against a lawyer for *special costs*. *Young* and *Kent* are not authority for requiring such a standard when making an order for party and party costs against a lawyer. In such circumstances, the lower standard mandated by the Rule is sufficient.
>
> The power to make an order for costs against a lawyer personally is discretionary. As the plain meaning of the Rule and the case law indicate, the power can be exercised on the judge's own volition, at the instigation of the client, or at the instigation of the opposing party. However, while the discretion is broad, it is, as it has always been, a power to be exercised with restraint.

The court found that the plaintiff's lawyer had failed to take any positive steps to meet his obligations as counsel both in response to the interrogatories and the demand for particulars.

While the decision doesn't contain further explanation of the impugned conduct, in his article, *Lawyer Must Pay Personal Costs: BC CA* published in the April 2, 2010 issue of The Lawyers Weekly, author Gary Oakes includes some commentary on the decision suggesting that the conduct of the lawyer was not seriously deficient and amounted to no more than production of inadequate particulars and a few days of delay in responding to the interrogatories.

It may not be unusual to come across conduct of the kind complained of in a typical litigation practice, but the court nonetheless found that the lawyer's conduct was in breach of his obligations under the applicable rules. This decision makes it quite clear that "mere delay and mere neglect" can constitute a failure to meet the standard required under the rules and may therefore bring financial consequences upon a lawyer personally.

When costs are ordered against a lawyer personally, there is no possibility of recovery of that loss under the CLIA insurance policy. Costs awarded personally against an insured lawyer as a result of that lawyer's conduct in litigation are ineligible costs, and the policy explicitly states that the insurer has no responsibility for and will not pay ineligible costs.

■ Bulletin # 195

Lawyer's Liability as a Director of a Corporation
by Tana Christianson, Director of Insurance, The Law Society of Manitoba

You may have noticed newspaper articles on a recent class action suit certification in Ontario. *Allen v. Aspen Group Resources Corporation,* decided December 12, 2009, is reported at 2009 CanLII 67668 (ON S.C.). This case should be of particular interest to the many lawyers who serve on boards of directors and also to the partners and associates of those lawyers. Strathy, J. refused to grant summary judgment dismissing the class action against the law firm (a limited liability partnership) of a lawyer who was a director of Aspen. The decision entertains the possibility that the lawyer's liability as a director of the corporation could also engage the liability of the lawyer's firm either under the Partnership Act or in negligence and muses that a lawyer who sits on a corporation's board, "may well be acting in the ordinary course of a law firm's business when he or she takes a seat at the boardroom table."

Admittedly, these comments are *obiter* only and made in the early certification stage of a class action proceeding, but they do merit consideration. If you or your partners or associates intend to act as a director or officer of a corporation, you should think about purchasing directors and officers liability insurance to protect you and your firm. Your mandatory professional liability insurance specifically excludes acting in the capacity of a director or officer of any enterprise other than the Law Society. This exclusion applies to publicly traded corporations (like the corporation in the Aspen decision), not-for-profit volunteer boards and everything in between. If you want insurance coverage when acting as a director or officer, outside officers and directors insurance can be purchased from the Canadian Bar Insurance Association (CBIA) at www.barinsurance.com or from commercial brokers.

(Published February 2010, *Communique*, The Law Society of Manitoba and reprinted with permission.)

■ Bulletin # 196

Are you a Clarifier or an Obfuscator?

At the recent American Bar Association's Lawyers National Legal Malpractice conference, U.S. Supreme Court Justice Antonin Scalia, together with lawyer/writer Bryan A. Garner presented on the topic of making a persuasive argument in court. In the course of their presentation, Justice Scalia distinguished between two kinds of lawyers – Clarifiers and Obfuscators - and credited Garner with developing these characterizations. Clarifiers, he said, are lawyers who make the path clear for a court when making arguments or writing briefs, while Obfuscators clutter that path with obstacles designed to distract from the facts or the applicable law.

As I listened to their presentation, it occurred to me that these same characterizations could also apply to lawyers' communications with their own clients.

Lawyer-client communications and miscommunications are a frequent source of client complaints to law societies. These issues also often contribute to or are underlying causes of claims of professional negligence.

Think about this - when you communicate with your clients, are you a Clarifier? Do you explain legal concepts to your clients in plain language at a level appropriate to their individual background and circumstances? Do you, through both verbal and non-verbal cues, encourage your clients to ask you questions? Do you provide written confirmation of instructions received or advice given so as to ensure there are no miscommunications? When your clients ask for advice and you know the answer isn't what they want to hear, do you nonetheless provide a clear answer?

Or are you an Obfuscator? When you communicate with your clients do you sprinkle your conversation with Latin terms and refer to legal principles without providing any definitions or explanations? Do you cut short client interviews after you've checked off all the items on your agenda, without allowing any time for your clients to question you? If your clients do ask questions of you, do you answer with another question? Or do you couch your answers to difficult questions with ambiguity, provisos and limitations?

Obfuscators can come off sounding a lot like the stereotypical used car salesman, never quite answering the question posed and leaving their clients feeling a little like they may have just been scammed. On the other hand, the clients of Clarifiers are likely to feel informed, empowered and in control of their legal decision-making.

Justice Scalia's point in his presentation was that the arguments presented by Clarifiers are more likely to be heard and therefore more persuasive to the court. In client communications, the same holds true. The better your client hears and understands what you are saying, the more likely your client will heed your advice.

When the case is lost, or the deal goes sour, the Clarifier's clients are less likely to pin the blame on their counsel. While the result may still be unsatisfactory, these clients are more likely to have been aware of the possibility of a negative result and will have better understood how and why the result was reached. The Obfuscator's clients, however, are more typically surprised by a negative outcome. As a result, they will be more likely to turn against their counsel when looking for a place to pin the blame.