Lessons from leading litigation cases

Mary Carter agreements must be disclosed immediately

In ***Aecon Buildings v. Stephenson Engineering* 2010 Onca 898**, the Court of Appeal held that Mary Carter agreements must be disclosed immediately to all parties and to the Court, failing which the defaulting party's action will be stayed.

Aecon did construction work for the city of Brampton. Aecon later claimed damages against the city for delays in completion. Both parties reached and agreement whereby the damage claim was capped. In return the city agreed to prosecute a third party claim against its consultant Page + Steele for Aecon's benefit. Page + Steele commenced a fourth party claim against Stephenson Engineering. Stephenson Engineering learned of the Mary Carter agreement's existence before it pleaded to the fourth party claim. It demanded production of the agreement, and got it. Stephenson Engineering moved to have the third and fourth party claims stayed.

The motions judge held that these claims were not an abuse of process, because Stephenson learned of the Mary Carter agreement before it prepared its pleadings, and no party was prejudiced by the delayed disclosure.

The Court of Appeal disagreed. The agreement was not voluntarily produced immediately upon its completion. It was only produced several months after its existence was discovered by Stephenson Engineering, and Stephenson Engineering specifically requested it. Litigants are not required to make inquiries to seek out such agreements. The parties who enter into Mary Carter agreements must immediately disclose its existence.

The absence of prejudice did not excuse the late disclosure. Any failure of compliance amounts to abuse of process. The only remedy to redress the abuse of process was to stay the proceedings. Only by imposing consequences of the most serious nature on the defaulting party is the court able to control its own process and ensure justice is done between the parties. To permit the litigation to proceed without disclosure of such agreements renders the process a sham and amounts to a failure of justice. The third and fourth party claims were stayed.

Write a "non-retainer" letter – avoid a lawsuit!

Writing "non-retainer" letters is not mandatory, but failing to do so may leave you vulnerable to a malpractice lawsuit, as ***Broesky v. Lust*, 2011 Onsc 167 (Canlii)** shows.

Broesky retained solicitor Lust to prosecute her claim for disability benefits. After this claim settled, Broesky alleged she also retained Lust to sue the driver of the vehicle in which she was a passenger, and to claim Statutory Accident Benefits (SAB.) In the alternative, Broesky claimed even if she did not retain Lust on her tort and SAB claims, Lust was nevertheless obliged to provide advice about them, and the applicable limitation periods.

Madam Justice J. Mackinnon found that all available documentary evidence pointed to a retainer only for the disability claim. There was no credible evidence to support a retainer for the tort and SAB claims, notwithstanding that Lust never expressly stated in writing that he would NOT be handling the tort and SAB claims. In the absence of such a letter, the fact that Lust's legal assistant kept impeccable telephone logs and claims files greatly assisted the successful defence of this action.

The Court found that lawyers are not negligent for failing to confirm a "non-retainer" in writing, although it is prudent to do so. Such a letter is for the solicitor's protection.

This judgment helpfully draws a distinction between a "non-retainer" letter and a letter limiting a solicitor's retainer. "Limited retainer," as properly understood, refers to a solicitor undertaking a lesser level of service than a reasonably competent solicitor would provide in the circumstances. Examples of "limited retainer"

include closing a real estate transaction without a title search, or advising about a separation agreement without obtaining financial disclosure. Accepting a client's instructions to pursue a disability benefits claim - but not a tort or SAB claim - is not a "limited retainer."

This judgment also iterates that it is NOT true that whenever there is a conflict in evidence between a client and a lawyer, the client's version must be preferred. This may be the case where "all other things are equal", or where there is a doubt or ambiguity about the terms of a retainer. Lust's retainer was set out in two letters to Broesky. The retainer was clear and unambiguous – to prosecute the disability claim. Lust raised the possibility that Broesky had tort and SAB claims. Broesky said she would attend to these claims herself, therefore Lust had no further obligation to Broesky and her claim was dismissed.

The entire lawsuit might have been prevented, however, had Lust told Broesky, in writing, to he was not representing her on her tort and SAB claims. Model non-engagment and termination of mandate letters are available in the CBA Conflicts of Interest Toolkit .

Prepared by: Debra Rolph, LAWPRO's director of research