The Torquemada Rule

is Alive and Well

When Rule 57.07 first came into force in 1985, it was known among some members of the Ontario Bar as the "Torquemada Rule". Torquemada was the first grand inquisitor of the Spanish Inquisition. This comparison is a stretch, but Rule 57.07 does provide for the assessment of costs against solicitors personally in a wide variety of circumstances. At common law, costs were awarded only where the solicitor's conduct was "inexcusable, meriting reproof, grossly negligent, oppressive or outrageous." Solicitors who were merely negligent were not subject to costs orders. Under Rule 57.07, it is enough that the solicitor's negligence or other default caused costs to be wasted.

A survey of cases decided in 2007 illustrates the wide variety of circumstances in which a lawyer may be held liable for costs under Rule 57.07, or its equivalent in other provinces.

The Case:

***McDonald v. Standard Life*, [2007] O.J. No. 2334 – Aggressiveness in the absence of Righteousness is Mere Bullying**

Prior to discoveries, solicitor H became aware that the defendant had a surveillance video of her client. Solicitor H was concerned that her client would be seriously embarrassed by the video unless H: 1) got particulars of the video prior to her client's discovery, and 2) had the opportunity to examine the defendant before the plaintiff was discovered. Unfortunately for H the defendant had served its notice to examine first.

H moved to strike out the statement of defence on the basis that the defendant refused to provide a summary of facts of surveillance prior to discovery and refused to attend on discovery prior to the plaintiff being examined.

J. W. Quinn J. found that the plaintiff was not entitled to pre-discovery details of the surveillance. The Court also held that the defendant was not obliged to attend discovery prior to its discovery of the plaintiff. The Court observed that defendant's counsel had requested several times that H provide authority for the positions she took. H did not do so. The Court wrote:

> "Lawyers charge high hourly fees and to warrant such fees it is not asking too much that they be held accountable for not knowing the law in the case for which they have been retained. Here, H was not attempting to advocate a novel or otherwise meritorious point, to make new law or to otherwise enlighten the jurisprudence of this Province. She simply did not know the existing law and she stonewalled Sava's efforts to have her reveal the legal authority for her position regarding the discoveries. Warnings by Sava that H was not correct in law were ignored. She took a very aggressive stance with Sava over the discoveries. I have no quarrel with aggressive counsel (if civil). However, aggressiveness in the absence of righteousness is merely bullying."

The Court ordered that H not charge her client for any fees relating to the motion, and that she pay the defendant's costs on a partial indemnity basis fixed at $5,000.

The Case:

***Standard Life Assurance v. Elliott*, (2007) 86 O.R. (3d) 221 – Third Party Claims Arguable, But Brought with an Ulterior Motive**

Standard Life sued Elliott for return of $30,000 allegedly overpaid in disability benefits. M, on behalf of Elliott, served third party claims on every employee of Standard Life who had been involved in the file. Standard Life successfully moved to strike out the third party claims.

The Court found that the third party claims were an abuse of process. Adding all of the third parties was a completely unnecessary step that was grossly out of proportion to the actual amount in dispute between the parties. M "waged a war of attrition against the insurance company, intending to make it so expensive for the insurer to litigate his client's claim that it would simply give up." The fact the he felt there was some case law to support his position did not mean that the position was legitimately taken, as opposed to being taken for ulterior purposes. M deliberately caused excessive costs to be incurred without reasonable cause in order to put pressure on the insurance company. Costs were ordered payable by M and his client jointly and severally, on a substantial indemnity basis.

The Case:

***Schreiber v. Mulroney* [2007] O.J. No. 3040 and [2007] O.J. No. 3191 – Client's Instructions Do Not Excuse Breach of Undertaking and Lack of Civility**

The notorious litigation between Karlheinz Schreiber and Brian Mulroney gave rise to a Rule 57.07 order against D, Schreiber's solicitor. Schreiber sued Mulroney, alleging that he advanced money to Mulroney for services that were never performed. The suit was commenced in Ontario. Mulroney's counsel immediately advised D that he would be moving for an order that Ontario was not the appropriate jurisdiction. D confirmed his availability for a return date of the motion, but advised that unless he received Mulroney's motions material within a stated period of time, D would note Mulroney in default. Mulroney served his motions material within the time stipulated by D. Mulroney also brought a motion to extend the time for serving the statement of defence, which motion was adjourned.

D noted Mulroney in default and obtained a default judgment. The Court was not informed of the agreement not to note Mulroney in default, nor of the outstanding motions regarding jurisdiction and extension of time for filing a statement of defence. Mulroney's counsel was given no notice of the motion to obtain the default judgment, and only learned about it through the media.

J.C. Newbould, J. allowed Mulroney's motion to set aside the noting in default and the default judgment. If D intended to resile from his agreement not to note Mulroney in default, he should have given Mulroney's counsel notice of his intention. The fact that Schreiber may have instructed D to obtain the default judgment did not excuse D. D breached his agreement with Mulroney's counsel. It was an egregious breach that D had no right to commit and Schreiber had no right to instruct him to commit. A lawyer must decline to follow instructions which would constitute misconduct.

The Court also referred to the *Rules of Civility*. Principle 19 provides that counsel should not cause any default or dismissal to be entered without first notifying opposing Counsel. Principle 30 provides that counsel, not the client, has the sole discretion to determine the accommodations to be granted to opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights.

The Court also took notice of correspondence between D and Mulroney's counsel, accusing Mulroney's counsel of discourtesy and surreptitiously attending before the Master. Copies of these letters were sent to the Advocates' Society, and the managing partner of the law firm of Mulroney's counsel. The Court held that this correspondence should be censured. Because the Court found that D was "no doubt under the gun" from Schreiber, D was only responsible for 25 per cent of Mulroney's costs, which exceeded $64,000.

The Case:

***Eblie v. Yankoski*, [2007] M.J. No. 145 – Affidavit Contains Hearsay and Irrelevant and Scandalous Allegations**

Yard J. reminded solicitors that in preparing affidavits, they must exercise professional skill and judgment. It is not appropriate to simply type what the client wants said. The impugned affidavit contained paragraphs that were irrelevant, scandalous, frivolous and vexatious. It was no answer to say that the affidavit was prepared in haste to support an urgent motion. It takes little or no additional time to observe the rules of evidence and practice in drafting an affidavit.

The Case:

***Plating Performance v. Ideal Plating Inc.* [2007] O.J. No. 792 – Solicitor's Failure to Properly Remove Himself from the Record**

Solicitor B was retained by the defendant Baweja to represent himself and the defendant Hastings. B filed a statement of defence. Baweja stopped paying B. B ceased acting. B did not properly remove himself from the record. He did not tell the defendant Hastings that he had ceased to act. He did not get a Notice of Intent to represent himself, or a Notice of Change of Solicitors, from Hastings. The plaintiff obtained default judgment against Hastings. Hastings subsequently learned about the default judgment, and successfully moved to set it aside. Costs were ordered against B personally, fixed at $10,500. B did not appear on the Rule 57.07 motion, even though he had been given notice of it.

The Case:

***Waterloo (City) v. Singh*, [2007] O.J. No. 2163. – Accepting a Retainer Knowing That There Was a Conflict**

D.J. Gordon J. held that the solicitors knew from the outset that there was a conflicts issue arising from their previous representation of the parties. They should not have accepted the retainer, or at least, ceased to act and moved to get off the record once the issue was identified by the city. However, the clients were equally responsible for the $10,000 costs order, since they were aware of the conflict from the beginning.

The Case:

***Rand Estate v. Lenton*, [2007] O.J. No. 831 – Delaying Tactics, Unnecessary Motions, Delay in Obeying Court Orders**

The Rand Estate commenced litigation to determine entitlement to certain life

insurance proceeds. A senior partner in the C & Partners law firm had drafted the shareholders agreement between Rand and Lenton, and had provided corporate advice to both. The agreement provided that the "key man" insurance would be used to "buy out" the shares owned by the deceased partner's estate. Lenton refused to pay any insurance money to the Estate.

C & Partners decided to represent Lenton against the interests of the Rand Estate, even though it had previously acted for both. The Rand Estate eventually got judgment against Lenton for over $1 million, but was able to collect only an insignificant part of that sum. After judgment went against Lenton, C & Partners placed a $100,000 mortgage on Lenton's only land asset to secure its fees, again to the prejudice of the Rand Estate.

The Estate sought the costs of the litigation pursuant to Rule 57.07, on the basis the C firm unreasonably caused costs to be wasted in various ways. The Court found that C & Partners used delaying tactics, brought unnecessary motions, was inadequately prepared for the motions which it brought, advanced arguments that had no merit, failed to appear at various hearings, acted for Lenton despite clear conflict of interest, disregarded court orders and disregarded obligation to be courteous to others. The Court vacated C & Partner's mortgage from Lenton's property, but C and Partners delayed removing it. The C firm's ongoing unprofessional conduct resulted in the Rand Estate incurring wasted legal costs. The total costs payable by the solicitors, including the costs of the Rule 57.07 motion was $63,150.

The Case:

Walsh v.1124660 Ontario Ltd. **[2007] O.J. NO. 639 – Conduct Verges on Contemptuous, but No Wasted Costs**

This case demonstrates that a solicitor whose conduct at trial borders on contempt of Court increases his chances of having to respond to a Rule 57.07 application. G.D. Lane, J. found that solicitor G's conduct towards the Court at trial was "quite uncalled for, rude and occasionally bordering on, if not actually, contempt." Nevertheless, Justice Lane declined to order costs against G. It would not have been right to award the adverse parties costs as punishment for G's contempt or near contempt. Contempt is generally punishable by fees, not costs. While G was responsible for some delay in the proceedings, these delays were not sufficient to warrant a costs order. The Court also declined to find G in contempt.

The Case:

Trang v. Alberta **[2007] A. J. No. 918 Alberta Court of Appeal Left in the Lurch for a More Interesting Case at Guantanamo Bay**

Solicitor W was lead counsel for Trang in a case to be argued before the Alberta Court of Appeal on June 5, 2007. W had agreed to this date. Some months prior to the agreed hearing date, solicitor W was given the opportunity to represent K, who was confined at Guantanamo Bay. One June 4, W sent a letter to the Court of Appeal, stating the he would be out of the country on June 5. It was impossible to reach W on June 4 or 5. Costs of $1,000 were awarded against W, payable to the Deputy Registrar of the Court.

The Court declined W's suggestion that W's client should be liable for these costs. The client had nothing to do with the adjournment. It came entirely from another client more attractive to W. W knew months previously that he might go to Cuba to represent K. He should have made arrangements for alternative counsel at the time. W did not promptly seek to adjourn the appeal when he first learned that he had the opportunity to be elsewhere. He did not tell the Court of the problem until he had left Canada and became unreachable, leaving the Court with a diktat.

The Case:

Rowe v. Lee **[2007] N.S.J. No. 42. – Staff problems and Client Pressures No Excuse for Not Preparing Motions Material in Time**

A Nova Scotia solicitor caused two chambers applications to be adjourned because he failed to file a memorandum of law in time. He was late with his memorandum when the application finally did come on for a hearing. By way of explanation, the solicitor pointed to inadequacies in his office staff, personal medical appointments, and client pressures. These excuses won no sympathy from the Court. The Court observed that difficulties with office staffing, client pressures and balancing one's personal life are issues faced by all practising lawyers in Nova Scotia. Despite these pressures, the vast majority of lawyers are able to comply with the time frames set out in the Civil Procedure Rules. Costs of $900 were awarded against the solicitor.

The Conclusion

As has been shown, wasted cost orders have been made against solicitors for derelictions of duty ranging from outrageous to relatively venial. The costs awarded may be small, or they may be substantial. Don't let it happen to you!

Debra Rolph is director of Research at LawPRO.