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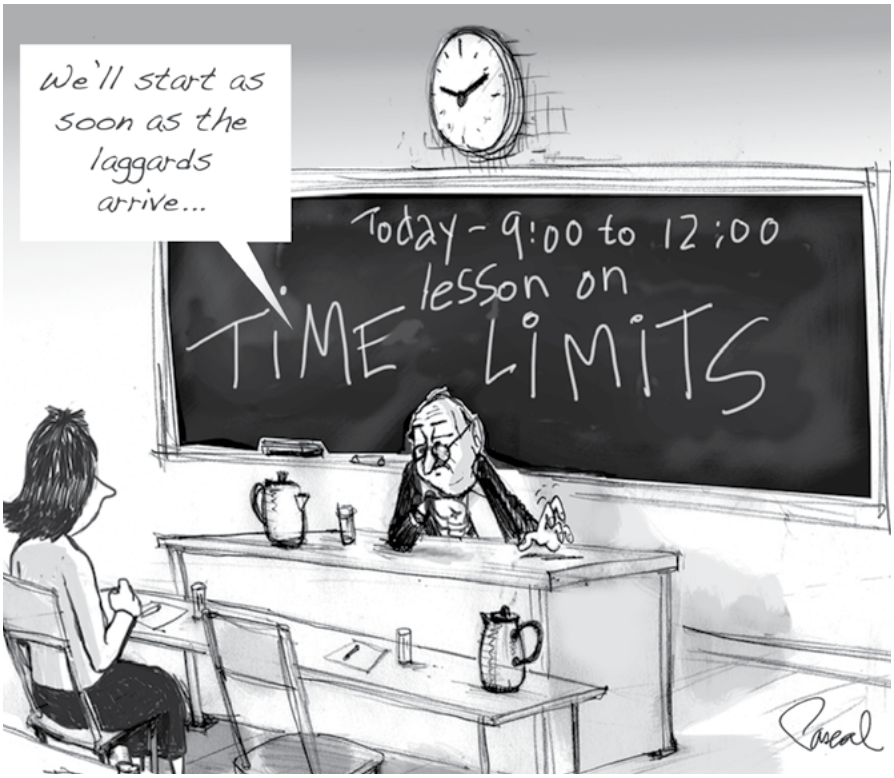
It's not just the destination that gives meaning to life, but the journey.

Marc Levy

BEWARE OF DEADLINES

For the 2016 fiscal year, 16.8% of the sums paid by the Insurance Fund as indemnities or defence costs were attributable to the alleged or actual failure to meet prescription deadlines or other procedural deadlines.

While missed deadlines sometimes result from a lack of legal knowledge, they are often due to lawyers' poor organization of their practice.



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A new training activity regarding deadlines, offered by the Insurance Fund, will be presented at the 2017 convention of the *Association des avocats et avocates de province* (AAP) to be held at Le Montagnais Hotel in Chicoutimi, on September 29, 2017. Take advantage of this training activity to get a better grasp on the importance of managing deadlines so as to prevent the risk of facing malpractice proceedings.

CORRESPONDENTS, COUNSEL AND PARTNERS

In the course of your practice, you are probably called upon to work in close cooperation with other lawyers, be they correspondents, counsel or your own partners. You have probably wondered whether you are liable for the actions of your colleagues.

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A correspondent or counsel, as the case may be, is a lawyer with whom you have chosen to share the handling of a file. In these situations, you should ensure that each person's role is clearly understood and you should confirm your agreement in writing. By doing so, there will be no doubts regarding each person's responsibilities, and you will avoid situations in which your client suffers harm due to someone's failure to act.

In order to reduce the risk of confusion, all lawyers working in the same file should indicate all deadlines in their respective agenda systems and ensure, when those deadlines arrive, that the work has been properly performed. Sharing a file does not mean forgetting about the file, far from it. This is not a question of a lack of trust, but rather double checking things.

Don't forget that, as far as the client who has given you the mandate is concerned, you are the only one responsible for his file. It is not up to your client to worry about the division of tasks among the various lawyers. It is your responsibility to ensure that the work is done, and done properly.

If a file requires you to act jointly with a lawyer outside Québec, it would be wise to check whether the lawyer does in fact have a license to practice and holds sufficient professional liability insurance to cover the professional services he will be called upon to render.

TECHNOLOGY AND LIABILITY

Nowadays, the legal profession interacts on a regular basis with technology, be it via e-mail, cell phones, the Internet or computerized searches. All of these technologies have been an indispensable and integral part of lawyers' day-to-day work for years.

The use of technology, or rather its improper use, can become another source of liability for lawyers in the course of their practice. Here, too, prudence is required.

E-mail

Section 3 of the *Règlement sur la comptabilité et les normes d'exercice professionnel des avocats*, CQLR, c. B-1, r. 5, which has been in force since July 8, 2010, imposes the obligation on lawyers to have access to a computer at their professional domicile and have an e-mail address established in their name. This means of communication has become as essential as the telephone and is used for internal communications, to consult with colleagues and to send information to clients. According to section 83 of the aforementioned Regulation, lawyers had two years as of the date of its coming into force (July 8, 2010) to comply with these requirements.

One question is heard over and over again: *"Can lawyers rely on e-mail to send documents considered to be confidential?"*

We know there is a possibility that a document sent by e-mail will be intercepted, read or even altered, without the knowledge of the recipient or the sender.

Section 34 of *An Act to establish a legal framework for information technology*, CQLR, c. C-1.1 states that:

*"**34**. Where the information contained in a document is declared by law to be confidential, confidentiality must be protected by means appropriate to the mode of transmission, including on a communication network.*

Documentation explaining the agreed mode of transmission, including the means used to protect the confidentiality of the transmitted document, must be available for production as evidence."

This important requirement to take the appropriate means to ensure the confidentiality of transmitted documents also applies to lawyers. Every day, lawyers send documents that the Act declares to be confidential, given that lawyers are bound by solicitor-client privilege.

The Act does not identify what appropriate means should be used. This could involve the use of a password, the establishment of a closed network with the client, or the encryption of e-mails, the last option certainly being the most effective solution.

Lawyers should therefore agree with their clients on the method of transmission they intend to use, as well as the means they will take to ensure confidentiality. In this regard, it may be useful to include an appropriate clause in the initial mandate.

Clients could nevertheless authorize their lawyer to use unsecured e-mail to communicate with them, even for information covered by solicitor-client privilege.

Obviously, in such a situation, it would be preferable for the lawyer to obtain an express authorization.

It is also important to take the necessary measures to avoid situations in which messages are never read or are read much too late. If you are unable to read your messages for a certain period of time, make sure to inform the sender via an automatic reply in which you provide the name and contact information of a person they can reach in the event of an emergency, or make sure you ask someone to read your messages and follow up on them.

Telephones

Cellular phones do not offer the same degree of confidentiality as traditional land lines. Discussions on cellular phones can easily be intercepted.

Here, too, lawyers must exercise great prudence so as not to fail in their duty to protect the confidential nature of their exchanges. Wireless devices should not be used for confidential communications. In all cases, it is important to inform the other person that the communication is taking place over a cellular phone, so that they can freely accept the risk inherent in this type of communication.

Website

The Internet makes it possible to reach a vast audience and, obviously, potential clients. Consequently, more and more lawyers and law firms have decided to establish their own website. These sites may include information about the firm, the expertise available at the firm and some general legal information. They may also contain links allowing Internet users to contact the firm or one of its members, in order to provide feedback or ask a more specific question. Adopting certain rules of conduct from the moment a site is launched can reduce the risk of triggering professional liability as a result of the information contained on the site.

For example, it is absolutely essential that you indicate your firm's geographic location, so as to avoid misleading readers about the applicability of the rules set out on the site.

Moreover, you should keep a copy of all the information contained on the site. In the event of a dispute, you must be able to provide printed evidence of the site's content at any point in time.

We recommend that you include a warning indicating that the information contained on the website, although of a legal nature, does not constitute a legal opinion and that, in addition, the sending of an e-mail with a specific question does not have the effect of automatically establishing a lawyer/client relationship nor does it imply your acceptance of any mandate whatsoever.

Taking the time to set out these details on your website should help you avoid claims by Internet users.

FOCUS ON THE NEW *CODE OF CIVIL PROCEDURE*

In applications for abuse of procedure pursuant to articles 51 and following of the *Code of Civil Procedure*[1] (formerly articles 54.1 and following), courts are sometimes asked to order the parties' lawyers to personally pay, in addition to legal costs, damages for any injury suffered by another party, including to cover the professional fees and disbursements incurred by that other party. In some cases, such applications may even seek a judgment for punitive damages against the lawyers personally.

Under the former *Code of Civil Procedure*, just as under the new *CCP*, the case law[2] has consistently held that applications for abuse of procedure under articles 51 and following of the *CCP* **contemplate only the parties**, not the lawyers.

Article 53 *CCP* refers to a "party" and article 54 specifically mentions the words "order a party". At no time would it be possible to make an order against a lawyer personally pursuant to these articles. Indeed, the case law is consistent on this point.

In *Riolo Vaccaro v. Duret*,[3] while referring to the position it had adopted in *N.M. v. P.P.*,[4] the Court of Appeal clearly stated that, in principle, the provisions of

1 – CQLR, c. C-25.01.

2 – *N.M. v. P.P.*, 2010 QCCA 1326 (CanLII); *Corporation de construction Germano v. Régie des installations Olympiques*, 2013 QCCS 5665 (CanLII); *Riolo Vaccaro v. Duret*, 2015 QCCA 203 (CanLII); *Charland v. Lessard*, 2016 QCCA 452 (CanLII); *Place Dupuis Fiducie commerciale v. Locations Saint-Cinnamon inc.*, 2016 QCCQ 8878 (CanLII); *Gestion MRCB inc. et al. v. Lambert*, Longueuil Sup. Ct., no. 505-17-009163-165, December 20, 2016, Michel Déziel, J.; *Étude légale JFBV v. 9272-4327 Québec inc.*, 2017 QCCQ 552 (CanLII).

3 – *Supra*, note 2.

4 – *Supra*, note 2.

articles 54.1 and following of the *CCP*, as it existed at that time, contemplated the parties to the dispute themselves, not their lawyers.

In *N.M. v. P.P.*, a 2010 judgment, the appellant had asked the court, among other things, to find that the lawyers for the respondents had acted in an abusive, vexatious and quarrelsome manner. The Court of Appeal stated, in *obiter*, that there were [TRANSLATION] *"no grounds for allowing the motion, because the motions to dismiss the appeal prepared by the respondents' lawyers had been well founded,"* and it added that [TRANSLATION] *"it would appear from the construction of articles 54.1 to 54.6 CCP that they only contemplate the parties to a proceeding."*

In *Place Dupuis Fiducie commerciale v. Locations Saint-Cinnamon inc.*,[5] a more recent decision dated July 29, 2016, which referred to the ruling in *Charland v. Lessard*,[6] Mr. Justice Cameron stated the following:

[TRANSLATION]

"In the Court's opinion, Charland *v.* Lessard ***must not be interpreted as opening the door to the notion that the word "party", in articles 51 and following and in article 342, include the lawyer personally****. The legislature chose to continue using the word* "party" *in these new articles of the new Code of Civil Procedure, knowing the restrictive interpretation of that term by the case law as a result of the 2010 Court of Appeal ruling in* N.M. *v.* P.P.[6] *and the case law that followed.*

It would seem that, in Charland*, the Court of Appeal sought to reaffirm the principle that, apart from powers that may be granted to the courts pursuant to legislation, they have the inherent power to punish lawyers, not only for contempt of court, but in respect of compensatory costs as well.*

If this power had originated under former articles 54.1 and following, and now under articles 51 and following of the CPC, the Court of Appeal would have expressly stated so and would have explained why it was modifying the position adopted by it in N.M. *v.* P.P.*, without having to rely on the power confirmed by the Supreme Court in* Young*."* (Emphasis added).

5 – *Supra*, note 2.

6 – *Supra*, note 2.

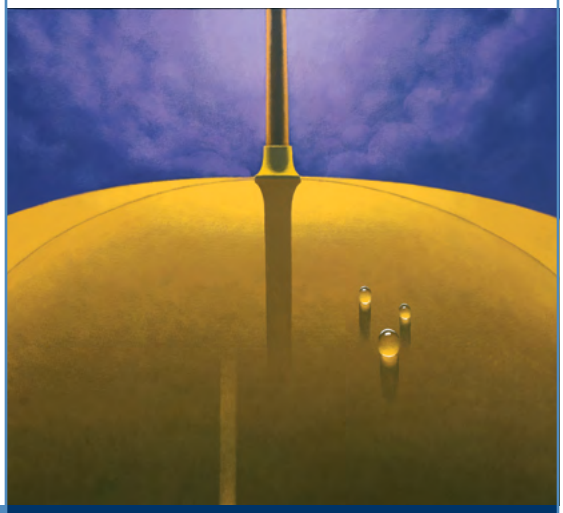
By allowing the partial exception to dismiss with respect to the lawyer, the Court therefore ruled that the conclusions seeking an order against the lawyer for extrajudicial fees and punitive damages pursuant to articles 51 and following *CCP* were inadmissible at law.

Two even more recent decisions, *MRCB inc. et al. v. Lambert*,[7] unreported to our knowledge, and *Étude légale JFBV v. 9272-4327 Québec inc.*,[8] have reaffirmed the principle that a claim based on articles 51 and following of the *Code of Civil Procedure* can only be made against a party to the proceedings.

Nonetheless, this does not mean that an abuse of procedure by a lawyer cannot be punished. Therefore, prudence must always be exercised.

7 – Longueuil Sup. Ct., no. 505-17-009163-165, December 20, 2016, Michel Déziel, J.

8 – *Supra*, note 2.



NOTICE

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