NEWS

Toronto ABA Conference offers tips for solos

Conference attracts over 7,000 lawyers

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Solo and small firm lawyers face particular challenges in running their practices that those in large firms do not. An informative presentation at the American Bar Association (ABA) annual meeting in Toronto provided a number of practical high-tech as well as low-tech tips to help bring solo and small firm offices into the 21st century. The talk was one of over 150 continuing legal education programs presented on a range of topics during the ABA conference, held in Toronto from Aug. 4 to 9 — and attracting over 7,000 lawyers from around the world.

Solo and small firm practitioners "need and cannot afford not to have the best technology" to help run their practices, according to Jeffrey Allen of the law firm Graves & Allen in Oakland, Calif. This can pose a challenge when such lawyers do not have their own IT departments, added Allen, who was a panellist at the fast-paced talk, "90 Tips in 90 Minutes." Furthermore, he pointed out that there are no separate rules from governing bodies for solo and small firm lawyers regarding use of technology. Nonetheless, he added that they "can do as good or better as the large firms."

Allen and his fellow panellists proceeded to outline for attendees the various technologies available to make their practices run better. This ranged from the advantages of using Mac computers to various types of voice recording devices and voice recognition programs to the latest scanning machines. Panellists also pointed to a number of free applications available on the Internet for everything from cleaning computer files to services that encrypt confidential information to those that can generate as well as store passwords. They also highlighted useful features that lawyers may already have but not necessarily know about, such as a tool in Adobe Acrobat that allows one to use the program like a typewriter to fill out a PDF form.

Allen is also a proponent of storing files electronically, adding that it is cost efficient and saves space, a particular concern for solo and small firm lawyers. This is also important in cases of catastrophe, according to Allen, pointing to earthquakes in his native California. However, he added that lawyers should ensure that any electronic files are encrypted and password protected.

Writer and blogger Tim Baran also reminded attendees that there are various non-technology related techniques that lawyers can use to make their practices and lives run better and with less stress. Pointing out that studies show that frequent breaks increase mental agility, Baran suggested that lawyers should work in 25 minute uninterrupted chunks of time. He added that this should be coupled with stress-reducing breaks where lawyers can do something like meditate or practice yoga. Lawyers should also conduct a retrospective review every two weeks "to examine what is working and what is not working," according to Baran, who works in New York City for Rocket Matter, LLC, which provides practice management and time and billing software for the legal services industry.

Noting that solo and small firm lawyers can face many distractions, particularly those working from home, Baran also recommended changing locations periodically, whether it is moving from one room to another at home, or going to a local coffee shop to get some work done. "It gives you a fresh perspective," said Baran, who works from home.

"You need to play as well," added Baran, recommending going to see a movie as an example. He also cautioned against multi-tasking, suggesting instead that lawyers concentrate on only one task, which he asserted is more time effective and efficient. To Baran, this includes turning off your email and only checking it periodically.

Baran also identified a number of non-law related resources available on the Internet to help simplify daily tasks. These included such things as Flixster, which lists movie times, and

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Why class actions create ethical minefields

Courts must wrestle with the challenging dynamic between lawyer, representative plaintiff and absent class members

CLASS ACTION SERIES

Part 3 of a 3-part series

LUIS MILLAN

Class action ethics, an issue barely broached by academic circles, the legal profession and even by regulatory authorities or bar associations, has now surfaced following a series of rulings that underscore the tension between the singular nature of class action litigation and the traditional position that ethical guidelines governing single plaintiff proceedings also apply to class actions.

In the absence of rules of professional conduct tailored for class action litigation, the courts have begun filling in the gap and providing guidance, albeit on a case-by-case basis, on the ethical minefields that line the class action landscape, the latest of which was in *Smith Estate v. National Money Mart Co.*, [2011] O.J. No. 1231, in which the Ontario Court of Appeal voiced concerns over an uncontested motion for class counsel fees in the face of an adversarial vacuum.

"We're relying on judges to do the job," remarked University of Windsor law professor Jasminka Kalajdzic, who recently organized a two-day conference on class actions. "And it's always of course on a case-by-case basis. That's the nature of the job. They can pronounce upon a specific problem, and fashion a specific solution to the problem before them but it's very difficult to create rules that have broad application when you are a judge sitting on one case dealing with a particular set of facts."

Class actions are a unique procedural tool that foster singular ethical conundrums. This is because plaintiffs are not ordinary clients, lawyers are expected to be in "equal measure" zealous advocates, private attorney general and venture capitalists while the courts are often thrust into uncomfortable and non-traditional roles, adds Kalajdzic. Aside from the ethical pitfalls class counsel face when they represent groups within the class who have different types of claims, some of whom may be "stronger than others," the legal community is beginning to grapple with the ethical challenges posed by the entrepreneurial nature of class actions, the adversarial void often alluded to by the courts when class counsel and defence agree on a settlement or remain mute over the reasonableness of class counsel fees and the atypical dynamic between representative plaintiffs and class counsel.

In arguably one of the most important decisions to date in Canada on class action ethics, *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536 (Ont. S.C.J.), Justice Paul Perell observed that "it is necessary to adjust carefully the historical rules" that govern the relationship between lawyer and client for the "imperatives" of a class proceeding. He added that one of the challenges facing the courts involves "[pruning] the bad and harvesting the good of the dynamic among lawyer, representative plaintiff, and absent class members."

But some lawyers, particularly class action defense counsel, believe the courts haven't gone far enough in pruning the bad and harvesting the good. While acknowledging that the entrepreneurial nature of class actions is clearly recognized in statute and in decisions as an incentive for class counsel to "take these cases," Vancouver commercial litigation lawyer Brad Dixon considers that the recruitment of plaintiffs for class actions has gone overboard, with class counsel going so far as to routinely announce investigations of public company conduct before there is even a commencement of a claim. He is calling for self-restraint, and failing that, restraint should be imposed by the courts or professional regulators.

"Recruitment of plaintiffs is in and of itself not prohibited conduct," noted Dixon, a partner with Borden Ladner Gervais LLP. "Therein lies the difficulty. An entrepreneurial incentive for plaintiff's counsel has been created, but there needs to be some limits on circumstances where lawyers are publicly announcing investigations of potential defendants with all of the implications from that even before a client has identified an issue that they want addressed. There needs to be some rules or constraints on ethical conduct."

Class counsel, not surprisingly, don't buy into that line of reasoning. Though acknowledging that there is a general rule in place that forbids lawyers from conducting themselves in a way that brings the practice into disrepute, securities class action lawyer Dimitri Lascaris believes it is "entirely appropriate" in a modern economy for lawyers to play an educative role. Alerting the public at large when their rights have been violated and conveying the need for someone to act as a representative plaintiff is "not only not unethical" but something that should be encouraged, argues Lascaris.

Otherwise, "there are going to be a great many wrongs that don't go unremedied in our society," said Lascaris, a partner with

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Need for genuine plaintiff rather than placeholder

Ethics

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Siskinds LLP. "There's a huge power imbalance in our society between corporations, and consumers and investors, and the only way to rectify that is to allow lawyers who understand people's rights and are able to identify situations in which those rights have been violated to communicate to members of the public."

But then, "Who is the client in a class proceeding?" wonders Kalajdzic, an issue she describes as a fundamental but often overlooked question. The problem manifests itself in many ways, beginning with the fundamental ethical rule that lawyers communicate with their clients and seek instruction, points out Kalajdzic. But in a class action, it's simply not possible to consult with each class member, nor can class members perform the traditional client's role of monitoring the lawyer's conduct. Kalajdzic, who interviewed seven judges who currently are or were formerly designated class action judges for an article she wrote about class action ethics, notes that even judges themselves expressed skepticism over the ability of a recruited plaintiff to represent the interests of the class independently. However, Kalajdzic notes that in spite of their leeriness and recognition that some representative plaintiffs are not active in the way that the traditional client in individual litigation is expected to be, case law highlights a disjuncture.

"All discussions about ethics and rules of conduct flow from how we view the client in the class action context," said Kalajdzic. "I think judges have touched on the question in a number of decisions but haven't confronted it fully. At the end of the day judges still return to the premise that the rules of conduct which were fashioned in a very different context to govern a very different solicitor-client relationship apply to the class action context. That's where I find the case law to be disjointed."

> "In most situations where a class action is appropriate no one in the class will have suffered so great a loss that this is going to be the primary concern in their lives.

The need for a "genuine plaintiff" has surfaced in case law and is a bone of contention with defence counsel. In *Chartrand v. General Motors Corp.*, [2008] B.C.J. No. 2520, Justice Donna Martinson held, in dismissing the class action certification, that "what is needed is a genuine plaintiff with a real role to play and not a placeholder plaintiff for the entrepreneurial interests of lawyers who have so much at stake." In *Fantl*, Judge Perell said that there are "many good reasons" for a class proceeding to have a genuine plaintiff with a genuine claim, not least of which it reduces frivolous claims, acts as a check and balance to the excesses of entrepreneurial law firms and provides a voice to protect the interests of the absent class members.

Except, points out Dixon, that while it is "pretty well established" in case law, in reality courts rarely deny class action certification because the plaintiff was recruited and not playing an active role. "The absent client problem is really another way of articulating this whole point about lawyers driving the suit. But the courts are applying a pretty high threshold before they conclude that someone is a placeholder. There are very few cases that have failed on that ground," said Dixon, who successfully argued *Chartrand*.

Class counsel, however, are not convinced that it is an issue that must be grappled with. While expecting representative plaintiffs to be reasonably informed, reasonably engaged and exercising a reasonable degree of oversight, Lascaris believes it is unrealistic to expect them to be "passionately" pursuing the litigation as if it was the most important thing in their lives. Indeed, Lascaris describes the notion of representative plaintiffs as placeholders as a cliché bandied about by defense counsel.

"We want representative plaintiffs to be engaged," said Lascaris. "We want them to exercise reasonable oversight. It's entirely right that our courts should require that, but in most situations where a class action is appropriate no one in the class will have suffered so great a loss that this is going to be the primary concern in their lives. We have to recognize the realities of the situation." ■

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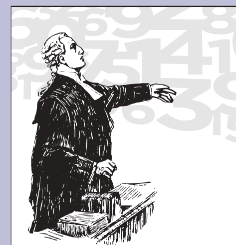

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