



Boyd Balogh

# Litigation practice:

## new processes call for new approaches

*Effective client communication – a perennial Achilles heel for lawyers – has taken on increased importance for lawyers generally, and litigators specifically.*

The reasons are two-fold: First, as has been documented in LawPRO publications in the past, clients' expectations are changing. Today's client is more knowledgeable, more questioning and more inclined to be a participant rather than a spectator in moving a dispute forward.

Equally important are changes in the litigation process prompted by the trend to case-managed actions, mandatory mediation and the concomitant expectations of judges to actively involve the client in settlement conferences.

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Moreover, if you haven't dusted off your *Rules of Professional Conduct* in a while, you may be surprised that the *Rules* actively support this trend. As is detailed below, the *Rules of Professional Conduct* encourage client participation in all stages of the litigation process. And the *Rules* applied under case management are being carried over to other streams. Judges often want a client or his/her representative in attendance so they can properly address the strengths and weaknesses of a case, for the purpose of encouraging early settlement.

## Applying the *Rules*

### Case-managed actions/applications

Case-managed actions and applications are all Toronto Region civil actions and applications commenced on or after July 3, 2001. They also apply to Ottawa actions (with limited Simplified Procedure).<sup>1</sup>

Client-based participation is evident in the following stages of the litigation:

#### (a) **Mandatory mediation**

Mandatory mediation is to be conducted 90 days after the filing of the first defence or notice of intent to defend the action (r. 24.1.09(1)). The mediation deadline may be extended by consent of all parties an additional 60 days (r. 24.1.09(3)).

Who is required to attend:

- (i) **the parties;**
- (ii) their lawyers; and
- (iii) any representative of any **insurer [read client] who may be liable to satisfy all or part of the judgment in the action or to indemnify or reimburse any party.**

#### (b) **Settlement conference**

In case-managed actions, the "settlement conference" has replaced the pre-trial conference. It is governed by r. 77.14.

The wording of the "attendance" rule is broad and **requires the attendance of all persons from whom the solicitor takes settlement instructions.**

#### (c) **Trial management conference**

The *Rules* do not expressly set out who is required to attend a trial management conference. The purpose of the Rule, generally stated, is to provide direction that will facilitate the "orderly and expeditious conduct of the trial."

This Rule implies a meeting among counsel to discuss trial logistics and accordingly would suggest that only counsel need attend. You should however, be mindful of the circumstance where opposing counsel may use this forum as an opportunity to advance settlement. A judge's authority under Rule 77.11(1) **would permit him or her to order a client's attendance at the**

**trial management conference in order to review the parties' position on settlement.**

#### (d) **Case management conferences**

Case management conferences may be convened at a master's or judge's option, or on the request of a party to the action. Rule 77.13(2) **contemplates the attendance of the client.**

#### (e) **Powers generally – Rule 77.1(1)(1) – The general authority of the case management judge or master**

Since July 1, 2001, all judges involved in Toronto action are "case management" judges. The authority of a case management judge or master is very broadly framed. **It allows him or her to order virtually anything in keeping with the purpose of r. 77, which is expressed in r. 77.02.** Essentially, r. 77.02 provides that a case management judge or master may do what they deem necessary to advance the purpose of case management, namely, to encourage early and fair settlement and bring proceedings "expeditiously to a just determination." This rule prevails, if in conflict with others. Often, a judge or master will rely on this rule as broad authority to "encourage" settlement, or to expedite the action.

## 2. Non case-managed actions

These are actions or applications started before July 3, 2001, and actions or applications to which case management does not apply. It also includes actions or applications started in a jurisdiction without case management.

#### (a) **Pre-trial conference**

Rule 50.01 allows a judge (on his or her initiative) or at the request of any party to the action or application to direct a pre-trial conference.

Counsel should be mindful of **the potential change in a pre-trial judge's view of the purpose of the pre-trial.** Even though the client is not obliged to attend under Rule 50.01, a judge may nevertheless insist on the client's presence.

## 3. Simplified Procedure

Simplified Procedure actions are not case-managed. They will not be subject to the general powers of the case management judge or case management master under Rule 77.11(1).

#### (a) **Pre-trial conference – Rule 76.10**

The Simplified Procedure (as amended, on January 1, 2002) now has express rules on who is obliged to attend at the pre-trial conference.

Rule 76.10(2) provides, expressly that a **"party and his or her lawyer"** are obliged to participate by personal attendance (or telephone or videoconference – if personal attendance is impracticable).

<sup>1</sup> Does not include the following: (i) family law actions; (ii) commercial list matters; (iii) estates proceedings; (iv) Rule 64 – Mortgage actions; (v) construction lien proceedings; (vi) bankruptcy and insolvency proceedings; (vii) class proceedings; and (viii) simplified rules proceedings.

# The implications for practice

What does all of this mean for you? It means that now more than ever you need to pay attention to client communication as a tool to minimize your risk.

These changes mean it is more important than ever for you to consider your client – their needs, expectations, and understanding of the process. Your client is now your participant in the litigation process. She or he must know what to expect, what their role is, what your role is, and how the process will unfold. You need to report to your client, in advance, on any mandatory mediation, settlement conference or pre-trial conference. Your failure to do so could result in consequences such as an adjournment (at your or your client's expense) and/or a jeopardized client relationship.

Moreover, you need to carefully manage both their expectations and their participation, as an integral element of the process of moving to a resolution.

What to do? At the risk of preaching to the choir, here are a few simple steps that you can implement to ensure your client communication addresses the expectations of the litigation process today:

## Always prepare a retainer letter

- The retainer letter must set-out the terms of your retainer and set-out in general terms the scope of your authority.
- If your retainer changes during the course of your relationship with your client, send out a follow-up letter highlighting the change in terms.

## Prepare your client for the process

- Explain what lies ahead in the litigation process to your client; ensure she or he understands at what stages her/his active participation may be required.
- Confirm attendance dates with your client well in advance.
- Provide enough time in preparing any pre-attendance report (mandatory mediation or settlement conference) to allow your client to review your brief. They will be participating. Better to catch any errors or misunderstandings before they sit down at the table with the judge or mediator.
- Ensure you have communicated as thoroughly as possible the opposing party's position to your client, as one way to ensure expectations are realistic.

## Get clear instructions from the client

- All contentious instructions that you receive should be confirmed in writing with your client.
- A memo to file is good, but for the truly contentious issues (i.e. when your client does not take your advice), write a letter

confirming your advice, your client's instructions, and the fact that they acknowledge that the instructions are contrary to your advice.

## Organize all aspects of the offer to settle

- Know your client's concerns, and understand ahead of time what is important to the client to settle the matter. For example, your client may be looking for an apology when you are focused on damage amounts. Prepare your client for the larger range of settlement options that may be available during a hearing or mediation. Try to avoid last-minute surprises that could derail the process simply because the client has not been adequately prepared.
- Put in place a process to resolve potential disputes on the offer to settle. Sort out the details, discuss the implications of the various possible settlement options, and draft minutes of settlement in advance.
- Do not let that offer to settle sit on your desk. As soon as one comes in, forward a copy of it, even with the simplest of covering letters, to your client for their review and instructions.
- Always confirm your client's settlement instructions in writing. Send them a copy of the offer or acceptance for their approval. Follow-up with any complicated, technical or contentious points by phone call.

## Make client communication an opportunity

Take advantage of the fact that you will have more contact and communication with your clients.

Remember, existing clients mean potential for future retainers, either through their own needs (as in the case of institutional clients) or through word of mouth. Why not take your current client matter and turn it into a client development initiative? A mandatory mediation or settlement conference provides an excellent venue to showcase your skills.

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To help you better understand and manage the dynamics of your interactions with clients, and how you can reduce your risk of a malpractice claim, practicePRO created the *managing the lawyer/client relationship* booklet. It is one in a series of booklets to help lawyers manage the risks associated with law practice. It is available at [www.practicepro.ca/practice/lawyerclient.asp](http://www.practicepro.ca/practice/lawyerclient.asp) or you can call Customer Service at 416-598-5899 or 1-800-410-1013 or e-mail [service@lawpro.ca](mailto:service@lawpro.ca).

