Blaney McMurtry LLP

PUBLICATION

Businesses may be helped by Law Society rule change

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The Law Society of Ontario, which governs the practice of law in Ontario, has rewritten one of its rules of professional conduct to create greater clarity for lawyers on how assertively they may represent clients in litigation intersecting with regulatory matters.

This could make for less ambiguity in litigation, more confident advocacy, and speedier, more cost effective resolution of disputes.

These implications flow from a Law Society decision taken last February to amend Rules 3.2-5 and 3.2-5.1 of the *Rules of Professional Conduct,* previously referred to as the "threatening criminal proceedings" rules.

These amendments provide clarity to the profession regarding what types of threats and complaints to regulatory authorities are, and are not, acceptable when acting on behalf of a client.

The rationale for the rule is that threatening the use of the criminal justice process must be condemned as a matter of policy because of the potentially oppressive uses of criminal law to defeat civil claims and defences.

However, the language of the rule left lawyers wondering where to draw the line between a complaint to a regulatory body that was proper versus an abuse of process. For example, it was not clear whether sending a demand letter on behalf of a client to a polluter saying that "if the pollution is not remediated, we will request the Ministry of Environment and Climate Change to issue an order against you" would be in breach of the rule.

The rule as previously drafted could be interpreted so as to interfere with the practice of seeking the assistance of the Ministry of Environment and Climate Change or other environmental regulators, such as Environment Canada, conservation authorities and municipalities, on behalf of their clients in the context of an environmental matter. The Law Society agreed and made

amendments to the rule that maintained its purpose while also clarifying when a threat to report to an authority was acceptable.

The amendments do not change the spirit of the rule, which is that resorting to the use of the criminal justice process remains inappropriate if the motivation for doing so is to defeat a civil claim or defence. The rule that results from the amendments, however, no longer poses a potential limitation on asking authorities to fulfill their statutory mandates.

The clarification provided by the amendment benefits not just environmental lawyers and clients but the entire legal profession, as it has an impact on anyone whose practice intersects with federal, provincial or municipal regulators.

Lawyers can now freely consider asking regulatory authorities to get involved in civil claims in which the circumstances fall into the regulator’s mandate and so advise opposing parties without fear of being in violation of their duties of professional conduct.

Talia Gordner is a member of Blaney McMurtry's commercial litigation, environmental, and intellectual property practices. Her work covers a broad range of corporate and commercial matters with an emphasis on the management and resolution of complex environmental and regulatory disputes. She also acts as counsel in a variety of trademark disputes in both the Superior Court of Justice and the Federal Court.

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