

## MINUTES

**COMMITTEE:** Ethics Committee

**DATE:** April 2010

### 3. CHAPTER 8, RULE 1: ISSUE RAISED BY NEW SUPREME COURT RULES

The Trial Lawyers Association asked for assistance from the Ethics Committee in understanding counsel's ethical obligations in relation to new rule 7-1 of the Supreme Court Civil Rules relating to discovery of documents.

The effect of the change in the rule appears to be that a different standard of relevance applies. Under old Rule 26(1) counsel had an obligation to list documents where there was a possibility they are relevant to the action. Under new Rule 7-1(1) counsel's obligation appears to be to list documents that are relevant.

The Committee noted the comments of Chief Justice McEachern in *Boxer v. Reesor* (1983) 43 B.C.L.R. 352 (S.C.) with respect to the obligations of counsel in the preparation of a list of documents (at para 20):

The responsibility of a solicitor in connection with the preparation of a list of documents has often been stated. I regard the following extract from Fraser and Horn, *The Conduct of Civil Litigation in British Columbia* (1978), vol. 1, pp. 276-77, to be an accurate statement of the law except that in this province we do not require an order for production and lists of documents are no longer verified by affidavit:

Nowhere in civil procedure is the responsibility of the lawyer greater than in the area of discovery of documents.

This is partly because the lawyer's concept of relevancy is ordinarily more extensive than that of the client. It seems rarely to occur to a litigant that such things as cancelled cheques, receipts, birthday cards, telephone bills and the like might have a bearing on the case. A kind of documentation which a client notoriously fails to produce, unless specifically asked to do so by his lawyer, is the interoffice memo, sometimes a rich and critical source of information.

Additionally, the litigant, owing no special duty of loyalty to the integrity of the judicial system, may be unenthusiastic about disclosing the existence of documents harmful to his case. As an officer of the Court, the lawyer has the responsibility to police the conscience of his client in this area.

The process of discovery of documents tends to pinch most, as one might expect, where the party from whom discovery is sought has numerous records to go through. The task of persuading a client to undertake this duty faithfully can be considerable. Careful attention should be paid to – and the client questioned about – documents which have, either innocently or corruptly, passed out of his possession, by destruction or otherwise.

In the Committee's opinion the obligations of counsel McEachern C.J. refers to in *Boxer v. Reesor* are obligations of professional conduct.

In the Committee's view a lawyer has an ethical duty to exercise due diligence to ensure that a client makes the disclosure of documents required by the Rules of Court. That duty is not altered by the change from old Rule 26(1) to new Rule 7-1(1), although the standard to which the client must conform is different under the new rule.