

KEEPING CURRENT

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Legal research and the duty to disclose relevant law

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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Legal research is important. In general, every legal issue requires some form of legal research because each legal issue is informed either by a rule, a statute, the common law or equity.

In the first year of law school, every law student is generally required to take a course on legal research and writing.

Under professional codes of conduct, legal research is expressly stated to be a skill. Under section 3.1 of the [Law Society of Ontario's Rules of Professional Conduct](#), legal research is one of the skills that comprises the definition of a "competent lawyer. A "competent lawyer" is, among other things, a lawyer who has and applies relevant knowledge skills and attributes in a manner appropriate to each matter undertaken on behalf of a client including implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including legal research.

Legal research can be time consuming because the work involves gathering

relevant sources, which may include textbooks, articles, statutes and case law, and then carefully and thoroughly reviewing the sources gathered in order to provide advice to a client.

A lawyer's ethical duty to the court

But the importance of legal research goes beyond the solicitor-client relationship and extends to an overarching duty that lawyers are not only advocates on behalf of their clients, but also officers of the court. Accordingly, in matters that are litigated before the court, a lawyer has additional duties. A lawyer in discharging his or her duties must treat a tribunal with candour, fairness, courtesy and respect such that a parties' right to a fair hearing is promoted and such that justice can be done.

Although a lawyer's function is not to assist the other side or advance matters that are harmful to a client's case, a lawyer is prohibited from misleading a tribunal and acting in a manner which will bring the administration of justice into disrepute. A lawyer cannot knowingly attempt to deceive a tribunal or influence

the course of justice by, among other things, misstating the law or suppressing what otherwise ought to be disclosed.

With respect to legal research, a lawyer cannot deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent. In instances where this occurs, the lawyer is in breach of the rules of professional conduct and can be disciplined.

Over the years, courts have been asked to comment on the duty of lawyers to bring to their attention appropriate authorities that impact on a case even where the other side has failed to raise the authority.

Some recent cases

In [Zadeh v. Khaibari, 2018 ONSC 4667](#), an applicant sought certain declarations in connection with a failed real estate transaction. While an initial deposit had been paid for the property, a second deposit was not paid. The buyer then alleged that the agreement of purchase and sale was null and void for numerous reasons and demanded a return of the initial deposit. While the buyer's lawyer threatened to register a caution on title, the seller accepted a communication from the buyer's lawyer as an anticipatory breach, terminated the agreement of purchase and sale and resold the property for \$490,000 less than the buyer's offer.

One of the issues that required determination was whether a failure on the part of the seller to discharge a private mortgage before the closing date breached the agreement of purchase and sale. The buyer had written to the seller's lawyer seven days before closing that the private mortgage needed to be discharged and that the seller was in breach of the agreement by having failed to remove it.

The court noted that the lawyer for the buyer had unsuccessfully advanced this same argument in another decision. Yet the buyer's lawyer did not bring this decision to the attention of the court. In a cryptic comment, Justice Speyer stated: "He ought to have done so."

In [Blake v. Blake, 2019 ONSC 4062](#), the court engaged in a more fulsome discussion regarding the duties of a lawyer as an officer of the court. In this estates litigation matter the respondent brought a summary judgment motion to dismiss an application. The basis for the summary judgment motion was that the application was *res judicata*, that the application was out of time and that there simply was no genuine issue for trial. The motion was dismissed.

On the motion, the lawyer for the respondent only raised one authority that dealt with a question of whether or not a Notice of Objection filed in the estate matter was subject to any limitation period. That decision, however, was not directly on point. However during the judge's own independent research, another authority was easily discovered which answered the question of whether a Notice of Objection was a "claim" that was subject to the relevant limitation period. The judge then also discovered a blog entitled "Is a Notice of Objection to Accounts Subject to a Limitation Period?" in which the case the judge had found was discussed.

The blog was written by a lawyer at the same firm which represented the respondent.

At paragraph 25 of the costs endorsement, Justice Daley drew the inference that the decision he had discovered was known to the respondent's lawyer and at paragraph 26 stated: "...I have reached the very troubling conclusion that counsel for the respondents purposefully did not bring the decision in [Wall v. Shaw \(2018 ONSC 1735\)](#), aff'd [2018 ONCA 929 \(Div. Ct.\)](#))



to the attention of the court during submissions on the motion or while my decision was under reserve. The decision was directly on point with the issue at stake on the summary judgment motion and the decision was adverse to the interests of the respondents.”

Justice Daley then reviewed rules of professional conduct and noted that lawyers have a positive duty to make full disclosure of all binding authorities relevant to a case, including all authorities on point whether they support or undermine the position being urged upon the court, even if the opposing lawyer has not cited that authority.

The breach of the lawyer’s duty resulted in the court awarding the applicant substantial indemnity costs for successfully defending the summary judgment motion.

In [Kapoor v. The Law Society of Saskatchewan, 2019 SKCA 85](#), the Saskatchewan Court of Appeal was required to determine whether a finding by the Law Society that the appellant lawyer was guilty of conduct unbecoming by failing to bring a relevant and adverse case authority to the attention of a court should be upheld.

The lawyer had represented an accused on a charge of driving while disqualified. At the conclusion of that case, the lawyer requested a non-suit on among other grounds that the Crown had failed to prove that the accused not enrolled in a specific program. The lawyer contended that proof of non-enrollment was an essential element of the offence. The lawyer relied on a Quebec Court of Appeal case and an Alberta Provincial Court case called [R. v. Liptak, 2009 ABCP 342 \(CanLII\)](#) in support of his argument. However, the lawyer did not mention another Alberta Provincial Court decision called [R. v. Whatmore, 2011 ABPC 320 \(CanLII\)](#). The *Whatmore* case was contrary to the position that

the lawyer was advocating and was discovered by the court before the trial ended.

Ultimately the lawyer was charged with conduct unbecoming because he had “[f]ailed to treat a Judge of the Provincial Court of Saskatchewan with candour, fairness, courtesy and respect, by failing to bring relevant and adverse case authority, of which he was aware, to the Court’s attention during argument of a non-suit on application...”

The Law Society’s disciplinary committee found that the lawyer’s conduct was deliberate based on a review of an exchange between the lawyer and the judge during the hearing of the driving offence. While the lawyer contended that the duty of candour and fairness did not require him to divulge to the court all knowledge a lawyer possesses about a case, the hearing committee had found very specific facts that engaged the duty of candour in the circumstances. In its decision, the disciplinary committee stated:

The facts central to the determination of the complaint are not in issue. [Mr. Kapoor] acknowledged he was aware of the *Whatmore* decision, which was adverse to the position and the case authority he was citing. While he may have suggested to the trial judge that his failure to mention *Whatmore* was innocent, this position is not tenable when considering the whole of the discussion recorded in the transcript, and counsel for [Mr. Kapoor] did not advance this in the Hearing.

The Saskatchewan Court of Appeal concluded that the disciplinary committee’s conclusion that the lawyer had breached his duty of candour and thereby committed conduct unbecoming a lawyer when he failed to draw the *Whatmore* decision to the attention of the trial judge was not unreasonable.

Conclusion

The take away from these decisions is not only that legal research is important, but that lawyers have a duty to assist the court in ensuring that in every case justice is done. This means that where binding authorities are known to a lawyer, even if those authorities are contrary to a client's case and are not raised by the lawyers for the other side, they must be brought to the attention of the court. Failure to do so can result in significant cost consequences for a client and result in a lawyer facing discipline for conduct unbecoming.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** at 416.865.6651 or by email at sthiele@grllp.com

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