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Treat Other Counsel How You Wish to Be Treated: The Rules Versus the Golden Rule

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When a plaintiff serves a statement of claim, the *Rules of Civil Procedure* (the "***Rules***") require that a defendant must serve a statement of defence within a prescribed time (usually 20 days), failing which the plaintiff can note the defendant in default and obtain default judgment. Default proceedings are a crucial mechanism for ensuring that defendants respond to claims and take them seriously.

The following is a situation that every plaintiff-side lawyer has been in before:

1. You draft and serve your client's Statement of Claim.
2. You get a letter on official letterhead from *LAW FIRM* advising that they "have just been retained and are in the process of reviewing the Statement of Claim with our client. We are requesting an extension of the time to deliver a defence until *date in the future beyond the 20-day deadline in the *Rules*."
3. You agree to the requested deadline, but state that no further extensions will be given.
4. The requested deadline passes without a defence being delivered.

As counsel for the plaintiff, you have done everything right: you have courteously agreed to an extension and put in writing that no more extensions will be given. Counsel for the defendant did not heed your warning. Wouldn't you be completely within your rights under the *Rules* to note the defendant in default for failing to serve a defence in time?

So you go ahead and note the defendant in default.

According to Justice Myers in *Strathmillan Financial Limited v. Teti*, 2021 ONSC 7603, this isn't a grey area where there is room for professional discretion. Notwithstanding that the *Rules* allow for it, noting the defendant in default in these circumstances is wrong.

Strathmillan Financial Limited v. Teti

The plaintiff in this case sued the defendants for unpaid invoices.

1. The claim was served on July 15.
2. The defendants served a notice of intent to defend on July 29, setting an August 14 deadline for delivery[1] of the statement of defence.
3. During the first week of August, counsel for the plaintiff wrote to counsel for the defendants and advised him that the defence must be delivered on time, failing which the defendants will be noted in default.
4. Counsel for the defendants asked for two more weeks. Counsel for the plaintiff agreed, requiring the defence by August 30.
5. On August 30, counsel for the defendants asked for another week on the basis that he had sent a draft to the defendants for review and was not certain it would be finalized that day.

6. Counsel for the plaintiff granted a four-day extension (over the Labour Day weekend). He invited opposing counsel to justify why he needed more time and said the four-day deadline would not be enforced if there was a compelling reason for failing to comply.

7. The defendants served their defence on September 3 at 2:09 p.m. They tried to file the defence the next day at the court, but were rejected because the plaintiff had already noted them in default.

Master's[2] Decision

The plaintiff would not agree to set aside the noting in default. The defendants were required to have the noting in default set aside by a case management master, on a full motion. The master awarded $7,500 in costs against the plaintiff. The plaintiff sought leave to appeal the cost award (but not the decision to set aside the default), which is how the case came before Justice Myers.

Decision on Leave to Appeal Cost Award

"**An outrageous misuse of the default process under Rule 19**" is how Justice Myers described the decision by plaintiff's counsel to note the defendants in default. He denied leave to appeal and ordered a further $6,000 in costs against the plaintiff.

Justice Myers went into detail regarding the responsibilities of counsel in these circumstances and what actions are, or more importantly are not, appropriate:

1. Noting in default is for when a defendant does not participate (or a defence is struck out). It is wrong to note a defendant in default when there are counsel involved for both sides.

2. Disagreements regarding pleadings, service, timing, etc. should be resolved at a case conference, if counsel can't reasonably resolve it between themselves.[3]

3. The decision to grant or refuse an extension to another lawyer is a decision for counsel to make. The Advocates' Society's *Principles of Civility and Professionalism for Advocates* are clear: Advocates, and not the client, have the sole discretion to determine the accommodations to be granted to opposing counsel and litigants in all matters not directly affecting the merits of the cause or prejudicing the client's rights. Advocates should not accede to a client's demands that the advocate act in a discourteous or uncooperative manner.Even if the client refuses the extension, absent actual prejudice, counsel must agree.

4. Counsel is duty-bound to take the word of opposing counsel, absent a valid reason to do otherwise.

5. The *Rules*, timetables and schedules ought to be enforced. Doing so promotes efficient, affordable and fair resolution of disputes. The plaintiff's actions had the opposite effect.

6. With respect to the cost award, the plaintiff argued that there is a presumption that the plaintiff is entitled to costs, in circumstances where the court "grants an indulgence" (i.e. forgives the other party for technical non-compliance with a Rule or deadline). Justice Myers found that no such presumption exists.

How Does This Affect How We Litigate a Case?

For starters, anyone who responds to the official looking letter described above with "We will agree to X deadline, failing which we will take steps to note your client in default" needs to revise their templates. The underlined words have no practical meaning and effective letter writing should not include making empty, meaningless threats. Based on Justice Myers' comments, the response should say: "…failing which we will write to the court to request a case conference pursuant to Rule 50.13(1)."

In cases where a delay creates real prejudice for the plaintiff, noting a party in default may not be as egregious. However, seeing as every plaintiff's counsel believes an action needs to be adjudicated

immediately, the best course of action is likely still to request a case conference under Rules 50.13(1), but on an urgent basis.

This does create an opening for serious mischief on the part of a defendant who is participating in the action but doesn't deliver a defence. Counsel for the plaintiff is required to grant indulgences and extensions and does not have the ability to note a defendant in default. The plaintiff can request a case conference, but that request comes with its own delays before the case conference will be heard, particularly in a time where the court is backed up due to COVID-19.

Rule 57.01 sets out the factors in making a cost order and specifically provides that any conduct by a party to lengthen unnecessarily the duration of a proceeding should be considered when making a cost order. While Justice Myers determined that the demand from counsel for the plaintiff to justify why more time was needed was improper, that doesn't mean that a defendant will not be held accountable if there was in fact no justifiable excuse for the delay. In order to prevent defendants from abusing the law set out in Justice Myers' decision, case management associate justices can hold defendants accountable for forcing the plaintiff to a case conference by imposing strict timelines for the action and making cost orders against defendants who make plaintiffs jump through these hoops unnecessarily.

[1] Under Rule 1.03 (1), "delivery" of a document requires that the document be both served and filed with the court.

[2] As they were called at the time.

[3] Justice Myers released another decision, *Innocon Inc. v. Daro Flooring Constructions Inc.*, 2021 ONSC 7558, which goes into detail on how to use case conferences effectively.

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