Civility

By: Gavin MacKenzie*

> Stupidity you may be born with, but nobody is born with bad manners. They are acquired, and can be "unacquired" — except it's a lot harder.[1]

A frequent complaint of experienced lawyers is that civility is on the decline. Often the evidence of incivility is adduced on examinations for discovery.[2] A leading American expert on legal ethics has accurately observed that civil litigation is often uncivil.[3]

Whether standards of civility today are lower than formerly might be debated. There is no shortage of anecdotal evidence that the standards of a few decades ago were wanting as well. In 1955, a Toronto magistrate who published a book titled *Legal Etiquette and Court-Room Decorum*[4] found it necessary to issue the following injunctions in a list of transgressions that, the author asserted, were perpetrated by counsel every day:

> Do not address the court or examine witnesses with your hands in your pockets.
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> Do not put pencils, cigarettes, etc., over your ear.
>
> Do not read newspapers, magazines, etc., in court.
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> Do not work out crossword puzzles at the counsel table.
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> Do not comb your hair, trim your fingernails . . . [or] arrange lipstick in court...

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1 John D. Arnup, "Advocacy,"Law Society of Upper Canada Gazette, vol. 13, no. 1 (March, 1979), p. 27 at 35.

2 See chapter 4, *supra*, part 4.6.

3 Geoffrey C. Hazard, Jr., "The Prospect of Rule 11 Gives Pause", National Law Journal (May 13, 1991), p. 17 at 18.

4 S. Tupper Bigelow, *Legal Etiquette and Court-Room Decorum* (Toronto: Carswell, 1955).

> Remove topcoats or overcoats before addressing the courts ...
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> Do not use terms like "found-ins", "drunks" or "vags" in magistrates courts. Every human being is entitled to be treated with dignity. If these unfortunates must be referred to as a class, they should be referred to as: those charged with (convicted of) being found in...
>
> It is not good manners to put your feet on the courtroom chairs while addressing the court or examining witnesses, or use the chairs in any other unconventional way, such as leaning back in them, straddling them backward, and so on. Half-standing, half-sitting on the counsel table is not correct in any circumstances.
>
> It is not proper to chew gum, eat candy or peanuts or suck lozenges in court.
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> ... the court should not be addressed or a witness asked a single question while you are seated.[5]

A legendary American trial lawyer, Vincent Hallinan (who died at the age of 95 in 1992) claims to have had 28 fist fights with opposing counsel in courtroom hallways. He called this "settling out of court." He used to dismiss witnesses at the completion of his cross-examinations by saying, "That is all. You can crawl down off the witness stand now."[6]

Whether or not today's standards of civility and etiquette are lower than those of the past, few would argue that they are as high as they should be.[7] The difficult issues are whether it is within the province of the organized bar to regulate civility and, if so, what should be done to elevate standards.

Ethics and etiquette share a common concern, namely, respect for the interests and dignity of others. Both have as their goal the fostering of a civilized common life. The field of ethics tends to be concerned more with larger issues and long term objectives, whereas etiquette is concerned mainly with the here and now. The difference, however, is one of degree rather than quality.[8] Felix Frankfurter said that "morals are three-quarters manners."[9] One may forgive the hyperbole in the assertion of the character in playwright Tom Stoppard's *Professional Foul* that "the history of human calumny is largely a series of breaches of good manners."[10]

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5 *Ibid.*, pp. 67-68.

6 Michael Checchio, "Vincent Hallinan Still Roars", National Law Journal (May 20, 1991), p. 34.

7 See Geoffrey C. Hazard, Jr., "Change Rules to 'Civilize' the Profession,"National Law Journal (April 17, 1989), p. 13.

8 See Thomas Hurka, "The Difference Between Etiquette and Morality? It's a Question of Degree," Toronto *The Globe and Mail* (April 23, 1991), p. A-16.

9 David Shrager & Elizabeth Frost, eds., *The Quotable Lawyer* (New York: Facts on File Publications, 1986), p. 223.

10 Tom Stoppard, "Every Good Boy Deserves Favour" and "Professional Foul" (London: Faber and Faber, 1978), p. 54.

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No one is likely to urge law societies to emulate the curious preoccupation of some judges with such irrelevancies as the length or colour of barristers' skirts or pants. (An English judge in the late nineteenth century said that he always found difficulty "in appreciating the arguments of counsel whose legs are encased in light-coloured trousers").[11] Canadian rules of professional conduct require lawyers to be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.[12]

This duty extends, of course, to courts and tribunals.[13] "While acting as an advocate," the rules provide, "a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with courtesy and respect."[14] Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.[15] Lawyers should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other lawyers.[16]

A leading Ontario barrister has argued that incivility is counter-productive to effective advocacy: "Your job as an advocate is to convey your message .... Your job, always, is to figure out how to be heard on behalf of your client. And it is hard to be heard over the din of incivility. ... Effective advocacy requires control. A lack of civility displays a lack of control. Loss of control means that you are not functioning at your best."[16.1] Another commentator, however, has argued that focusing on civility shifts focus away from ethical values more deserving of the profession's attention, including reporting lawyer misconduct, speaking out about the functioning of our justice system, and resolutely advancing client's interests.[16.2]

Rules of professional conduct also caution lawyers against becoming contaminated by ill feelings that frequently characterize the attitudes of their clients toward each other. "The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter", the rules provide.

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11 David Pannick, *Judges* (Oxford: Oxford University Press, 1987), p. 203. See also David Pannick, *Advocates* (Oxford: Oxford University Press, 1992), pp. 179-180.

12 FLSC *Code*, r. 7.2 - 1.

13 FLSC *Code*, r. 5.1 - 1.

14 FLSC *Code*, r. 5.1 - 1.

15 FLSC *Code*, r. 5.1 - 1, para. 1 of commentary.

16 FLSC *Code*, r. 7.2 - 1, para. 3 of commentary.

16.1 Marie Henein, "Five Big Ideas - Get a Grip on Civility", *Precedent*, Oct. 11, 2012 (lawandstyle.ca/5-big-ideas-get.a.grip.on.civility/).

16.2 Alice Woolley, "Does Civility Matter?" (2008) 46 Osgoode Hall L.J. 175. A third commentator has argued that the focus on professional incivility may mask a more insidious type of incivility in our justice system, namely systemic incivility for damages and marginalized individuals and communities, as in the case of First Nations residential school survivors: Elizabeth Sanderson, "Comments on Systemic Incivility for Harmed Individuals and Communities", a paper presented to a Canadian Institute for the Administration of Justice conference on Ethics and Civility in the Practice of Law in Toronto on December 13, 2013.

"Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system."[17]

As a hearing panel of the Law Society of Upper Canada expressed it:

> Our system of justice is based on the premise that legal disputes should be resolved rationally in an environment of calm and measured deliberation, free from hostility, emotion, and other irrational or disruptive influences. Incivility and discourteous conduct detracts from this environment, undermines public confidence and impedes the administration of justice and the application of the rule of law.[17.1]

The hearing panel defined incivility as "a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, as well as ill-considered or uninformed criticism of the competence, conduct, advice or charges of another lawyer." On appeal, the Appeal Panel added that it is professional misconduct to impugn the integrity of opposing counsel unless the allegations are both made in good faith and have a reasonable basis. A *bona fide* belief is insufficient, as it gives too much licence to irresponsible counsel with sincere but unsupportable suspicions of opposing counsel. The Appeal Panel added that even when lawyers honestly and reasonably believe that opposing counsel is engaging in professional misconduct they must avoid the use on invective to raise the issue.[17.2]

On further appeal, the Divisional Court held that the Appeal Panel's test did not "go far enough to protect the importance of zealous advocacy." The Court restated the test by adding the requirement that in order for in-court civility to constitute professional misconduct, it must be established that the conduct in issue is both uncivil and that it "undermined, or . . . has the realistic prospect of undermining, the proper administration of justice."[17.3]

The Court of Appeal, dismissing a further appeal by the lawyer, rejected "the premise of an inherent collision or competition between the duty of zealous advocacy and the duty of courtesy and civility":

> The duty of zealous advocacy must be jealously protected and broadly construed. But it is not absolute and must not be abused. Nor do the Conduct Rules assign it paramountcy. The Conduct Rules provide for a constellation

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17 FLSC *Code*, para. 2 of commentary.

17.1 *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94, at para. 65. The Law Society Appeal Panel upheld the Hearing Panel's finding of professional misconduct. While it reduced the penalty imposed from a two-month suspension to a one-month suspension, it did not disagree with the Hearing Panel's statement about the reasons for requiring civil conduct: 2013 ONLSAP 41.

17.2 2013 ONLSAP 41 (L.S.U.C. Appeal Panel) at para. 36, affirmed 2015 CarswellOnt 1238 (Ont. Div. Ct.), affirmed 2016 CarswellOnt 9453 (Ont. C.A.), leave to appeal allowed 2017 CarswellOnt 1199 (S.C.C.).

17.3 (2015), 124 O.R. (3d) 1 (Ont. Div. Ct.) at paras. 72, 75-76, affirmed 2016 CarswellOnt 9453 (Ont. C.A.), leave to appeal allowed 2017 CarswellOnt 1199 (S.C.C.).

> of obligations that together make up the overarching duty of professionalism that condition the privilege of practising law in Ontario.[17.4]

The Court of Appeal added that the often misused adage that "a hard fought trial is not a tea party" does not license abusive and unprofessional behaviour towards opposing counsel. All participants in litigation and the public have a legitimate right to expect that the advocate's duty of zealous advocacy will be tempered by the overriding duty to adhere to all the standards of the profession, including the duty to act with courtesy and good faith.[17.5]

The Supreme Court of Canada has adopted, as a definition of incivility, "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy."[18]

The rules explicate the content of the duty of courtesy toward other lawyers in several ways. Lawyers should accede to reasonable requests for trial dates, adjournments, waivers of procedural formalities and similar matters that do not prejudice clients' rights.[19] Lawyers should avoid sharp practice and not take advantage of or act without fair warning upon slips, irregularities or mistakes of other lawyers not going to the merits or involving any sacrifice of clients' rights.[20] A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.[21]

The rules add that lawyers must answer with reasonable promptness all professional letters and communications from other lawyers that require answers, and should be punctual in fulfilling all commitments.[22] Lawyers should not give undertakings that cannot be fulfilled, and should fulfil every undertaking given.[23]

The rules also stipulate that if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer, (a) approach, communicate or deal with the person on the matter, or (b) attempt to negotiate or compromise the matter directly with the person.[24] There is an exception, however, for limited scope retainers. In those cases, a lawyer may deal directly with the person unless the lawyer has been

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17.4 2016 ONCA 471 (Ont. C.A.) at paras. 131-132, leave to appeal allowed 2017 CarswellOnt 1199 (S.C.C.).

17.5 At paras 138-39.

18 *Dore´ v. Barreau du Que´bec*, 2012 SCC 12 (S.C.C.).

19 FLSC *Code*, rule 7.2 - 1, para. 4 of commentary.

20 FLSC *Code*, rule 7.2 - 2. See also *Arthur v. Meaford (Town)* (1915), 34 O.L.R. 231 at 233-234 (Ont. H.C.), *per* Middleton J.; and *Meadwell Enterprises Ltd. v. Clay & Co.* (1983), 44 B.C.L.R. 188 at 200 (B.C. S.C.).

21 FLSC *Code*, rule 7.2 - 3. See also Mark Koehn, "Attorney, Participant Monitoring and Ethics: Should Attorneys be Able to Surreptitiously Record Their Conversations?" (1991) 4 Geo. J. Legal Ethics 403.

22 FLSC *Code*, rule 7.2 - 5.

23 FLSC *Code*, rule 7.2 - 11.

24 FLSC *Code*, rule 7.2 - 6.

given written notice of the nature of the legal services being provided under the limited scope retainer and the communication falls within the scope of that retainer.[25]

From time to time lawyers are required to appear before discipline committees as a result of discourteous conduct. Most complaints are dealt with by way of informal invitations to attend before the committee (which do not result in the acquisition of a discipline record) or by unpublished reprimands. Breaches of undertakings are sometimes visited with harsher sanctions, depending on the consequences of the breach and other circumstances of the case.

At least one lawyer has been publicly disciplined twice for persistent discourtesy. In the first case, the lawyer led off a cross-examination of a witness whom he was representing by saying to the lawyer who was conducting the cross-examination, "You can start now, Dumbo." He then spilled coffee on the opposing counsel's notes three times during the cross-examination, which terminated with the lawyer telling the opposing counsel that he could "crawl back into [his] hole now." The lawyer was publicly reprimanded.[26] In the second case, the lawyer was suspended for three months when he refused to stand when addressing the court, despite the judge's repeated insistence that he do so.[27]

In a 2011 Ontario case,[27.1] a lawyer was found guilty of professional misconduct for failing to be courteous and civil (among other things) by using sexually explicit, rude, and profane language in a mediation. The hearing panel stated that though an isolated instance of profanity in an exchange between counsel would not necessarily amount to misconduct, when such language is used as part of a campaign of rudeness, and aggressive and intimidating behaviour, such behaviour crosses into the realm of professional misconduct.[27.2]

In an English case, a solicitor was struck from the roll for writing an offensive letter to the Secretary-General of the Law Society. The letter read as follows:

> I thank you for your letter of the 11th instant and think it may well help you and any other jumped up prat who has to consider matters, if I first put one or two things straight.
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> H is a bent little git and T as useless a pillock as I have ever encountered.

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25 FLSC *Code*, rule 7.2 - 6A and accompanying commentary.

26 *Re Balaban*, Law Society of Upper Canada, discipline committee report adopted by Convocation, May 24, 1984.

27 *Re Balaban (No. 2)*, Law Society of Upper Canada, discipline committee report adopted by Convocation, September 25, 1986.

27.1 *Law Society of Upper Canada v. Guiste*, 2011 ONLSHP 24.

27.2 At para. 27. The lawyer was reprimanded publicly and required to apologize in writing to the lawyers who were the objects of his incivility: *Law Society of Upper Canada v. Guiste*, 2011 ONLSHP 129.

> They have breached their duty to the court, made it make two stupid orders through different judges with about as much integrity as a cow pat.
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> Attached is a page from the Salvation Army songbook that I inspired them or they chose to use on Sunday night. Sort yourself out, laddie.

A year earlier, the solicitor had been fined £2000 after a discipline hearing, also for writing offensive letters. He had refused to pay the fine. At his second hearing, he refused to apologize for his conduct. His right to practise was revoked after 22 years as a solicitor, perhaps because he had proven himself ungovernable.[28]

More problematic are instances of discourtesy that litigation lawyers encounter regularly. These include truculence and attempts to humiliate witnesses and lawyers for adverse parties. Some lawyers negotiate as if they believed that trying to understand another party's position would weaken the strength of their resolve in bargaining.[29]

In a 2000 case,[29.1] the Ontario Court of Appeal characterized the conduct of defence counsel at a lengthy civil trial as demonstrating "a level of rancour and hostility rarely, if ever, seen in an Ontario courtroom." The conduct in question included repeated attacks on the plaintiffs' counsel's integrity and competence. The Court emphasized that civility in the courtroom is very much the responsibility of the trial judge and counsel alike, "a shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves." The Court added that "the failure to satisfactorily discharge this responsibility in this case tarnished the reputation of the administration of justice," and that the case "underlines the importance being given by leaders of the bench and bar to improving civility in the courtroom."[29.2]

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28 London *Evening Standard* (April 13, 1991). In *Li v. College of Pharmacists* (1994), 116 D.L.R. (4th) 606, 95 B.C.L.R. (2d) 153, 49 B.C.A.C. 115, 80 W.A.C. 115 (B.C. C.A.), the British Columbia Court of Appeal, by a two-to-one majority, upheld a decision quashing an order of the disciplinary committee of the respondent College finding the appellant guilty of professional misconduct for dealing with several customers in a rude, belligerent and unprofessional way. The majority of the Court observed that "civility is not amenable to regulation"and is not reasonably connected to any objective embodied in the governing legislation. The case can readily be distinguished from those involving lawyers who have been disciplined for such lapses on the basis that rules of professional conduct expressly require lawyers to treat clients, other lawyers, and the court with courtesy (see notes 12 through 14, *supra*).

29 See Lord Hailsham, *A Sparrow's Flight: The Memoirs ofLord Hailsham ofSt. Maryleborne* (London: Collins, 1990), p. 362; Geoffrey C. Hazard, Jr., "Change Rules to Civilize the Profession", National Law Journal (April 17, 1989), p. 13; and John Honsberger, "Civility Within the Profession", Law Society of Upper Canada Gazette, vol. 25, no. 2 (June, 1991), p. 176 at 177-179.

29.1 *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (Ont. C.A.), leave to appeal refused 2001 CarswellOnt 3412, 2001 CarswellOnt 3413 (S.C.C.).

29.2 *Ibid.*, p. 136.

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In a 2002 decision,[29.3] the Ontario Superior Court of Justice dismissed an application for judicial review brought by the Ontario Securities Commission. The Commission sought an order removing the judge presiding over the trial of charges under the *Ontario Securities Act*, in part on the ground that the trial judge had wrongly failed to restrain uncivil conduct by defence counsel, thereby producing an unfair trial and creating a reasonable apprehension of bias on the part of the Commission. The Commission's position was that the trial, which had proceeded for 70 days before the judicial review application was brought, should be stopped midstream and started over again before a different judge.

In dismissing the application the Superior Court stressed that interlocutory rulings, short of jurisdictional error, provide no basis to interfere with a continuing trial. The Court held that the Commission had failed to discharge the heavy burden a party must bear who seeks to remove a judge in the midst of a continuing trial. Nothing in the evidentiary record or in the trial judge's rulings, the Court held, disclosed any jurisdictional error that required the trial to be stopped midstream and started fresh before another judge.

The uncivil conduct of defence counsel about which the Commission complained included attacks on the prosecution, which often consisted of attacks on the prosecutor's integrity. Defence counsel's basic stance, the Court observed, was that any position argued by the prosecutor with which defence counsel disagreed was not simply wrong but outrageously improper. It would be reasonably open to the prosecutor to conclude that whenever he took a position with which defence counsel disagreed, defence counsel would characterize the prosecutor's position as unethical.

The tone of defence counsel's submissions, the Court wrote, "descended from legal argument to irony to sarcasm to petulant invective", and on one occasion "more resemble[d] guerilla theatre than advocacy in court."

A great deal could be said about this manner of conducting litigation, the Court stated, but it is not the task of the Court on a judicial review application to pass judgment on counsel's litigation style unless if affects the jurisdiction of the trial judge. The question is not whether defence counsel's vociferous level of attack was appropriate but whether the trial judge lost jurisdiction by failing to put defence counsel under a gag order of some kind. The judge does not lose jurisdiction even if counsel's litigation style is abusive and sometimes personally nasty, unless the judge's response prevents a fair trial. The trial judge, the Court added, has a wide discretion to decide whether the wounded feelings of one side prevent it from presenting its case adequately.

It may be that a less patient judge or a more interventionist judge might have "put an early lid" on defence counsel's profusion of self righteous moral outrage and insist he make his points without excessive rhetoric, the Court observed. Some judges may have done more to curb the nasty edge in counsel's rhetoric. It is a matter of judgment in each case, however, whether it is best to intervene and risk further inflaming a counsel whose zeal exceeds his or her civility or

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29.3 *R. v. Felderhof*, [2002] O.J. No. 4103 (Ont. S.C.J.).

judgment, or simply to let the storm pass and then move ahead. In this case, the Court held, the trial judge displayed a position of scrupulous judicial neutrality and was patient to a fault. It could not be said that the trial judge's patient refusal to descend into the arena or to depart from his established position of judicial neutrality above the fray represented an error of law, the Court concluded, let alone a jurisdictional error.

The Court pointed out the growing recognition of the importance of civility in the litigation process not as a matter of personal courtesy but as an aspect of the need to maintain a civilized and orderly forum for the effective adjudication of competing rights. A lack of civility may interfere with the fairness of the proceedings.

Defence counsel has a right, however, to make allegations of abuse of process and prosecutorial misconduct, both of which are recognized legal categories that form part of the arsenal of defence tactics. The trial judge does not lose jurisdiction by listening to such allegations. On the contrary, the judge is obliged to listen and to rule on them, and may lose jurisdiction by failing to do so.

So far as the trial judge's jurisdiction is concerned, it does not matter whether defence counsel is deliberately baiting the prosecutor or whether counsel is simply incapable of controlling his or her rhetoric and sarcasm.

The question is whether the effect of the conduct was such that the judge lost jurisdiction by failing to do more to curb it. The trial judge, "who takes the daily temperature of the trial in a case where both opposing counsel have a low threshold of moral outrage," has a wide discretion in choosing how to address the problem. Here the trial judge remained neutral, and his conduct of the trial did not give rise to a reasonable apprehension of bias.

A motion for costs of the Crown's application for costs was refused, in part because an effect of awarding costs would be to reward defence counsel for unacceptable conduct.[29.4]

The Ontario Court of Appeal dismissed both an appeal by the Crown from the Superior Court's dismissal of its judicial review application, and an appeal by the accused from the Court's dismissal of its motion for costs.[29.5] The Court of Appeal found that the trial judge's response to defence counsel's improper rhetoric did not deprive the trial judge of jurisdiction or prevent the prosecutors from fulfilling their duties or having a fair trial.

The Court of Appeal added, however, that it is important that everyone, including judges, encourage civility both inside and outside the courtroom. "Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client," the Court wrote, "and is as important in the criminal and quasi-criminal context as in the civil context."[29.6] The Court adopted the view previously expressed by Morden, J.A., that civility "is not just a nice, desirable

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29.4 *R. v. Felderhof*, [2003] O.J. No. 393 (Ont. S.C.J.).
29.5 (2003) 68 O.R. (3d) 481 (Ont. C.A.).
29.6 *Ibid*. at 513.

adornment to accompany the way lawyers conduct themselves," but rather is a quality that contributes to the goal of resolving conflicts rationally, peacefully and efficiently. The Court wrote that hostile, obstructive, unfair, or demeaning comments by counsel in the course of submissions to a court affect not only the other counsel, but also diminish the public's respect for the court and for the administration of justice and thereby undermine the legitimacy of the results of the adjudication.[29.7]

The Court of Appeal agreed with the Superior Court that defence counsel has a right to make allegations of abuse of process and prosecutorial misconduct, but added the qualifications that such a right exists only where those allegations have some foundation in the record and may lead to a remedy, and that the right must be exercised only at the appropriate time in the proceedings.[29.8] Allegations of improper motives or bad faith must not be made as part of the normal discourse in submissions over the admissibility of evidence or the conduct of the trial. Even where there is a foundation for such allegations in the record and they are levelled at the time of a motion seeking a remedy based on abuse of process, for example, counsel are required to make their submissions without rhetorical excess and invective.[29.9]

The defence counsel was found guilty of professional misconduct in a conduct hearing initiated by the Law Society of Upper Canada, largely based on the decisions of the Superior Court and the Court of Appeal.[29.9.1]

The allegations of professional misconduct that were found to have been established included that the defence counsel had undermined the integrity of the profession by communicating with the prosecutors in a manner that was abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer, and that he had failed to act with courtesy and good faith through engaging in ill-considered or uninformed criticism of the prosecutors.

The finding of professional misconduct was upheld by the Law Society Appeal Panel[29.9.2] and, on further appeal, by the Ontario Divisional Court.[29.9.3]

The Appeal Panel emphasized that the term "incivility" should not be used to discourage fearless advocacy manifested by passionate, brave and bold language. It mischaracterizes the objective and meaning of civility obligations, the Appeal Panel wrote, to suggest that they mandate politeness or create an obligation akin to being nice to one another, incivility is not mere rudeness or bad manners, or excess rhetoric or sarcastic remarks.[29.9.4]

The specific issue in the case, as the Appeal Panel characterized it, was the extent to which counsel may impugn the integrity of opposing counsel. In the

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29.7 *Ibid*. at 514.
29.8 *Ibid*. at 515.
29.9 *Ibid*. at 517.
29.9.1 *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94.
29.9.2 *Law Society of Upper Canada v. Groia*, 2013 ONLSAP 41.
29.9.3 2015 ONSC 686 (Ont. Div. Ct.).
29.9.4 At para. 211.

trial that gave rise to the disciplinary proceedings, the Appeal Panel found, the defence counsel's repeated allegations of prosecutorial misconduct — which suggested that the prosecutors could not be relied upon to keep their word and that they were lazy and incompetent — were completely unfounded. The Appeal Panel found the allegations amounted to a relentless personal attack on the integrity and *bona fides* of the prosecutors.[29.9.5] The Appeal Panel quoted with approval the remarks of a leading Ontario defence counsel that "[c]ounsel have a professional responsibility to preserve the dignity of the forum in which they practise."[29.9.6]

The Divisional Court addressed what it identified as a difficult question: How does one determine the point at which uncivil conduct turns into professional misconduct? Does uncivil conduct by itself amount to professional misconduct or must there be something more?[29.9.7] The Court recognized that trials are generally "intense, stress-filled events" in which emotions run high and much is at stake. Harsh words will often be spoken in the heat of battle. Nevertheless, the Court held, there are limits to the allowances that should be made "under the excuse that the 'rough and tumble' is inherent in the nature of the trial process", and when the line between excusable excess and professional misconduct is crossed, it should be expected that consequences will follow.[29.9.8]

The Court concluded that incivility amounting to professional misconduct does not allow for a fixed definition: "[u]ncivil words spoken by one lawyer in one case may not cross the line into professional misconduct whereas similar words spoken by another lawyer in a different case may."[29.9.9]

That is not to say, the Court added, that there are no rules or standards by which lawyers can measure their conduct and understand whether they are potentially embarking on a course that may lead them into difficulty. As a starting point, the Court quoted a statement by the Appeal Panel (with which the parties agreed) that counsel must not impugn the motives or integrity of opposing counsel or make allegations of prosecutorial misconduct unless such allegations are made in good faith and have a reasonable basis.[29.9.10] The Court held, however, that this test in itself fails to go far enough to protect the importance of zealous advocacy: the use of language that may be very tough in its expression, that is passionate and may sting does not engage the incivility concern. Rather, the conduct that engages the incivility concern "begins with conduct that is rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality." It is conduct that attacks the personal integrity of opponents, parties, witnesses, or the court, where there is an absence of a good faith basis for the attack or the belief of counsel that the attack is warranted is not

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29.9.5 At paras. 266, 285, 295, 303, 304, 306, 318-322.
29.9.6 At para. 219.
29.9.7 At para. 47.
29.9.8 At paras. 52-53.
29.9.9 At para. 68.
29.9.10 At para. 69.

objectively reasonable. A single instance of such conduct will be less likely to engage the misconduct concern than will repeated instances.[29.9.11]

In order for the uncivil conduct to rise to the level of professional misconduct, however, the conduct must have the tendency to bring the administration of justice into disrepute, the Court added. It is ultimately necessary for the conduct to have undermined, or to have had the realistic prospect of undermining, the proper administration of justice.[29.9.12]

On further appeal, the Court of Appeal for Ontario was divided. By a two-to-one majority the court dismissed the lawyer's appeal and upheld the finding of professional misconduct for incivility. The majority rejected the suggestion adopted by the dissenting judge that the hearing and appeal panels and the Divisional Court gave inadequate consideration to how the trial judge reacted to the lawyer's conduct, and how the lawyer responded to judicial direction.[29.9.13] The majority observed that there are many reasons why a trial judge may elect not to criticize or complain about an advocate's uncivil conduct in court. Some judges are reluctant to intervene because to do so might interfere with the appearance of judicial impartiality. Refraining from intervening may permit the proceeding to advance more efficiently. "The important point," the Court held, "is that, just as a presiding judge's affirmative criticism or complaint — before or after trial — is not a precondition to the Law Society's exercise of its disciplinary authority, neither is a presiding judge's inaction in the face of an advocate's uncivil in-court conduct an approval of such conduct."[29.9.14]

All three members of the court agreed that civility is not merely aspirational, but rather is a codified duty of professional conduct repeatedly confirmed by the courts, "an essential pillar of the effective functioning of the administration of justice." Its necessity and importance are settled law.[29.9.15]

The majority of the Court of Appeal accepted that an advocate's isolated lapse of judgement or occasional disparaging conduct about another participant in litigation generally should not trigger disciplinary action. The case before the Court, however, involved a pattern of unfounded, personal attacks on the integrity of opposing counsel and baseless allegations of misconduct. It was the serious and repetitive nature, and manner of expression of the allegations, that elevated them into the realm of professional misconduct.[29.9.16]

In a 2010 case,[29.10] the Quebec Court of Appeal and the Supreme Court of Canada[29.10.1] upheld a finding that a lawyer had violated section 2.03 of the

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29.9.11 At paras. 71-74.

29.9.12 At paras. 75-76.

29.9.13 2016 ONCA 471 (Ont. C.A.) at para. 419, leave to appeal allowed 2017 CarswellOnt 1199 (S.C.C.).

29.9.14 Para 108.

29.9.15 Para 119.

29.9.16 Paras. 141, 202.

29.10 *Dore´ v. Barreau du Que´bec* (2010), 326 D.L.R. (4th) 749 (Que. C.A.). 29.10.1 2012 SCC 12, 343 D.L.R. (4th) 193 (S.C.C.).

Code of ethics of advocates and sections 59.2 and 152 of the *Professional Code* by writing a letter to a judge that read in part as follows:

> I have just left the Court. Just a few minutes ago, as you hid behind your status like a coward, you made comments about me that were both unjust and unjustified,....
>
> Because you ducked out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me....
>
> If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills . which has caused you to become pedantic, aggressive, and petty in your daily life, makes no difference to me; ...
>
> Your deliberate expression of these character traits while exercising your judicial functions, however, and your having made them your trademark concern me a great deal, and I feel that it is appropriate to tell you.
>
> ... Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court where you lack the courage to hear opinions contrary to your own to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge,....
>
> I would have very much like[d] to say this to your face, but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.
>
> Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change....
>
> As this letter is purely personal, I see no need to distribute it.

The Supreme Court of Canada held that the *Charter of Rights and Freedoms*' guarantee of freedom of expression did not insulate the lawyer from a finding of professional misconduct, as the limitation on that freedom was demonstrably justified in a free and democratic society. The lawyer was reprimanded and suspended for 21 days. The Court held that the decision reflected a proportionate balancing of the lawyer's expressive rights with the Disciplinary Council's statutory mandate to ensure that lawyers behave with "objectivity, moderation and dignity" in accordance with the *Code of ethics for advocates*.

In dealing with the appropriate boundaries of civility for a lawyer, the severity of the conduct must be interpreted in light of the expressive rights

guaranteed by the *Charter* and, in particular the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular. Disciplinary bodies and courts must balance the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession, and must demonstrate that they have paid due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion.[29.10.2]

Proper respect for expressive rights, the Court added, may involve discordant criticism. It does not follow, however, that lawyers have an unlimited right to breach the legitimate public expectation that they will behave with civility. "[I]t is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility," the Court wrote. "On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint."[29.10.3]

The Supreme Court of Canada's decision was applied by a Hearing Panel of the Law Society of British Columbia in a 2014 case[29.10.4] in which a plaintiffs' personal injury lawyer was cited for writing two letters to defence counsel that were alleged to be "discourteous, uncivil, offensive or otherwise inconsistent with the proper tone of a professional communication." In the letters the lawyer had referred to a doctor whom the defendant's counsel had arranged to examine the plaintiff as a "hireling" of the defendant's insurer and had taken exception, in colourful language, to a law clerk employed by defence counsel writing to him quoting from case law.

The Hearing Panel held that it must abide by the Supreme Court of Canada's admonition that "proper respect for [expressive rights guaranteed under the *Charter of Rights and Freedoms*] may involve disciplinary bodies tolerating a degree of discordant criticism. . . ". It found that though the lawyer could have expressed his views "more elegantly, less abrasively, and more persuasively," neither the words he used nor the manner in which he expressed them constituted a marked departure from the conduct the Law Society expects of its members and that, accordingly, the lawyer was not guilty of professional misconduct.

Incivility has been visited by cost consequences in a series of Ontario cases.

In a 2001 decision,[29.11] the Court of Appeal upheld a trial judge's order whereby one of two defendants found liable to the plaintiffs was required to pay a larger share of the costs than its share of liability. The trial judge had based his

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29.10.2 At para. 63.

29.10.3 At para. 68.

29.10.4 *Re Harding*, 2014 LSBC 45.

29.11 *Ontario New Home Warranty Program v. Bertrand & Frére Construction Co.*, [2001] O.J. No. 2014 (Ont. C.A.).

award of costs in part upon the conduct of this defendant's counsel, who had engaged in repeated, serious and groundless allegations against the integrity of counsel for one of his co-defendants. On thirty-five occasions the offending counsel accused his co-defence counsel of literally committing fraud on the court, allegations that the Court found to be unsupported.

In a 2002 decision,[29.12] the Superior Court of Justice upheld an order of a master that imposed on plaintiffs' counsel (jointly and severally with the plaintiffs) personal liability for costs. The case is a further illustration of our courts being called upon to respond to incivility on the part of counsel — in this case on examinations for discovery (a too frequent venue for problems in this area). Neither counsel emerged from the case unscathed. The Court rejected a suggestion that one counsel's lapses were mitigated by the fact that they were in response to the other counsel's conduct. "[T]hat cannot be allowed as an excuse," the Court remarked, "or we will have established a recipe for a downward spiral into increasing incivility."

The issues arose in the context of an appeal from two orders of a case management master on motions to compel fulfilment of undertakings, to compel answers to questions objected to on discovery, and to obtain directions regarding the continuation of the examinations.

The Court accepted the characterization of the examination for discovery of one of the defendants as one characterized by a poisoned atmosphere. At a time when leaders of the bar have repeatedly drawn it to the attention of the profession that there has been an alarming and deplorable decline in civility between counsel, the Court wrote, [this] examination for discovery is a sorry example of the trend. Each counsel fell well below the standard of civility reasonably expected of them as lawyers. Each side on appeal included in its written materials examples of bad conduct on the part of the other side. "Sad to say," the Court commented, "they are both right."

29.12 *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069 (Ont. S.C.J.).

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The plaintiffs' counsel conducted a "sprawling examination" of the defendant, and appeared not to have been well-prepared. He was found by the master to have conducted the examination in an abusive manner, laughed and snickered throughout the examination, asked frivolous questions, and intimidated and demeaned the witness. He answered his cell phone and left the room while the defendants' counsel was speaking. the Court wrote that the plaintiffs' counsel's "generally self-indulgent approach is more troubling to me than most of his outrageous questions, although the latter are clearly part of the former."

In the Court's view, however, the defendants' counsel's conduct could not be condoned on the basis that he was merely responding to the plaintiffs' counsel's improprieties. While the problem reflected the parties' divergent views of the merits of the plaintiffs' case, defendants' counsel was required to permit proper questions relevant to the case as pleaded, no matter how overblown he considered the plaintiffs' case to be. Counsel had a duty to refrain from judgmental or derisive comments about the plaintiffs' claims and not to express disdain for either the plaintiffs' case or the plaintiffs' counsel. By surrendering, unprofessionally, to the temptation to respond sarcastically to provocative questions, the Court held, defendants' counsel compromised his right to complain of comparable improprieties on the part of plaintiffs' counsel.

The Court upheld orders of the master that imposed on the plaintiffs' counsel (jointly and severally with the plaintiffs) personal liability for the costs thrown away and for the costs of the motion for directions. The Court held that although the defendants' counsel contributed to the poisoned atmosphere of the examination, the plaintiffs' counsel's improprieties met the test for an order imposing personal liability on counsel for costs and justified the bringing of the motion by the defendants. The amount fixed for costs thrown away and attributable to counsel should, however, be adjusted to reflect (i) the portion of the examination that provided information of utility, (ii) an allowance for genuine differences of opinion about the relevance and propriety of some of the questions, (iii) an allowance reflecting that some of the time wasted resulted more from incompetence than from impropriety (only the latter may form the basis of an award of costs against counsel personally), and (iv) an allowance for the part of the wastage of time that is properly attributable to the transgressions of the defendants' counsel.

Finally, the Court observed that awards of costs personally against a lawyer under rule 57.07 of the Ontario *Rules of Civil Procedure* are not limited to cases of gross negligence and cases in which the conduct of the lawyer is inexcusable and such as to merit reproof. Those words set the bar too high. Courts must be extremely cautious in awarding costs against a lawyer, but rule 57.07 should be given its plain meaning. It authorizes the court to require lawyers to pay costs personally where they cause costs to be incurred without reasonable cause or to be wasted by undue delay, negligence, or other default. Proof of gross negligence or abuse of process is not a condition precedent to such an order.

In another 2002 decision,[29.13] a master awarded costs against defendants' counsel personally (jointly and severally with his clients), and fixed costs on a substantial indemnity scale, on the basis that counsel's approach to the case and his dealings with plaintiffs' counsel were "so lacking in professionalism and fair play that the court must demonstrate its disapproval in a tangible way". The impugned conduct included responding rudely to plaintiffs' counsel's correspondence, noting plaintiffs in default on two separate occasions without notice to the plaintiffs' counsel, and addressing the court in writing without having been asked to do so or having sought and received leave.

The master cited a pamphlet published by the Ontario Advocates' Society entitled *Principles of Civility*. The master observed that the pamphlet does not have the force of law, but added that the principles expounded are objectives that lawyers should aspire to achieve, and that failing to adhere to the principles will be sanctioned in extreme cases, such as the one before the Court.

The Advocates' Society's *Principles of Civility* were also applied by a master in a 2003 decision,[29.14] in which a lawyer who was representing himself as plaintiff in litigation was ordered to pay costs of a motion on a substantial indemnity scale as a result of unsubstantiated, disparaging remarks he made about defendants' counsel. The master held that counsel who appear before Ontario courts are expected to comply with the Law Society's *Rules of Professional Conduct* and should also adhere to the *Principles of Civility*, or risk sanctions by the court.

In a 2013 decision,[29.15] the Court of Appeal for Newfoundland and Labrador awarded costs to the appellants despite their failure to produce relevant documents where counsel for the respondents "seriously overreached in asserting that counsel for the Appellants exhibited egregious, wilful misconduct and wrongdoing, and acted in an improper and unethical manner in concealing the documents." The Court of Appeal found that although the appellants ought to have made disclosure of the documents, and in that sense precipitated the issue before the Court on the respondent's motion to dismiss the appeal, "the non-disclosure did not call for the response made by counsel for [the Respondent] with an aggressive attack on the professional reputation of counsel for the Appellants."[29.16]

The Court of Appeal observed that the entire proceeding "has been characterized by an unseemly degree of animosity and rancour which does no credit to the parties or their counsel."[29.17]

29.13 *Etubicoke Noodles Inc. v. Rajah*, [2002] O.J. No. 5157.

29.14 *Baksh v. Sun Media (Toronto) Corp.* (2003), 63 O.R. (3d) 51. See also Daniel Naymark and Jennifer Ip, "Judicial Sanction of Uncivil and Unprofessional Conduct", a paper presented at the Advocates' Society's Civility and Professionalism Symposium in Toronto on February 8, 2012.

29.15 *Humby v. Newfoundland and Labrador Housing Corp.*, 2013 NLCA 4.

29.16 At paras. 47, 50.

29.17 At para. 2.

Many explanations have been offered for these belligerent attitudes: the bar has grown impersonal as it has multiplied in size; there is greater competition for clients and cases; as society itself has become more contentious, civility has come to be equated with servility and weakness.[30]

Codes of professional civility have been considered in several American jurisdictions. In 1992, the United States Court of Appeal for the Seventh Circuit adopted a recommendation that all lawyers seeking to practise before it first certify that they have read and will abide by a newly approved civility code.[31] Should law societies try to eliminate the problems of abusive language and tactics by adopting such a code?

Although the severity of the problem is apparent, it is not apparent that another code will help to remedy it. At least one American commentator, Geoffrey Hazard, has suggested that a code of civility is likely, on the contrary, to intensify conflict over "professionalism."[32] "True civility" he says, "involves an element that eludes legislative prescription."[33]

What is required is the sense to follow a good example. Professions, like families, have pride and traditions. Our greatest advocates have been renowned for their courtesy. A former Chief Justice of Canada, John Cartwright, has been described as having the characteristics of "gentlemanliness, fairness, reasonableness, candour, magnanimity, and complete integrity." He has also been described as the most effective counsel of his time.[34] A former Chief Justice of the United States, similarly, has written that:

> There are some lawyers who scoff at the idea that manners and etiquette form any part of the necessary equipment of the courtroom advocate. Yet if one were to undertake a list of the truly great advocates of the last one hundred years, I suggest he would find a common denominator: They were all intensely individualistic, but each was a lawyer for whom courtroom manners were a key weapon in his arsenal. Whether engaged in the destruction of adverse witnesses or undermining damaging evidence or in final argument, the performance was characterized by coolness, poise, and graphic clarity, without shouting or ranting, without baiting witnesses, opponents or the judge.[35]

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30 Hazard, *ibid.*, p. 13; Honsberger, *ibid.*, p. 179.

31 Martha Middleton, "Seventh Circuit OK's Rules On Civility", National Law Journal (January 11, 1993), p. 14. See also Geoffrey C. Hazard, Jr., "Civility Code May Lead to Less Civility", National Law Journal (February 26, 1990), p. 13.

32 Hazard, *ibid.*, p. 13.

33 Hazard, *supra*, note 29, p. 13.

34 Honsberger, *supra*, note 29, p. 177. See also John J. Robinette, "John Robert Cartwright", Law Society of Upper Canada Gazette, vol. 14, no. 3 (September, 1980), p. 214 at 216, in which the author recalls the school motto of Winchester School, William of Wykeham's Foundation, and Chief Justice Cartwright's precept: "Manners Maketh Man."

35 Warren E. Burger, Lecture, Fordham University Law School, December 28, 1973, quoted in David Shrager and Elizabeth Frost (eds.), *The Quotable Lawyer* (New York: Facts on File Publications, 1986), p. 194. See also the quotation from former Chief Justice Burger's address to the American Law Institute, May 24, 1971, appearing at p. 193 of the same volume; and W. Gibson Gray, "Expectations of Courts", Law Society of Upper Canada Gazette, vol. 15, no. 2 (June, 1981), p. 129 at 131.

There are limits to what codes of conduct and the disciplinary process should be expected to accomplish. Improved training in advocacy skills, concentrating on the models of the great advocates of the past and present, and combined with a collective "that's not done"[36] may be the most effective remedy for incivility.

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36 See Thomas Hurka, "The Difference Between Etiquette and Morality? It's a Question of Degree", Toronto *Globe and Mail* (April 23, 1991), p. A-16.