



A LAWYER'S DUTY TO OPPOSING COUNSEL

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*Over the next generation, I predict, society’s greatest opportunity will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry.*²

1. PROFESSIONALISM AND THE PRACTICE OF LAW

Benjamin Cardozo, former Associate Justice of the U.S. Supreme Court, stated that “[m]embership in the bar is a privilege burdened with conditions.”³ The *Rules of Professional Conduct* are a manifestation of many of these ‘conditions’. Observance of the Rules and the duties articulated therein encourages professionalism in the practice of law.

What then, is ‘professionalism’? Many will say that it is a positive thing, but also be unable to express the precise meaning of the term.⁴ The inability of many to define professionalism is due, in part, to the multitude of definitions attached to the term. Rather than narrow professionalism to a fixed definition, it is better to speak of the commonalities between definitions. Many definitions of professionalism rest upon the notion of service to others.

It is the commitment to serve others and not a lawyer’s expertise that positions her as a professional. The public’s perception of lawyers and its respect for them is based on this commitment.⁵

2. PROFESSIONALISM TODAY

Today, public opinion and personal experience suggest that professional behaviour is not what it once was. Lawyers are quickly vilified. Segments of the public believe that Lawyers are ‘not to

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² Beverly G. Smith “*Professional Conduct for Canadian Lawyers*” (1989 Butterworths) at p. 104 citing Gavin MacKenzie, 1.2 Legal Education and Training (p. 1-4) [Smith]

³ Margret Ross, “*Challenges to the Standards of Professionalism in the Legal Profession*” March 28, 2008 [Ross] quoting Benjamin Cardozo in *Re Rouss*, 221 N.Y. 81, 84 (1917)

⁴ Jordan Furlong, “*Professionalism Revived: Diagnosing the Failure of Professionalism Among Lawyers and Finding a Cure*” Paper in support of the Keynote Commentary to be Delivered at the Chief Justice of Ontario’s Tenth Colloquium on the Legal Profession, March 28, 2008: Ottawa, page 1 “professionalism’ is a powerful word that...represents something positive that people want to emulate and incorporate into their own lives. [Furlong]

⁵ *ibid* [Furlong]

be believed, fickle and motivated by self interest’⁶. Statistics from 2004 reveal that only 44% of Canadians trust lawyers⁷. Some say that the public and personal dissatisfaction with lawyers can be tied to the decline in service to others:

The extent to which lawyers have lost our sense of professionalism is precisely the extent to which we have lost our focus on our duties to others and on serving their best interests and, not coincidentally, to the meaning and satisfaction of our vocations as lawyers. The less we dwell on others and more we serve ourselves, the weaker do our bonds of professionalism become.⁸

On this backdrop, the discussion of a lawyer’s duty to opposing counsel is both timely and potentially significant.

3. DUTY TO OPPOSING COUNSEL: RULES OF PROFESSIONAL CONDUCT

Lawyers licensed by the Law Society of Upper Canada are subject to its *Rules of Professional Conduct*.⁹ These *Rules* serve as touchstone for our discussion.

The *Rules* themselves are mandatory, while the accompanying commentaries are explanatory and/or advisory.¹⁰ The *Rules* “impose limitations on the competitive conduct of lawyers in an adversary system.”¹¹ They have been “designed to temper the extravagances of lawyers whose behaviour is reminiscent of the [adversary] system’s origin of trial by combat”.¹² One element of that limitation and tempering is a lawyer’s duty to opposing counsel.¹³

⁶ *Supra* note 3 at 3 [Ross]

⁷ *ibid* [Ross]

⁸ *supra* note 4 at 5 [Furlong]

⁹ *Rules of Professional Conduct*, of the Law Society of Upper Canada, are available at <http://www.lsuc.on.ca/media/rpc.pdf> [Rules] See below for discussion of the similar rules governing lawyers’ conduct outside Ontario.

¹⁰ Report of the Task Force on Review of the Rules of Professional Conduct, Report to Convocation, April 29, 1999, p. 11.

¹¹ *supra* note 2 at p. 2-9 [Smith]

¹² *ibid* at p. 2-11 [Smith]

¹³ “[T]he C.B.A. Code strongly addresses the duty of professional collegiality. It states that lawyer’s conduct toward other lawyers should be characterized by courtesy and good faith. This is on the basis that “Fair and courteous dealings on the part of each lawyer engaged in a matter will contribute materially” to the end of serving the public interest effectively and expeditiously. Sharp practice between lawyers is eschewed. [Beverly G. Smith, *Professional Conduct for Lawyers and Judges*, 3rd ed., C.B.A Code c. XVI Rule and Commentary 1 and 4, p. 26, Chapter 1: The Lawyer as a Professional, para 43]

(A) RULE 4: Relationship To The Administration Of Justice

4.01 (1) When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

4.01 (6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

4.01 (7) A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another licensee in the course of litigation.¹⁴

(B) RULE 6: Relationship To The Society And Other Lawyers

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

6.03 (1) A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

6.03 (2) A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.

6.03 (3) A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other licensees not going to the merits or involving the sacrifice of a client's rights.

6.03 (4) A lawyer shall not use a tape recorder or other device to record a conversation between the lawyer and a client or another licensee, even if lawful, without first informing the other person of the intention to do so.

6.03 (5) A lawyer shall not in the course of a professional practice send correspondence or otherwise communicate to a client, another licensee, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

6.03 (6) A lawyer shall answer with reasonable promptness all professional letters and communications from other licensees that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

The *Rules of Professional Conduct* cannot address every situation. Upholding the spirit of the *Rules*, not just the letter, is integral to professionalism in the practice of law.¹⁵

¹⁴ *supra* note 9, Rule 6.03 (10) [Rules]

¹⁵ *ibid*, Rule 1.03(1)(f); **see also:** *supra* note 2 [Smith]

Discussion Point:

- Do the *Rules* provide sufficient guidance regarding a lawyer’s duty to opposing counsel?
- Do the *Rules* provide the flexibility necessary to deal with the diverse nature of the issues found by lawyers today?
- Do the *Rules* reflect the case law?
- The *Rules* are designed to elicit behaviour that promotes professional integrity¹⁶ but are they missing the mark?

4. THE DUTY TO OPPOSING COUNSEL: BOTH IN AND OUT OF THE COURTROOM

A true advocate practices his art at all times, both in and out of the Courts. Equally, our duties to opposing counsel exists in both arenas.

Communicating with Other Lawyers

Prior to 2001, the appropriate tone of professional communications was set out in the commentary of Rule 13. A commentary to a *Rule* is explanatory, advisory, and not mandatory. In 2001, the tone of professional communications was elevated to a rule.¹⁷ The words “or otherwise communicate” were added to the *Rule* to ‘broaden the scope of the rule’, indicating that ‘all types of communications...[are] subject to the *Rule*’.¹⁸

In *Law Society of Upper Canada v. Kay*,¹⁹ the disciplinary Hearing Panel stated the following on the subject of communications between lawyers:

The committee does not condemn all strongly-worded or ill-received communications. Truthful statements professionally communicated are not misconduct even if they are hurtful to the subject of the statements. Overwrought opinion, misplaced hyperbole, or a desire to intimidate, sully or defame have no

¹⁶ *ibid*, Rule 1.03(1) [*Rules*]

¹⁷ *ibid*, Rule 6.03 (5) [*Rules*]

¹⁸ Report of the Task Force on Review of the Rules of Professional Conduct, Report to Convocation- April 29, 1999, Law Society of Upper Canada, p. 36

¹⁹ *Law Society of Upper Canada v. James Alexander Kay*, 2006 ONLSHP 0031 [*Kay*]

place in communications from lawyers, whether directed to colleagues or to members of the public. The line between candour and slander is sometimes fine; a lawyer is better advised to err on the side of courtesy. Lawyers have a positive obligation to be courteous to each other and deal in good faith, their communications with each other must maintain the proper tone of a communication from a member of the Law Society, and whatever other stresses face lawyers in daily life or in practice cannot be allowed to interfere with these positive and important obligations.²⁰

An integral component of being courteous is acting civilly. Civility is a foundation of a lawyer's duty to opposing counsel.

Civility is an Element of Professionalism

Civil behaviour is the “duty of a lawyer, not merely an optional course of conduct which is available”.²¹ Failure to adhere to the duty to be courteous, civil and act in good faith brings consequences for both the lawyer and his or her client.²² “A consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.”²³ One need only look to the Law Society of Upper Canada's discipline hearings to see this consequence in action.²⁴

The Law Society of Upper Canada Hearing Panel, adopting the Honourable Chief Justice Roy McMurtry's words, stated:

Civility amongst those entrusted with the administration of justice is central to its effectiveness and the public's confidence in that system.²⁵

[...]

The lack of civility and alleged lack of civility by lawyers to their colleagues in the profession and to others has been the subject of considerable contemporary publicity. Such civility is necessary in the public interest and it is to be imposed and enforced, if necessary, by the profession's governing body. There must be no doubt that the member will be deterred from similar conduct in the future, and

²⁰ *ibid* Kay at 19

²¹ *supra* note 2 at 51 [Smith]. General Guidelines published by The Advocates' Society regarding Civility are stated in *The Principles of Civility for Advocates* which is available at <http://www.advocates.ca/civility/principles.html>

²² *supra* note 9, Rule 4.01(6) [Rules]

²³ *ibid*, Rule 4.01(6) Commentary [Rules]

²⁴ see for example: *Law Society of Upper Canada v. Shale Steven Wagman*, 2006 ONLSHP 74 (CanLII); *Law Society of Upper Canada v. Michael John Clayton Hordo*, 2008 ONLSHP 0110; *Law Society of Upper Canada v. Donald Archibald McNeil of the City of Wasaga*, 2006 ONLSHP 100.

²⁵ *supra* note 19 at 18 [Kay]

there must be no doubt that the Society's responsibility is to deter other lawyers from similar misconduct.²⁶

Incivility can harm more than the uncivil lawyer. The commentary of *Rule 6.03(1)* states that: “[t]he lawyer who behaves [uncivily] does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their function properly”.²⁷ Civility is a significant element of professionalism that ought not be minimized.

Professional Courtesy

In addition to acting courteously, the *Rules* also require lawyers to extend opposing counsel professional courtesies.²⁸ A ‘professional courtesy’ is defined as follows:

...extending to the other side an assistance to which the other side is not in law entitled, as long as the cause of justice is not affected, nor any substantial prejudice occurs to the lawyer’s own client.²⁹

Rules 6.03 (2) and *(3)* speak to this principle of ‘professional courtesy’ by making certain behaviour, and the avoidance of certain other behaviour, mandatory for lawyers. According to *Rule 6.03 (2)*, lawyers are to agree to “reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client”.³⁰ Conversely, to avoid what has been termed the “opposite to extending professional courtesy”³¹, *Rule 6.03 (3)* prohibits sharp practice.

Professional courtesies may properly be considered professional fairness, but may also be used as a tool to persuade others, including the court and clients, that lawyers act with professional integrity. Those lawyers acting with professional integrity will likely be more successful when asking for what they want whether from opposing counsel or the court. Ultimately, the hope is that such behaviour will be rewarded.³²

²⁶ *ibid* at 21 [*Kay*]

²⁷ *supra* note 9, *Rule 6.03(1) Commentary [Rules]*

²⁸ *ibid*, *Rule 6.03 [Rules]*

²⁹ *supra* note 2 at 52 [*Smith*]

³⁰ *supra* note 9, *Rule 6.03(2) Commentary [Rules]*

³¹ *supra* note 2 at 54 [*Smith*]

³² *supra* note 2 at 45 [*Smith*]

Discussion Points:

- **Does professional fairness require, for example, that a lawyer write to opposing counsel before noting their party in default or seeking default judgment?**
- **Do professional courtesies provide advantages that can be used as a strategy in obtaining such things as higher costs on motions, greater chances of overall success in court?**

Trial Tactics

Law suits are not tea parties and lawyers are not potted plants³³, living thing[s] that stand mute.³⁴ Lawyers are advocates and as such are charged with the duty to advocate strongly for clients. As advocates lawyers must “raise fearlessly every issue, advance every argument, and ask every question”.³⁵ Nevertheless, it is also “understood that while the client [is] important, the lawyer [has] obligations to others as well.”³⁶ It is for this reason that so called ‘inordinate use of...trial tactics...that go beyond the vigorous representation of a client’s case and enter into sharp practice are not permitted.’³⁷

A lawyer is “not obliged (*save as required by law or under these rules...*) to assist an adversary or advance matters derogatory to the client's case.”³⁸ The *Rules* dictate that when advocating on behalf of a client, a lawyer remains bound by his duty to the court, the administration of justice and opposing counsel. Those duties cannot be abandoned for the sake of trial tactics; nor should strong advocacy be tempered by pleasantries. It is a lawyer’s duty to advocate passionately while maintaining professional integrity and upholding a multitude of duties. Passionate advocacy need not be at the cost of civility, fairness and reasoned compromise.

³³*Re Ross v. Lamport*, [1956] S.C.R. 366 at p.375-76 [*Re Ross*] **see also:** Washington Attorney Brendan Sullivan, counsel to Lt. Col. Oliver North, at a Senate hearing into the Iran-contra scandal in 1987, objected frequently to questions being put to his client. Chairman Daniel Inouye told counsel to let North object for himself if he wished to do so, the attorney snapped, “what am I, a potted plant? I’m here as a lawyer; that’s my job” as cited in “*Safire’s Political Dictionary*” William Safire at 563

³⁴ *ibid* [*Re Ross*]

³⁵ *supra* note 9, Rule 4.01(1) [*Rules*]

³⁶ *supra* note 4 at 3 [*Furlong*]

³⁷ *supra* note 2 at 54 [*Smith*]. **See also:** *infra* note 68 [*Felderhof,*]; *infra* note 49 [*Murray*]; and *infra* note 73 [*Marchand*].

³⁸ *supra* note 9, Rule 4.01(1) Commentary [*Rules*] [Emphasis added].

Dealing with the Other Side

Engaging in civil and courteous behaviour with the other side can cause some problems. Clients may see such behaviour as a breach of the duty to them or worse a betrayal.³⁹ A lawyer can choose to respond to this delicate situation in a number of ways. A lawyer can explain the Rules which obligate him to act in a certain fashion; he can explain that while he is bound to follow his client's instructions he may not do so if the instructions conflict with his duties to the court. He may also explain that there is a potential cost savings benefit to co-operation and that ultimately, acting professional and courteous with the other side will help his client's case and not hinder it.⁴⁰

A lawyer's duty to opposing counsel works well when both sides of a dispute are 'playing by the same rules'. There will inevitably be situations where some lawyers will be content to act in a sharp, discourteous or unprofessional manner. The solution is not to respond in kind, but rather to protect your client's interests while upholding your duties as a lawyer. Lawyers know that the duty to opposing counsel is not the only duty owed in a courtroom.

Conflicting Duties

Competition amongst a lawyer's professional conduct duties is inevitable. A proposed four step method is:

“[T]o ascertain whether there may be a professional duty or duties owed. The next is to determine to whom or to what the duty or duties may be owed - i.e., to what constituencies. The third is to ask whether there is in fact a conflict between or amongst the duties owed. Assuming there is a conflict, the final and critical step is to conclude - on some basis - which duty must give way to the other.”⁴¹

Balancing the duties placed on a lawyer is not always easy; however, its difficulty should not dissuade lawyers from pursuing a balance based on individual reasoning and outside advice.

³⁹ *supra* note 2 [Smith]

⁴⁰ Michael Code, *Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System* (2007) 11 CanCrimlr 97 [Duty]

⁴¹ *supra* note 2 at 49 [Smith]

Discussion Points:

- **Is there a hierarchy of duties?**
- **What is the hierarchy? Duty to Court, Client, and Opposing Counsel?**
- **Can conflicts in duties always be resolved based on the hierarchy?**
- **How can we, or should we, resolve some of these conflicts?**
- **Can flexibility provide a solution to some of the common conflicts that a lawyer faces under the *Rules*?**

5. THE DUTY TO OPPOSING COUNSEL: CLIENT INSTRUCTIONS

*Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client*⁴²
....

The oft quoted dicta found in the speeches of the Law Lords in *Rondel v Worsley* has become the locus classicus of the duties of counsel to its client and the court. “To a certain extent every advocate is an amicus curiae”⁴³ and, therefore, “as was said in *Swinfen v Lord Chelmsford*; the duty undertaken by an advocate is one in which the client, the court and the public have an interest because the due and proper and orderly administration of justice is a matter of vital public concern.”⁴⁴ As a result there is the need for balance between counsel’s duties to his client and to the court.⁴⁵ The lawyer is not and should not be just a mouth-piece for his client. He has a duty to his profession and to his ethical responsibilities and part of that duty includes an

⁴² *Rondel v. Worsley* [1969] 1 A.C. 191 [*Rondel*]

⁴³ *Swinfen v. Lord Chelmsford*, [1967] 3 All E.R. 993 (H.L.)

⁴⁴ *supra* note 40 [Duty]

⁴⁵ *supra* note 42 [*Rondel*]

obligation to refrain from acting on instructions from his client which are in conflict with his duty to the court.

Counsel may not mislead the court or withhold documents and authorities which detract from his case; he may not cause unnecessary delay in order to gain advantage. Counsel is also under a duty to assist with the speedy administration of justice. Even though a client may desire his counsel to act in a particular manner, if counsel believes acting in such a way will do nothing to advance his client's case his duty is first and foremost to the court and he must listen to his conscience when making choices in the course of legal practice.⁴⁶

In a recent study published in the *Canadian Journal of Law and Jurisprudence* the authors used an analysis of lawyers engaged in problem solving as a lens to focus on professional ethics.⁴⁷ Interestingly, in only two cases (11%) involving private practitioners in Toronto did lawyers withdraw from the case when faced with the choice of acting against their own personal views and acting solely in accordance with their clients views. This is as compared to five cases (29%) involving private practitioners in smaller Ontario centres. The lawyers who were in conflict with their clients' views but remained on the case were compelled then to take on the role of the hired gun and take the instructions of their clients even though they disagreed with them. This occurred in 18 cases: five times for corporate counsel (38%), six times for private counsel in Toronto (32%) and seven times for private practitioners outside (41%).⁴⁸ Although undocumented, it is arguable that at least some of the conflict arose as a result of a conflict between the lawyer's duty to adhere to client instructions and the lawyer's overarching duty to the court.

Clearly, there are competing duties which a lawyer must consider when balancing client instructions and duties to the court and opposing counsel. Ultimately many such decisions will turn on the lawyer's own moral and ethical compass. However, it is important to consider that when a lawyer appears before judges on a regular basis, she will want the judge to trust what she is saying and have confidence in her. If she has done something questionable, has a reputation

⁴⁶ Michael C. Plaxton; *R. v. Lavallee, Rackel & Heintz: Jiminy Cricket Has Left the Building* (2002) 3 C.R. (6th) 253 [Jiminy Cricket]

⁴⁷ Margaret Ann Wilkinson, Christa Walker, Peter Mercer; *Testing Theory and Debunking Stereotypes: Lawyers' Views on the Practice of Law* (2005) 18 CANJLJUR 165 [Views]

⁴⁸ *Ibid* Views

for being on the edge of the rules, becomes known as the lawyer who uses borderline ethics in order to win, it will affect her ability to appear before the judge on behalf of other clients and get a fair adjudication. Accordingly, an important component of earning the title “professional” requires a lawyer to be cognizant of and act in manner consistent with all of the duties of the profession. The failure to do so has sometimes led to tragic consequences.

There are few associated with the administration of justice who are unable to recall the horrific tragedy of the Kristen French/Leslie Mahaffey murders. The impact of these crimes reverberated throughout the world. At the end of this sad and tragic period, we were left with a justice system in disrepute, a cold-hearted accomplice free after serving a mere 12 years in jail based on a plea bargain that many suggest should never have been negotiated, two families shattered and collateral damage so extensive it is hard to quantify. Many would argue that much of this damage was the result of the failure of Paul Bernardo’s first lawyer, Ken Murray, to turn over video-taped evidence of the crime which depicted Bernardo’s wife, Karla Homolka as a willing participant in the heinous acts rather than the “battered wife” she claimed to be. Later, when charged with obstruction of justice, Gravelly J. of the Ontario Superior Court of Justice said this about a lawyer’s obligation to opposing counsel in relation to evidence which a client instructs his counsel to suppress:⁴⁹

While Murray's conduct had a tendency to obstruct the course of justice in relation to the police and the Crown, it also influenced the way new defence counsel, Rosen, approached the conduct of Bernardo's defence. It had the further potential for a jury to be deprived of admissible evidence...Concealment of the tapes had the potential to infect all aspects of the criminal justice system...There is no obligation on a citizen to help the police, but taking positive steps to conceal evidence is unlawful...Murray's discussions with his client about the tapes are covered by the privilege; the physical objects, the tapes, are not. Hiding them from the police on behalf of the client cannot be said to be an aspect of solicitor-client communication...Although Murray had a duty of confidentiality to Bernardo, absent solicitor-client privilege there was no legal basis permitting concealment of the tapes. In this sense Murray had no higher right than any other citizen. Nor, in my opinion, can it be said that concealing the critical tapes was permissible because they may have had some exculpatory value. They were overwhelmingly inculpatory.⁵⁰

⁴⁹ *R v Murray*, 2000 CarswellOnt 1953, 48 O.R. (3d) 544, 186 D.L.R. (4th) [*Murray*] **see also**: Lucinda Vandervort, “*Mistake of Law and Obstruction of Justice: A “Bad Excuse” ... Even for a Lawyer!*” (2001) 50 U.N.B. L.J. 171

⁵⁰ *ibid Murray* at 107-117

At the end of the day, lawyers are not simply agents for their clients. There are times when a lawyer must act in a manner which may ultimately hurt his client. *R. v Murray* is, if nothing else, an excellent example of the conflict a lawyer may face in his duty to his client and his duty to the administration of justice.

Discussion Points

- **Recognizing that opposing counsel is an officer of the court, does the duty to the Court impute a parallel duty to opposing counsel?**
- **Does this undermine the concept of a hierarchy of duties?**
- **How far is too far?**

6. THE DUTY TO OPPOSING COUNSEL: THE UNREPRESENTED LITIGANT

In, “Ethical Issues Relating to Lawyers and Unrepresented Litigants in the Civil Justice System” prepared by Thomas G. Heintzman of McCarthy Tetrault as talking points for a recent conference, Heintzman discussed in depth the conflicting duties a lawyer faces when his adversary is unrepresented. Although he concludes that a lawyer owes no duty to an unrepresented litigant he appears to have supported the following proposed amendments⁵¹ to the CBA Code.

- a) A trial lawyer must not attempt to derive benefit for his or her client at trial with an unrepresented litigant due to the fact that the litigant is unrepresented, and should avoid imposing unnecessary disadvantage, hardship, or confusion to the unrepresented litigant.
- b) A trial lawyer is entitled to raise proper and legitimate technical and procedural objections but should not take advantage of the technical deficiencies in the pleadings, procedural steps, or presentation of the case against an unrepresented party which do not go to the merits of the case or the legitimate rights and interests of the client.⁵²

As well, there is ample authority to suggest that a lawyer has an additional duty to an unrepresented litigant. This special duty was recognized as far back as 1920 when the Orde J. in

⁵¹ Not in force at date of writing

⁵² Thomas G. Heintzman, “*Ethical Issues Relating to Lawyers and Unrepresented Litigants in the Civil Justice System*”[Ethical Issues]

*Chait & Leon v. Harding*⁵³ stated: “In every case where there is the least doubt...as to whether the other party is capable of protecting himself, it is the duty of [the] solicitor...to see, if possible, that the other party is adequately represented; and, in the absence of such independent representation, it is the duty of the Court to scrutinize...to see whether...there has been any overreaching or unconscionable dealing.” Further, in *Finney v. Tripp*⁵⁴ the court held that “[i]t was [the solicitor’s] duty to see that the infirm person was adequately protected or had independent advice. If [he] regarded himself as the adviser of the aged plaintiff, he should have insisted that proper arrangements protecting [him] were entered into...”

Moreover, the *Canadian Bar Association’s* Code of Conduct specifically deals with the duty as does the Commentary to Rule 2.04(14) of the *Rules of Professional Conduct*.

Section 8 of Chapter XIX of the code states:

The lawyer should not undertake to advise an unrepresented person but should urge such a person to obtain independent legal advice and, if the unrepresented person does not do so, the lawyer must take care to see that such person is not proceeding under the impression that the lawyer is protecting such person’s interests. If the unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in the *Rule* relating to impartiality and conflict of interest between clients. The lawyer may have an obligation to a person whom the lawyer does not represent, whether or not such person is represented by a lawyer.⁵⁵

Similarly the commentary to *Rule 2.01(14)* states; “If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this rule about joint retainers.”⁵⁶

In addition, some commentators including The Honourable Justice Jennifer Blishen have suggested that lawyers should consider, *inter alia*, the following guidelines⁵⁷ when faced with opposing an unrepresented party.

⁵³ (1920-21)19 O.W.N. 20 at 21 (Ont. H.C.) [*Chait*]

⁵⁴ (1922), 22 O.W.N. 429 at 430 (Ont. H.C.) [*Tripp*]

⁵⁵ Canadian Bar Association Code of Conduct <http://www.cba.org/cba/epigram/february2002/CodeEng.pdf> [CBA]

⁵⁶ *supra* note 9 Rule 2.01(4) [*Rules*]

⁵⁷ The Honourable Madam Justice Jennifer Blishen, *Self-Represented Litigants in Family and Civil Law Disputes* (2004) 25 C.F.L.Q. 117 [Self-Represented]

- **Be careful when negotiating.** Be careful not to pressure the self-represented party and avoid giving an opinion as to validity of a position. Furthermore, strongly recommend that the unrepresented party obtain independent advice, particularly before signing a negotiated agreement.
- **Consider doing some extra work.** When serving documents on an unrepresented party consider writing a cover letter explaining in simple terms what is being served, what must be done and any applicable deadlines. Provide the unrepresented party with copies of case law or statutes which will be referred to during the hearing.
- **Be Prepared.** Many unrepresented parties will use their best Law & Order or Perry Mason skills. Ask if there are any new materials or witnesses which the party plans to rely on.
- **Remember your Role.** You may request that the Rules be followed if you think that the Judge is being too lenient in his or her desire to ensure a fair trial.

Even though some courts have adopted what has been referred to as a “Dr. Jekyll and Mr. Hyde approach to unrepresented litigants”⁵⁸ as professionals we must give consideration to our *Rules*, our Code, and our case law which suggest that a lawyer does indeed have an additional duty to an unrepresented litigant.

Discussion Points:

Does an unrepresented litigant actually stand in the shoes of opposing counsel?

- **How much deference to an unrepresented litigant is too much?**
- **Can too much deference/assistance by counsel and the court impugn the impartiality of the judiciary?**
- **Are there other guidelines which can assist a lawyer and the judiciary when facing unrepresented litigants?**

7. THE DUTY TO OPPOSING COUNSEL: COSTS AND OTHER CONSEQUENCES

Both negative and positive consequences flow from observing and breaching the duties to opposing counsel. These consequences include: favourable or unfavourable costs orders and the

⁵⁸ D.A. Rollie Thompson, *No Lawyer: Institutional Coping with the Self-represented* (2001) 19 C.F.L.Q. 455 [No Lawyer]

loss of or enhancement of one's reputation. A sampling of consequences that result from a lawyer's behaviour with and towards opposing counsel are detailed below.

The Consequences of Breaking the Rules

Costs

Modern costs rules are designed to foster three fundamental purposes; first, to indemnify successful litigants for the cost of litigation; second, to encourage settlement; third, to discourage and sanction inappropriate behaviour by litigants.⁵⁹ The costs provisions of the *Rules*⁶⁰ have been held to apply equally to the self represented and the represented litigant.⁶¹

Increasingly, courts are awarding cost consequences to unrepresented litigant which essentially impose similar penalties as the cost penalties available under Rule 57.07 of the *Rules of Civil Procedure*.⁶²

Rule 57.07 (1) states:

Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

- (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
- (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
- (c) requiring the lawyer personally to pay the costs of any party.

⁵⁹ *Fong v Chang*, 2001 CanLII 7484 (ON C.A.) [*Fong*]

⁶⁰ *Rules of Civil Procedure*. O. Reg. 575/07, s. 6 (1) [*Civ. Pro.*]

⁶¹ **see for example:** *supra* note 59 *Fong* ; *infra* note 65 *Angel* and; *Voakes v. Trumley*, 1996 CarswellOnt 3441 in addition, in the 1986 Nova Scotia appeal decision in *McBeth v. Dalhousie College & University* 72 N.S.R. (2d) 224, 26 D.L.R. (4th) 321, 10 C.P.C. (2d) 69, 1986 CarswellNS 82 (N.S. C.A.). the successful law student appellant was granted her party-and-party costs, on the basis of a section 15 Charter argument. Subsequently, in 1995 in *Skidmore v. Blackmore*, 122 D.L.R. (4th) 330, 1995 CarswellBC 23 (B.C. C.A.). a five-judge panel of the British Columbia Court of Appeal reversed an earlier precedent and allowed for costs to the self-represented litigant. One of the reasons flowed from the "unenviable position" of the self-represented: "being unable to take advantage of the cost provisions of the Rules of Court while, at the same time, being liable to pay costs to his or her solicitor-represented opponent if the opponent is entitled to costs" at 38

⁶² *supra* note 60, s.57.07 [*Civ. Pro.*]

The test on awarding costs against a solicitor personally was stated by the Supreme Court of Canada decision in *Young v Young*.⁶³ by Justice McLachlin:

The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court.

Subsequent case law has indicated that the courts are loath to award costs against a solicitor personally.⁶⁴ Yet despite the court's hesitance in this regard it does seem that there is an increasing willingness to impose costs on unrepresented parties who unnecessarily frustrate the process. For example, costs have been awarded against a self-represented wife where she turned a five day trial into an eleven day ordeal through unnecessary cross-examination which was ultimately stopped by the court.⁶⁵ Recently in Alberta, on taxation, a judge ordered that two-thirds of the tariff amount was appropriate taxation for unrepresented parties.⁶⁶ Additionally, in another Alberta decision, solicitor-client costs were issued in favour of an unrepresented wife against her self-represented lawyer husband, which were somewhat reduced as a result of the wife's role in unnecessarily lengthening the proceedings.⁶⁷

Reputation Costs

There are old adages which state: "a positive reputation is hard earned, but easily lost" and "you are only as good as your reputation" Even though the Law Society and the courts rarely use their power to discipline bad behaviour, that is not to say that it goes unnoticed.

⁶³ [1993] 4 S.C.R. 3 [*Young*]

⁶⁴ See for example: *Triple 3 Holdings Inc. v. Jan*, 2006 CanLII 30457 (ON C.A.); *Arnold B. Schwisberg Barrister & Solicitor v. Perry Krieger & Associates*, 1997 CanLII 522 (ON C.A.); *Walker v. York Finch General Hospital*, 1999 CanLII 2158 (ON C.A.)

⁶⁵ *Angel v. Angel*, [1997] O.J. No. 3976, 1997 CarswellOnt 3796 (Ont. Gen. Div.) [*Angel*]

⁶⁶ *Shillingford v. Dalbridge Group Inc.*, [2000] A.J. No. 63, 2000 ABQB 28, 2000 CarswellAlta 48 (Alta. Q.B.)

⁶⁷ *C. (A.R.) v. C. (L.L.)*, [1999] A.J. No. 1075, 1999 CarswellAlta 868 (Alta. Q.B.).

In *Felderhof*⁶⁸ the Ontario Court of Appeal, in obiter agreed with the trial judge who had described defence counsel's conduct in some of the following ways: "unrestrained invective"... "excessive rhetoric"... "The tone . . . descended from legal argument to irony to sarcasm to petulant invective"⁶⁹... "[his]theatrical excess reached new heights on day 58"⁷⁰ "[his] conduct on this occasion more resembles guerilla [sic] theatre than advocacy in court"⁷¹ ... "unrestrained repetition of . . . sarcastic attacks"⁷²

Similarly, in *Marchand*,⁷³ the Ontario Court of Appeal described the complete breakdown of trust between counsel as being "... replaced by a level of rancour and hostility rarely, if ever, seen in an Ontario courtroom."

While it is true that our judiciary has a remarkable ability to conduct and judge cases fairly and thoroughly despite observing relentless acrimony between counsel should we not ask ourselves, before engaging in such behaviour, whether we are prepared to accept the reputational consequences of becoming known as the poster child for bad behaviour?

The Consequences of Observing the Rules

Taking the duties outlined above one step further, it is not only a lawyers duty to act courteously and civilly toward opposing counsel, it is good judgment to do so. Margret Ross states that "the exercise of judgment is required in order to ensure that we, as lawyers, remain the masters and not the slaves of process".⁷⁴ Consider the efficiency and effectiveness of resolving peripheral issues prior to trial for the judge, opposing counsel and lawyer themselves. These results can only come from collaborative and courteous interactions with opposing counsel. It is an approach that serves the interests of clients, the administration of justice and the profession alike.

⁶⁸ *R v Felderhof*, 2003 CarswellOnt 4943, 235 D.L.R. (4th) 131, 68 O.R. (3d) 481 (ON C.A.) [*Felderhof*]

⁶⁹ *ibid* *Felderhof* at 78

⁷⁰ *ibid* *Felderhof*

⁷¹ *ibid* *Felderhof*

⁷² *ibid* *Felderhof*

⁷³ *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*, 2000 CarswellOnt 4362, 51 O.R. (3d) 97, 138 O.A.C. 201 (Ont. C.A.)

⁷⁴ *supra* note 3 [*Ross*]

Discussion Points:

- **Is the reputational threat sufficient to deter bad behaviour by counsel?**
- **Should the *Rules* be flexible in regards to what is acceptable behaviour or should there be clear delineations?**
- **Does the flexibility of the *Rules* invite abuse?**
- **In our self-regulated profession should the Law Society and the Courts wield their power more forcefully?**

8. THE DUTY TO OPPOSING COUNSEL: THE BROADER PICTURE

Self-regulation is the cornerstone of legal independence and a highly valued procedure. A part of self-regulation is the regulation of the ethical norms of the legal profession. Regulation of ethical norms is common in countries all over the world. Many of the regulating legal bodies have codes of conduct akin to the *Rules of Professional Conduct*. The message, from reviewing codes from England and the United States, is that professionalism is a benchmark of the legal profession. A part of professionalism in those jurisdictions encompasses a duty to opposing counsel.

The Duty to Opposing Counsel in England

In England, the “Law Society and the Bar Council exercise delegated authority to regulate solicitors and barristers respectively. The Law Society has an elaborate code, the Bar Council a most succinct one.”⁷⁵ Rule 1 of the Law Society’s *Solicitor’s Code of Conduct*⁷⁶ sets out the ‘core duties’ of lawyers as follows: Rule 1.01 Justice and the rule of law; Rule 1.02 Integrity; Rule 1.03 Independence; Rule 1.04 Best interests of clients; Rule 1.05 Standard of service; and Rule 1.06 Public confidence. The duty to opposing counsel is nowhere to be found on that list. Looking to Rule 10 of the *Code*, ‘Relations with Third Parties’, it directs that: lawyers should not take unfair advantage of anyone for their own, or another’s, benefit; a lawyer must give sufficient time and information about the amount of costs when negotiating payment by another person; and a lawyer must fulfil undertakings promptly. While there may be no similar rule in

⁷⁵ Geoffrey C. Hazard, Anegelo Dondi, *Legal Ethics a Comparative Study*, Stanford University Press p.153.

⁷⁶*Solicitor Code of Conduct*, <http://www.sra.org.uk/solicitors/code-of-conduct.page> [*Code*]

England to Rule 6 of the Law Society of Upper Canada's *Rules of Professional Conduct*, a duty to opposing counsel a foundation of the profession in England.

The Duty to Opposing Counsel in the United States

Charles Wolfram, writing on the subject of legalization of American legal ethics, states:

[T]he profession of a lawyer is a means to an end, and that end the administration of justice. His first duty is indebted to his own client, but that is not the only one; there is also a duty to the court, that it shall be assisted by the advocate, a duty to the adversary, not to push an advance beyond the bounds of equity; a duty to truth and right, whose allegiance no human being can renounce; and a duty to the state, that it shall not be corrupted by the example of unscrupulous insincerity.⁷⁷

In the United States the duty to opposing counsel is a part of administering justice and as such is an integral component of many of the model professional codes. As an example, the Colorado Bar Association's *Model Professional Code*⁷⁸ encourages lawyers to fulfil a number of principles of professionalism to maintain a judicial system that is fair, effective and efficient. A number of duties to opposing counsel can be found within the *Code* including the duty to:

- act with candour, diligence, respect, courtesy, cooperation and competence;
- avoid offensive conduct even at the request of a client;
- never use the dispute resolution process as a means of harassment, to opposing counsel or opposing counsel's client, or to impede the timely, efficient and cost effective resolution of a dispute;
- have punctual communications;
- grant indulgences to opposing counsel;
- engage in collaborative scheduling;
- and, above all else, act with civility, professional integrity and personal dignity.

⁷⁷ Charles Wolfram, "Toward a History of the Legalization of American Legal Ethics--II The Modern Era" (2002) 15 Geo. J. Legal Ethics 2 at 205

⁷⁸ Colorado Bar Association Professionalism Committee
<http://www.cobar.org/index.cfm/ID/20094/subID/24566/CCRL//> [Code]

Similarly, the Preamble to the New Orleans Bar Association *Civility Code*⁷⁹ instructs lawyers:

A lawyer owes to opposing counsel a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

Moreover, in 1988 the Board of Directors of the Memphis Bar Association, acting on the theme of "Professionalism" appointed a Committee on Professionalism. Their assigned task – to compose a statement of the conduct expected of a true professional by one’s fellow lawyers. The Guidelines were adopted by the United States District Court for the Western District of Tennessee and are in place today. The guidelines encompass courtesy, civility, and professionalism; professional conduct in litigation and; professional conduct in business and commercial practice.⁸⁰

From this brief sampling of the codes of conduct in England and the United States, one can readily discern that the proper conduct of counsel toward both friend and foe, is an essential ingredient of professionalism both in Canada and abroad.

9. THE DUTY TO OPPOSING COUNSEL: CONCLUSION

“[A] law-suit is not a tea party”.⁸¹ However, it is not an opportunity to sling mud either. Law suits are, or ought to be, an opportunity to recover a right or remedy a grievance. Nonetheless, the temptation to criticize opposing counsel, to clients or the court, can be quite strong.

That is not to say that criticism has no place in litigation. Quite the contrary, voicing one’s disapproval is a natural companion of litigation. Some believe that criticism by lawyers of other lawyers, regardless of its form, is the cornerstone of professional regulation.⁸² It is the means by which lawyers keep one another ‘in check’. The *Rules* therefore, should not be thought to limit valid discussion about opposing counsel with others including clients and the court. Reasoned

⁷⁹ New Orleans Bar Association http://www.neworleansbar.org/civility_code_NOBAR.html

⁸⁰ <http://www.tnwd.uscourts.gov/pdf/content/AttyConduct.pdf>

⁸¹ *supra* note 33 [*Re Ross*]

⁸² *supra* note 19 at 180 [*Kay*]

criticism based on evidence of a lawyer's incompetence or unprofessional acts should be made.⁸³ Conversely "ill-considered" or "uninformed" comments about opposing counsel should not.⁸⁴

Perhaps the instruction to be taken from the *Rules* regarding a lawyer's duty to opposing counsel is that lawyers should reflect upon their acts before making them. A part of that reflection may be to question what can be gained, and lost, by taking a particular course of action. The practice of law is about personal integrity as well as professional integrity.⁸⁵ Cooperation, compromise, civility and candour are a part of that personal and professional integrity and are supported by a lawyer's duty to opposing counsel. These duties and the principles they uphold are vital to professionalism in the practice of law.

Concluding Discussion Points:

- **Is it necessary or advisable to draw a line in the sand regarding when our duties begin and end?**
- **What do we do when one lawyer refuses to play by the Rules?**
- **How do we manage client expectations of "television style" tactics with our duties to opposing counsel?**

⁸³ *supra* note 9, Rule 2.01;6.01(3), (4)-(7) [*Rules*]

⁸⁴ *supra* note 2 at 57 [*Smith*]

⁸⁵ Alice Woolley, "Integrity in Zealousness: Comparing the Standard Conceptions of the Canadian and American Lawyer" (1996) 9 Can. J.L. & Juris. 61 at 50. "La Forest emphasizes that the requirement that the lawyer maintain personal integrity is unqualified by any role or contextual factors arising from the lawyer's professional obligations."