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Civil Litigation

Uncivil communications with opposing counsel: Crossing the line

By **Barb Cotton and Christine Silverberg**

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(July 29, 2020, 2:24 PM EDT) -- The recent resignation of an Alberta lawyer, with an undertaking not to apply to the Law Society of Alberta for reinstatement, following citations that he "failed to be courteous and civil to another lawyer," among other things, gave us pause — when does a lawyer cross the line into uncivil communications with opposing counsel that could give rise to law society discipline? With the benefit of only the Disposition Summary at the time of writing, but without the full *Alberta Law Society Report*, we were motivated to look into this further.

The scope of civility in the context of zealous representation in a trial has been examined by the Supreme Court of Canada in *Groia v. Law Society of Upper Canada* 2018 SCC 27, as has the potential sanction of enhanced costs for incivility in court filings. The courts seem clear that unprofessional out of court communications will not be policed by the courts but rather by the law societies. What level of communications between counsel in an out of the court context is so egregious that it is sanctionable by a finding of professional misconduct?

Upon a review of the codes of conduct for lawyers across Canada, focusing on the *Alberta Code of Conduct*, the *Principles of Civility and Professionalism for Advocates* published by The Advocates' Society in Ontario dated Feb. 20, 2020, and selected jurisprudence of the courts and the various law society disciplinary tribunals across Canada, the bottom line seems to be that a lawyer will cross the line into incivility with opposing counsel if the communication is:

- demeaning or belittling;
- threatening or bullying;
- sarcastic or snide;
- rude, abrasive, hostile or obstructive;
- condescending or patronizing; or
- an insult or personal attack on opposing counsel.

Especially, it should be noted, if these types of communications take place over an extended period of time.

Perhaps this is best encapsulated by the Supreme Court of Canada in *Doré v. Barreau du Québec* 2012 SCC 12, which states that a lawyer must show "dignified restraint" in communications with opposing counsel.

We have come to these conclusions on the basis of the following:

Codes of conduct

Law societies across Canada participated with the Federation of Law Societies of Canada in the

development of a *Model Code of Conduct* from 2004 to 2010, and as a result most of the codes prescribe similar requirements in lawyer conduct. Regarding communication with opposing counsel, the *Alberta Code of Conduct*, for example, prescribes:

- A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity (c. 2.1).
- A lawyer must 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 (c. 7.2-1).
- Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other (commentary c. 7.2-1).
- A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers (commentary c. 7.2-1).
- A lawyer must not lie to or mislead another lawyer (c. 7.2-2).
- A lawyer must not send correspondence or otherwise communicate with another lawyer in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer (c. 7.2-6).

In 2000, The Advocates Society held a symposium on civility, which led to the development of the original principles, which have been updated over the years. The Advocates' Society characterizes the codes of conduct stipulated by the law societies as minimum standards and seeks to offer a more aspirational vision of the profession. In terms of communication between counsel, the principles over and above those set out in the codes include:

- Advocates should require those under their supervision to conduct themselves with courtesy and civility (principle 30).
- Advocates should always be honest and truthful with opposing counsel (principle 33).
- Advocates should demonstrate the same courtesy and civility shown to opposing counsel towards paralegals, articling students, self-represented litigants, or others (principle 34).
- Advocates should avoid sending intemperate correspondence, including e-mails (principle 39).
- Advocates should avoid acrimony or disparaging personal remarks when interacting with opposing counsel (principle 40).
- Advocates should not make ill-considered, gratuitous, derogatory, or uninformed comments about opposing counsel to others, including clients and the court; reasoned criticism based on evidence of lack of competence, unacceptable or discriminatory conduct, or unprofessional acts may be made in the appropriate forum (principle 42).
- Advocates should not attribute bad motives or improper conduct to opposing counsel, except when well-founded and relevant to the issues of the case (principle 44).
- The pursuit of zealous advocacy on behalf of a client never includes the use of personal threats, attacks, or personal and irrelevant accusations against fellow counsel (best practices at page 9).

This is the first of a two-part series. The second part will look at case studies where communications to opposing counsel have been found to be uncivil and disciplinary sanctions levied.

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