Law Society of Ontario | Barreau de l'Ontario

TAB 20

The Six-Minute Criminal Court Judge 2020

Professionalism In and Out of Court

The Honourable Philip Downes
Ontario Court of Justice

January 25, 2020

cpd

PROFESSIONALISM IN AND OUT OF COURT

Justice Philip Downes, Ontario Court of Justice

Prepared for the Six-Minute Criminal Court Judge

Toronto, January 25, 2020

A: INTRODUCTION

What follows are some examples of how the conduct of counsel is governed by both professional rules and common law authority. It is by no means a comprehensive account of what constitutes or what violates principles of professionalism. Rather, I have described some of the key governing principles and authorities which define professionalism for the legal profession in general, as well as for criminal counsel in particular.

In addition, I have provided examples of areas which, in my view, are the most common source of struggle for counsel appearing in the Ontario Court of Justice.

B: "PROFESSIONALISM"

Black's Law Dictionary:

"Professionalism": Quality of work, devotion and work ethics, comparable to a professional

"Professional": A person, who is a member of a professional body due to the education qualification and follows the prescribed moral and professional code of conduct.

> [P]rofessionalism signifies a cluster of values that are palpable, that you can see, hear, or feel. Scholarship, honour, personal integrity, leadership and independence, pride in our justice system, and generous pro bono public service, are just a few of the ways in which or by which it is exemplified.
>
> Professionalism is the life force that pulses within and drives through every ethical lawyer. It is the rock, the foundation, upon which the public maintains confidence in the justice system. It is the guiding light to lawyers in meeting their obligations to the public they serve, in defending the rule of law, and in upholding their duties and responsibilities to clients and to the court. Stated differently, being a lawyer, being a professional, means committing oneself to the fair administration of justice and to doing one's part in facilitating true access to justice.

"On Becoming a Professional: What It Means to Be a Lawyer." Remarks of Chief Justice Warren K. Winkler on the Occasion of the Law Society of Upper Canada's Call to the Bar Ceremony. Toronto, Ontario, June 15, 2010

> Law is a classic example of a profession. The term embraces a set of attitudes, skills, behaviours, attributes and values which are expected from those to whom society has extended the privilege of being considered a Professional. The underlying assumption that necessitates professionalism in law is the understanding that practicing law (in the broadest sense of the term) is an endeavour central to the operation of a just society. In the service of that noble and challenging endeavour, a lawyer is required to bring to bear a rigorous application of scholarly and ethical standards in combination with skills training and the ability to advocate for individuals in need of representation.

Tracy L. Wynne and Daniel A. Schwartz, "A Lawyer's Duty to the Profession" Advocates Society Symposium on Professionalism: https://www.advocates.ca/Upload/Files/PDF/Advocacy/InstituteforCivilityandProfessionalism/Duty_to_Profession.pdf

B: PROFESSIONALISM IN COURT

1. Legal knowledge/competence

Rule 3.1-2[1] A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary (excerpt):

Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

Commonly Misunderstood Areas of Advocacy

- Asking a witness to comment on the veracity or credibility of another witness
- Use of prior statements
- Admissibility of documents (particularly electronic documents)
- Seeking to justify inadmissible hearsay evidence as "narrative"

[1] Any reference to a Rule in this document is to the Law Society of Ontario *Rules of Professional Conduct*: https://www.lso.ca/about-lso/legislation-rules/rules-of-professional-conduct.

- Improper cross-examination of an accused/jury address by Crown counsel.

2. Conduct generally

5.1-3 When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

This includes treating witnesses, including eth accused, with respect in the course of cross-examination. Cross-examination which is sarcastic, demeaning, disrespectful, bullying or demeaning is not appropriate: *R. v. M.K.,* [2019] O.J. No. 2220 SCJ

Rule 5.1-5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.

Commentary (excerpt):

A consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, may constitute professional misconduct.

Rule 7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

Commentary (excerpt):

The presence of personal animosity between legal practitioners involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

> There are some lawyers who fall into uncivil behaviour naturally because it's a part of their personality to be unduly aggressive. And there are others who fall into it for fear of not being seen to be tough enough in order to win clients. Unfortunately, they are unable to draw the distinction between being tough-minded and aggressive.

Clifford Lax, quoted in "Civility: A Cornerstone of Professionalism", Ontario Lawyers Gazette, Winter 2008, at p. 6

> Incivility can prejudice a client's cause. Overly aggressive, sarcastic, or demeaning courtroom language may lead triers of fact, be they judge or jury, to view the lawyer - and therefore the client's case - unfavourably. Uncivil communications with opposing counsel can cause a breakdown in the relationship, eliminating any prospect of settlement and increasing the client's legal costs by forcing unnecessary

> court proceedings to adjudicate disputes that could have been resolved with a simple phone call.
>
> Uncivil behaviour also distracts the triers of fact by diverting their attention away from the substantive merits of the case. The trial judge risks becoming preoccupied with policing counsel's conduct instead of focusing on the evidence and legal issues

Groia v. Law Society of Upper Canada, [2018] 1 S.C.R. 772 at para. 64-65

> Civility and resolute advocacy are not incompatible….To the contrary, ***civility is often the most effective form of advocacy***.

Groia v. Law Society of Upper Canada, [2018] 1 S.C.R. 772 at para. 76 [emphasis added]

> Just as civility in the courtroom is very much the responsibility of counsel, it is also very much the responsibility of the trial judge. It is a shared responsibility of profound importance to the administration of justice and its standing in the eyes of the public it serves.

Marchand v. The Public General Hospital Society of Chatham, [2000] O.J. No. 4428 (CA) at para. 148.

Unacceptable conduct towards opposing counsel and the Court includes:

- Sarcasm
- Belittling of counsel and witnesses
- Ad hominem comments
- Accusations without proper foundation
- “Rhetorical excess”

> Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. Morden J.A. of this court expressed the matter this way in a 2001 address to the Call to the Bar: "Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers do their work." Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients…. Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication.

R. v. Felderhof, [2003] O.J. No. 4819 (CA) at para. 84

3. Client representation

Rule 3.2-1 A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

Rule 5.1-1 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

Common Areas of Concern

- Introduce your client to the judge.
- Humanize your client. Make your client part of the process.
- Understand the scope of your role to take positions on issues: when must you "take instructions"?
- Understand the need for a comprehensive plea inquiry *on the record*.
- Be the best source of accurate information about your client on sentencing.

The Plea Inquiry

Rule 5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

(a) the lawyer advises the client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

R. v. Beckford, [2019] O.J. No. 6430 (CA) at paras. 65; 72-74 [all emphasis added]

> 40 In order for a plea to be informed, it must be "entered by an accused who is aware of the nature of the allegations made against him or her, the effect of his or her plea, and the consequences of that plea". See *R. v. R.P.*, 2013 ONCA 53, 302

OAC 78, at para. 40, leave to appeal refused, [2013] S.C.C.A. No. 133, citing *T.(R.)*, at p. 519; *R. v. Lyons*, [1987] 2 S.C.R. 309, at pp. 371-372.

41 The validity of a plea of guilty is normally determined by a plea inquiry conducted by a trial judge. As Watt J.A. explained in *R. v. D.M.G.*, 2011 ONCA 343, 105 OR (3d) 481, at para. 42:

> For the plea to be informed, the accused must understand that the plea is an admission of the essential elements of the offence and that the presiding judge is not bound by any agreement made by the accused and the prosecutor. The accused must also understand the nature and consequences of a guilty plea. Under s. 606(1.2) the failure of the trial judge to fully inquire about the voluntary and informed nature of the accused's plea does not affect the validity of that plea. But an inquiry is mandatory nonetheless.

42 As the above extract from the transcript demonstrates, ***the trial judge decided that it was not necessary to conduct a plea inquiry because he trusted that trial counsel had properly advised the appellant.***

43 ***This appeal might well have been avoided if the trial judge had conducted a plea inquiry rather than relying on counsel to have done so.*** In the absence of a plea inquiry, this court must determine the validity of the appellant's plea based on the record, including the fresh evidence.

…

65 Plainly, trial counsel formed the view that the case against the appellant was so strong -- and the deal offered was so advantageous -- that the appellant should plead guilty. Nevertheless, ***it was trial counsel's duty to assess the strength of the evidence against the appellant before advising him***, and his own evidence establishes that he did not adequately do so. That evidence suggests that trial counsel's knowledge of the appellant's guilt -- and disapproval of the appellant's actions -- led to his failure to take appropriate actions on the appellant's behalf….

…

72 In summary, trial counsel's evidence establishes that he never met with the appellant at his office; did not obtain written instructions; did not review the DNA disclosure package; did not adequately assess the strength of the Crown's case; did not consider possible *Charter* infringements; and made no submissions as to the appropriate sentence.

73 The recurring theme in trial counsel's evidence is an insistence that his knowledge of the appellant's guilt obviated the need for him to take the sorts of steps that would normally be taken before advising an accused person regarding a guilty plea.

> 74 Whatever trial counsel may have thought of his client, it was his duty to represent him to the best of his abilities. ***He was required to evaluate the strength of the evidence against the appellant before advising him to enter a guilty plea***, no matter how advantageous he thought that plea would be.

4. Treatment of opposing counsel

Rule 7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

Commentary (excerpt):

A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners, but should be prepared, when requested, to advise and represent a client in a complaint involving another legal practitioner.

> It is a very serious matter to make allegations of improper motives or bad faith against any counsel. ***Such allegations must only be made where there is some foundation for them*** and they are not to be made simply as part of the normal discourse in submissions over the admissibility of evidence or the conduct of the trial. To persist in making these submissions does not simply hurt the feelings of a thin-skinned opponent. Those types of submissions are disruptive to the orderly running of the trial.

R. v. Felderhof, [2003] O.J. No. 4819 (CA) at para. 93 [emphasis added]

> The defence has the right to make allegations of abuse of process and prosecutorial misconduct, but ***only where those allegations have some foundation in the record***, only where there is some possibility that the allegations will lead to a remedy and only at the appropriate time in the proceedings.

R. v. Felderhof, [2003] O.J. No. 4819 (CA) at para. 88 [emphasis added]

5. Treatment of the Court

Rule 5.1-1 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.***

While it is difficult to imagine professional misconduct charges being brought for any of the following, the professional reputation of counsel can be affected by the persistent failure to follow some rudimentary practices:

- Dress professionally
- Be on time (be early!)
- Be prepared
- Have sufficient copies of material
- Consider the interests of court staff in putting material before the court.

If you have knowledge of a state of affairs which could result in an unfairness or a miscarriage of justice, take whatever steps are necessary to alert the court to the situation. In unusual cases, this may include writing directly to the trial judge (copying opposing counsel): *R. v. Cordeiro-Calouro*, 2019 ONCA 1002

B: PROFESSIONALISM OUT OF COURT

1. Enhancing the reputation of the profession generally

Rule 2.1-1 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.

Commentary (excerpts):

A lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety:

- In either private life or professional practice
- Whether within or outside the professional sphere.

The integrity of the legal profession is enhanced by lawyers engaging in:

- Mentoring and education
- Pro bono and community work
- Volunteering with legal associations, non-profit or charitable organizations
- Civic leadership
- Academic commentary

2. Communicating with opposing counsel

Rule 7.2-4 A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, 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.

Rule 7.2-5 A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

3. Communicating with the Court

- Where appropriate, seek direction from the Court on communicating via email. It may be appropriate to send material (e.g. sentencing-related information and authorities) electronically. Some judges welcome this form of communication, but since there is no universal or institutionalized practice in this regard, do not be afraid to ask for direction.

> I expect that the written submissions will not contain references to any irrelevant communications between Counsel nor any interpersonal remarks about the positions taken or advocated by either side. The written submissions must be confined to the issues for this Court to decide based on the applicable legal principles and the case law. If either Counsel or the Crown wish to address the Court about any other issues that are relevant to the hearing or the evidence sought to be introduced, they are invited to bring the matter forward and address me in Court on the record or file further written applications. I will not countenance being included in any email correspondence between Counsel and the Crown either directly or indirectly.

R. v. C.C., [2018] OJ No 4240 (SCJ)

4. Withdrawing representation

Rule 3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

[A lawyer] should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

Rule 3.7-4 A lawyer who has agreed to act in a criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the other licensee adequate time for preparation

in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and…

…(e) complies with the applicable rules of court.

Commentary (excerpt)

A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

Rule 3.7-6 In circumstances where a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not sufficient time between a notice to the client of the lawyer's intention to withdraw and the date set for trial to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:

(a) the lawyer should, unless instructed otherwise by the client, attempt to have the trial date adjourned;

(b) the lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

Resources

"On Becoming a Professional: What It Means to Be a Lawyer." Remarks of Chief Justice Warren K. Winkler on the Occasion of the Law Society of Upper Canada's Call to the Bar Ceremony. Toronto, Ontario, June 15, 2010

Law Society of Ontario *Rules of Professional Conduct*: https://www.lso.ca/about-lso/legislation-rules/rules-of-professional-conduct

"Civility: A Cornerstone of Professionalism", Ontario Lawyers Gazette, Winter 2008

Susan N. Turner, "Raising the Bar: Maximizing Civility in Alberta Courtrooms" (2003) 41 Alta. L. Rev. 547 at 557.

Does Civility Matter? (2008) 46 Osgoode Hall LJ 175 – 188

David Stockwood, Advocacy Today: The Decline of Professionalism, (October 1997) 16 Advocates' Soc J No 3, 1 – 2

The Honourable Joan L. Lax, "Professionalism: An old idea but a new ideal", 28 Advocates' J No 1, 12 – 15.

Lorne Sossin, "The Public Interest, Professionalism, and Pro Bono Publico" (2008) 46 Osgoode Hall L.J. 131 - 158

The Hon. Warren Winkler, "Professionalism and proportionality" 27 Advocates' J. No. 4, 6 – 7,

Spring 2009

Tracy L. Wynne and Daniel A. Schwartz, "A Lawyer's Duty to the Profession" Advocates Society Symposium on Professionalism

R. v. M.K., [2019] O.J. No. 2220 SCJ

Groia v. Law Society of Upper Canada, [2018] 1 S.C.R. 772

Marchand v. The Public General Hospital Society of Chatham, [2000] O.J. No. 4428 (CA)

R. v. Felderhof, [2003] O.J. No. 4819 (CA)

R. v. Beckford, [2019] O.J. No. 6430 (CA)