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"Uncivil by too much civility"?: Critiquing Five More Years of Civility Regulation in Canada

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The author revisits criticisms of the civility movement made in an earlier paper (“Does Civility Matter?” (2008) 46 Osgoode Hall LJ 175). She argues that Canadian law societies remain concerned with lawyer incivility, despite bringing surprisingly few formal prosecutions against lawyers for incivility. In a few cases the law societies’ concern can be justified insofar as lawyer incivility in those cases appears to correlate with serious professional dysfunction. Generally, however, the focus on incivility is counter-productive. First, in several cases the focus on lawyer incivility elides the complex and difficult ethical issues raised by the behaviour of the lawyers in question. Disciplining lawyers for incivility when their conduct was substantively unethical avoids consideration of precisely why their conduct was improper, and ignores the implications of that analysis for the ethical duties of lawyers more generally. Second, the civility movement envisages a narrow conception of the “good lawyer” and risks reifying a patrician model of advocacy. Finally, civility regulation has the potential to chill proper advocacy, particularly for vulnerable clients. Law societies who discipline lawyers for making the right argument in words that were poorly chosen discourage what they ought to encourage.

L’auteure revient sur les critiques du mouvement en faveur de la civilité faites dans un article précédent (« Does Civility Matter? » (2008) 46 Osgoode Hall LJ 175). Elle allègue que les barreaux canadiens continuent de s’inquiéter du manque de civilité chez les avocats, même si, étonnamment, ils n’intentent que peu de poursuites contre des avocats pour manque de civilité. Dans un petit nombre de cas, les préoccupations du barreau peuvent se justifier dans la mesure où le manque de civilité des avocats semble être lié à un grave dysfonctionnement professionnel. En règle générale, toutefois, l’accent mis sur le manque de civilité est contre-productif. En premier lieu, dans de nombreux cas, la focalisation sur le manque de civilité des avocats laisse dans l’ombre les difficiles et complexes questions d’ordre éthique soulevées par leur comportement. Le fait d’imposer des mesures disciplinaires à des avocats parce que leur conduite était contraire à l’éthique contourne la question de savoir en quoi exactement leur conduite était répréhensible, et laisse de côté les implications de cette analyse concernant les obligations éthiques générales des avocats. En deuxième lieu, le mouvement en faveur de la civilité préconise une conception étroite du « bon avocat » et risque de réifier un modèle patricien de défense des intérêts. Enfin, un règlement en matière de civilité pourrait faire planer un froid sur la défense des intérêts, particulièrement pour les clients vulnérables. Lorsqu’ils imposent des mesures disciplinaires à des avocats pour avoir avancé le bon argument avec des mots mal choisis, les barreaux découragent ce qu’ils devraient plutôt encourager.

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1. “I have often seen people uncivil by too much civility, and tiresome in their courtesy”: Michel de Montaigne, “Ceremony at meetings between kings” in *The Essays (Les Essais)* (Bordeaux: Simon Millanges, 1580) bk I, ch 8. I am grateful to Earl Cherniak, Adam Dodek, Amy Salyzyn, and David Tanovich for their helpful comments on this paper.

Introduction

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Introduction

The legal profession still cares about civility.² In his July 2012 opening remarks to the 5th Biennial International Legal Ethics Conference,³ the President of the Canadian Federation of Law Societies argued for the centrality of civility as a moral virtue for lawyers, and defended the regulatory attention paid to civility by the Canadian law societies that constitute the Federation's membership. The year also saw the Law Society of Upper Canada decide that Joe Groia was guilty of professional misconduct because of his incivility to opposing counsel during his successful defence of John Felderhof from insider trading and securities charges.⁴ And the Supreme Court of Canada affirmed the Barreau du Québec's decision that Gilles Doré was guilty of professional misconduct because of an uncivil letter he wrote to a judge.⁵

2. For my earlier discussion of civility regulation see Alice Woolley, "Does Civility Matter?" (2008) 46 Osgoode Hall LJ 175 [Woolley, "Does Civility Matter?"].

3. Address given in Banff, Alberta, July 2012, online: <<http://www.ucalgary.ca/ilec5/>>.

4. *Law Society of Upper Canada v Joseph Peter Paul Groia*, 2012 ONLSHP 0094 [Groia]. I appeared as an expert witness on behalf of Mr. Groia.

5. *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [Doré].

A paper I wrote five years ago challenged the regulatory attention paid to civility.⁶ It did so on two grounds. First, it argued that to the extent civility regulation is directed solely at lawyer rudeness, and in particular at lawyers who impolitely express legitimate positions or who criticize the conduct of other lawyers, that regulation has the capacity to undermine lawyer zeal and the self-regulation of the profession. Both zeal and self-regulation require that lawyers act fearlessly and take stands that may generate backlash from those the lawyers offend; civility regulation risks inhibiting lawyers' willingness to do so.⁷ Identifying when rudeness reaches the point of professional misconduct is also susceptible to undue subjectivity, with the assessment of impropriety (colourful or uncivil?) tending to lie in the eye of the beholder.⁸

Second, I argued that to the extent civility regulation is directed at conduct that is substantively unethical—i.e., that would be unethical no matter how politely it was done, such as harassment of a witness during cross-examination—the focus on civility distracts attention from the real ethical questions raised by such conduct. At what point, for example, does cross-examination shift from a legitimate challenge to a witness's credibility and to the authenticity of her story, to becoming unethical harassment? Condemning the lawyer's rudeness speaks to that question only indirectly, and not especially helpfully, since the line between legitimate and illegitimate cross-examination can be crossed no matter how polite the lawyer's tone and demeanor.⁹

This comment reconsiders and assesses those positions in light of the civility cases released since 2007, including the high profile cases of Groia, Doré, and Kevin Murphy, the lawyer whose conduct as defence counsel to

6. Woolley, "Does Civility Matter," *supra* note 2. For an excellent overview of the regulation of civility in the United States see Donald E Campbell, "Raise Your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility" (2011/2012) 47 *Gonz L Rev* 99. Campbell does not take a position on the virtues of civility regulation: "the justification for adopting these codes may be questioned," at 145. Rather, he emphasizes that effective and appropriate civility regulation requires a proper understanding of what civility means. For arguments in support of civility regulation see Judith D Fischer, "Incivility in Lawyers' Writing: Judicial Handling of Rambo Run Amok" (2011) 50 *Washburn LJ* 365; Christopher J Piazzola, "Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should have Adopted a Civility Rule" (2003) 74 *U Colo L Rev* 1197. For a view more in line with the opinions expressed here see Harry Cohen, "Lawyer Certification, Civility, 'Good Moral Character' and Pressures for Conformity" (2001) 25 *J Legal Prof* 101 (originally published in 1976). Cohen suggests that "[a]lthough the proponents of more certification and more civility may be shocked by the thought, their increasingly stringent demands are actually part of a large scale effort toward the invasions of privacy and harassment of those who disagree with governmental trends, either toward 'equalitarian uniformity' or in the direction of other kinds of despotism," at 104.

7. Woolley, "Does Civility Matter," *supra* note 2 at 179-183.

8. *Ibid* at 182-183.

9. *Ibid* at 184-187.

Julia Elliott played a part in ending the judicial career of Paul Cosgrove.¹⁰ It begins with the observation that despite the law societies' rhetorical commitment to civility, and the high profile cases just noted, formal civility proceedings have played a surprisingly minor role in formal regulatory governance of Canadian lawyers. There are only a handful of disciplinary decisions reported since 2007 and, with the exception of *Doré*, all of those decisions come out of Ontario and British Columbia. In most Canadian jurisdictions there were no published disciplinary decisions addressing lawyer incivility. Because of the publicity received by the cases, and the use of informal regulatory mechanisms to govern civility, the lack of formal proceedings does not significantly ameliorate the negative effects of civility discipline. It is nonetheless somewhat unexpected given the rhetorical emphasis placed on civility by the law societies.

More significantly, the reported cases suggest that in some instances lawyer incivility is a red flag allowing regulators to identify lawyers whose legal practices generally violate ethical and legal standards. Lawyers who routinely and consistently act with rudeness and incivility towards others may be at higher risk of different sorts of professional misconduct; their incivility, and regulators' concern with it, may help regulators address expeditiously their more substantive misconduct. This suggests a more productive role for civility regulation than was apparent from my prior review of the cases.

Having said that, a number of the cases reinforce the concerns with civility regulation identified in the earlier paper. In particular, *Doré* and *Murphy* show how the focus on civility elides the complex and difficult ethical issues raised by the behaviour of the lawyers in those cases. Disciplining lawyers for incivility when their conduct was substantively unethical avoids consideration of precisely why their conduct was improper, and ignores the implications of that analysis for the ethical duties of lawyers in general.¹¹ One of the cases, *Law Society of Upper Canada v Guiste*,¹² highlights the narrow conception of the "good lawyer" that the civility movement envisages, and the risk that it reifies a patrician model of advocacy. Finally, *Groia*, and the Law Society of British Columbia decision regarding Kelowna lawyer Gerry Laarakker,¹³ highlight the

10. *Law Society of Upper Canada v Kevin Mark Murphy*, 2010 ONLSHP 0023 [*Murphy*].

11. This is also the case with *Law Society of British Columbia v Lanning*, 2008 LSBC 31 [*Lanning*]; and 2009 LSBC 2; and *Law Society of Upper Canada v Ludmer*, 2012 ONLSHP 191 [*Ludmer*]. See text accompanying note 48.

12. *Law Society of Upper Canada v Guiste*, 2011 ONLSHP 24 [*Guiste*]; and 2011 ONLSHP 0129 [*Guiste* 2011].

13. *Law Society of British Columbia v Laarakker*, 2011 LSBC 29 [*Laarakker*]; and 2012 LSBC 2.

earlier noted danger of civility regulation to zealous advocacy and lawyer self-regulation. Law societies who discipline lawyers who made the right argument¹⁴ in words that were poorly chosen, discourage what they ought to encourage.

I. *The numbers*

As noted, civility matters to Canadian legal regulators. In a 2011 Discipline Advisory, the Law Society of British Columbia noted that rudeness and incivility are common grounds for complaints about lawyers.¹⁵ It and the Law Society of Upper Canada continue to express concern about the absence of civility in the profession, and to emphasize civility's importance in legal practice.¹⁶ The Law Society of Upper Canada in 2009 initiated the Civility Complaints Protocol under which judges may refer incidents of unprofessionalism "such as incivility" to the Law Society. Judges have always had the power to raise issues with a lawyer's conduct to a law society, but the point of the Protocol is to encourage them to exercise it. Under the Protocol the Law Society of Upper Canada will not initiate disciplinary proceedings in response to judicial complaints, but will have a mentor meet with the lawyer "to discuss the conduct in question and assist in his or her development as an advocate."¹⁷

Given that regulators view incivility as professional misconduct, that incivility is commonly asserted to be a serious problem in the profession,¹⁸ and that incivility is said to be a major source of complaints to law societies,¹⁹ one would expect incivility to also form a significant part of the disciplinary agenda of the various provincial law societies. That is, one would expect the regulatory focus on civility to translate into discipline of lawyers for incivility. Yet a review of the disciplinary record from 2007

14. By which I do not mean a successful argument; lawyers have an ethical obligation to make the best argument for their client even if that argument has only a limited chance of success. In some cases the "right" argument will be an argument more likely than not to fail (e.g., where an argument is necessary to preserve rights on appeal). The Federation of Law Societies of Canada, *Code of Professional Conduct*, Ottawa: FLSC, 2012, Rule 4.01(1) and Commentary.

15. Law Society of British Columbia, "Lack of Civility Can Lead to Discipline" (10 June 2011), online: <<http://www.lawsociety.bc.ca/page.cfm?cid=2220>> [LSBC, "Lack of Civility"].

16. See, for example, Law Society of Upper Canada, "For the Record: Civility" (8 August 2011), online: <<http://www.lsuc.on.ca/with.aspx?id=2147486422>>; Ontario Bar Association, "Law Society Treasurer Proposes Civility Measures" (27 May 2010), online: <http://www.oba.org/en/main/home_en/Newsdetails.aspx?no=NEWS05272010-1857-1E>.

17. Law Society of Upper Canada, News Release, "Civility Complaints Protocol" (24 September 2009), online: <http://www.lsuc.on.ca/media/sept2409_civilityprotocol_nr.pdf>.

18. See, e.g., Law Society of Upper Canada, "Civility: A Cornerstone of Professionalism," *Ontario Lawyers Gazette* (Winter 2008), online: <http://www.lsuc.on.ca/media/olg_winter08_professionalism.pdf> at 5-10.

19. LSBC, "Lack of Civility," *supra* note 15.

through 2012 does not confirm that expectation. In that period there were only ten disciplinary decisions addressing civility from the English speaking law societies plus the *Doré* decision out of Québec.²⁰ A review of the sixty reported disciplinary decisions from 2009 for the law societies of British Columbia, Alberta, Saskatchewan, Manitoba, and Nova Scotia identified only one decision addressing incivility.²¹ That contrasts to, from the same sixty-case sample, nine cases dealing with lawyer misappropriation of trust funds, fourteen cases arising from a lawyer's failure to respond to lawyers, clients, or the law society, and eighteen cases addressing a lawyer who misled or deceived a third party, regulator, the court, another lawyer, or the law society.²² For those law societies in 2009, civility issues arose in very few cases, both absolutely and relatively.

This relative paucity of disciplinary attention could be used to argue that the civility movement is more aspirational than regulatory, that the exhortation of lawyers to be civil is an attempt to bolster a better professional culture through encouragement rather than sanction. If that were truly the case the problems with the civility movement would be ameliorated, since a purely aspirational model is less likely to create negative incentives or to conflict irreconcilably with the lawyer's other duties. The weakness with that argument, however, is that it does not take many cases to create a reaction of caution or fear. The existence of at least three high profile civility cases in the past few years (*Murphy*, *Groia*, and *Doré*), and one case which received at least some media attention (*Laarakker*²³), means that Canadian lawyers are well aware that incivility may lead to disciplinary consequences.²⁴ Indeed, the Law Society of British Columbia said just that—"Lack of Civility Can Lead to Discipline"—in a

20. This is based on research of the CanLII and Quicklaw databases. In addition to the cases cited earlier see: *Law Society of Upper Canada v Townley-Smith*, 2012 ONLSHP 52 [*Townley-Smith*]; *Law Society of Upper Canada v Lyle*, 2010 ONLSHP 40 and 2011 ONLSHP 34 [*Lyle*]; *Law Society of Upper Canada v Ranieri*, 2009 ONLSHP 0068 [*Ranieri* 2009]; and 2011 ONLSHP 0094 [*Ranieri* 2011].

21. My recollection is that in fact only one decision addressed incivility—*Lanning*, *supra* note 11; however, in my paper I list incivility as amongst various topics that had between one and three cases dealing with them. See: Alice Woolley, "Regulation in Practice: the 'ethical economy' of lawyer regulation in Canada and a case study in lawyer deviance" (2012) 15 *Legal Ethics* (forthcoming).

22. *Ibid* at 247-248.

23. Michael McKiernan, "BC Lawyer fined \$1500 for outburst at Ontario colleague," *Canadian Lawyer Mag* (18 January 2012), online: <[http://www.canadianlawyermag.com/legalfeeds/658/B.C.-lawyer-fined-\\$1500-for-outburst-at-Ontario-colleague.html](http://www.canadianlawyermag.com/legalfeeds/658/B.C.-lawyer-fined-$1500-for-outburst-at-Ontario-colleague.html)>.

24. Note also the recent headline about the disbarment of Kimberly Townley-Smith who, as discussed below, was primarily disciplined for substantive ethical misbehaviour: Glenn Kauth, "Law Society sends message to lawyers who attack judges," *Law Times* (29 October 2012), online: <<http://www.lawtimesnews.com/201210299402/Headline-News/LSUC-sends-message-to-lawyers-who-attack-judges>>.

2011 publication. It is likely that far more lawyers know that lawyers have been disciplined for incivility than know that the number of the lawyers who have been is small. In addition, in Ontario and British Columbia there have been formal proceedings taken against lawyers on a regular basis, even if not a frequent one. Moreover, law societies have the capacity to regulate lawyers through informal as well as formal mechanisms. In Ontario, for example, lawyers subject to a complaint by a judge through the Complaints Protocol will be asked to undertake “mentoring” from the Law Society of Upper Canada. In addition, the Law Society of Upper Canada may issue an “Invitation to Attend” which requires the lawyer who receives it to meet with senior benchers to be advised that his or her conduct was not acceptable. These informal mechanisms reinforce and enhance the chilling effect of formal disciplinary proceedings.

Consider in particular the Complaints Protocol. There are no articulated standards to govern when a judge reports misconduct to the law society.²⁵ The complaint must detail the misconduct, but there is no standard defining what, for example, should be considered incivility warranting complaint. In addition, while the complaint does not formally result in sanctions being imposed on the lawyer, it does create ongoing issues for the lawyer’s practice. If a judge has brought a complaint against a lawyer, the lawyer conceivably has a duty to disclose the past complaint to a client in the event the lawyer needs to appear before the complaining judge on the client’s behalf. That lawyer—and her client—may legitimately question the ability of the lawyer to receive a fair hearing from the judge; in particular, they may question the lawyer’s ability to advocate zealously for the client knowing that the judge has viewed the lawyer’s past advocacy as uncivil. This concern may be exacerbated to the extent that the Law Society views the complaint as frivolous or the incivility as reasonably provoked by improper conduct on the part of the judge; the lawyer may be concerned that the judge will resent the Law Society’s position and take it out on the lawyer or her client in the subsequent matter. In short, the lack of an articulated standard of behaviour and the negative consequences for her practice may lead the reasonable lawyer to modify the intensity of her advocacy to avoid a judicial complaint of incivility, even if that complaint could not result in disciplinary proceedings.

It is difficult, then, to make confident assertions about how the disciplinary approach taken by the law societies affects the impact of the civility movement. Outside of Ontario and British Columbia it may be

25. See, e.g., Civility Complaints Protocol, “Protocol for the Superior Court of Justice,” online: Law Society of Upper Canada <http://www.lsuc.on.ca/media/mar3110_scj_protocol.pdf>.

fair to say that the concerns identified in the earlier paper are somewhat ameliorated by the lack of formal disciplinary action taken with respect to civility, although even there informal regulatory mechanisms, the cross-jurisdictional publicity from disciplinary cases, and the public statements made by regulators,²⁶ mean that the civility movement will still have an impact on lawyer regulation and conduct. And in Ontario and British Columbia the disciplinary attention paid to civility, and the introduction of the Civility Complaints protocol, makes the questions raised about the virtues and dangers of the civility movement more pressing than ever.

II. *Civility canaries*

In four of the ten post-2007 civility decisions, the lawyers who acted with incivility can reasonably be portrayed as in ethical disarray, with their incivility to other lawyers, the court, or their clients highlighting or representing the broader ethical failings of their law practices. Thus, in *Law Society of Upper Canada v Lyle*²⁷ the lawyer acknowledged that on three different occasions he had filed affidavits that were false or with respect to which he had not taken steps to ensure their accuracy.²⁸ He also acknowledged that he had been found in civil contempt of court in relation to the filing of an improper affidavit.²⁹ In addition, twenty-two complaints about Lyle's incivility were brought to the attention of the Law Society, and he acknowledged the accuracy of the numerous allegations as to his rude behaviour towards his own former clients, other lawyers, individuals working with Children's Aid, and self-represented litigants.³⁰ Lyle did not dispute the assessment of his behaviour as professional misconduct, and based his submissions to the Law Society on his diagnosis with Attention Deficit Hyperactivity Disorder and the steps he had taken to treat and address his own behaviour.

In *Law Society of Upper Canada v Coady*³¹ the lawyer engaged in a wide variety of professional misconduct including, *inter alia*, acting for a client despite being in a serious conflict of interest³²; filing unmeritorious applications and engaging in abusive litigation³³; ignoring court orders³⁴;

26. Such as the statements by the President of the Federation of Law Societies at the International Legal Ethics Conference, *supra* note 3.

27. *Lyle*, *supra* note 20.

28. *Ibid* at para 4 and 5.

29. *Ibid* at para 32.

30. *Ibid* at para 4 and 5.

31. *Law Society of Upper Canada v Coady*, 2009 ONLSHP 0051 [*Coady*]; and 2010 ONLSHP 0004.

32. *Coady*, *supra* note 32 at para 44.

33. *Ibid* at, e.g., para 120 and 198.

34. *Ibid* at para 167.

failing to render a proper account to a client³⁵; and trading on a mortgage obtained for a former client.³⁶ In general the panel described her behaviour in this way:

Having observed her demeanor throughout this hearing, we conclude that in this instance Coady continued her pattern of conduct in the numerous civil and other proceedings in which she has been involved over the years. She uses rules of procedure, intended to promote procedural fairness, as instruments to frustrate, delay and inflict financial hardship on her opponents and enemies, whoever she perceives them to be.³⁷

Coady also made rude and unfounded allegations about the ethics and conduct of various judges who had made rulings against her,³⁸ about former clients,³⁹ and about other lawyers⁴⁰ or parties⁴¹ involved in cases against her.

In *Law Society of Upper Canada v Ranieri*,⁴² the lawyer misappropriated client funds, failed to serve her clients, and engaged in unauthorized practice of law. She was also personally abusive to a client⁴³ and, on an earlier occasion, punched a client in the nose.⁴⁴ In *Law Society of Upper Canada v Townley-Smith* the lawyer made unfounded allegations in litigation, offered evidence and opinion while acting as an advocate, and failed to cooperate with the Law Society.⁴⁵

In each of these cases the lawyer's incivility represented, or formed part of, a broad and serious pattern of professional misconduct. It may be, however, that the lawyer's incivility brought his or her misbehaviour to the attention of the law society and that the law society's concern with incivility motivated it to investigate the lawyer. This may be particularly the case with Lyle, whose other misbehaviour was less obvious and serious, while his incivility had led to a significant number of complaints being made against him. It may be that in his case, and to a lesser but still observable extent in the cases of Coady, Ranieri, and Townley-Smith, incivility was an effective signal for the law society that there was a reason to be concerned with issues of professional misconduct.

35. *Ibid* at para 159.

36. *Ibid* at para 223 and 227.

37. *Ibid* at para 273.

38. *Ibid* at, e.g., para 191, 200, and 271.

39. *Ibid* at para 197.

40. *Ibid* at para 261.

41. *Ibid* at para 275.

42. *Ranieri 2009* and *Ranieri 2011*, *supra* note 20.

43. *Ibid*.

44. *Ranieri 2009*, *supra* note 20.

45. *Townley-Smith*, *supra* note 20.

This use of incivility as a heuristic for identifying lawyers whose practices have fallen into disarray, and as a trigger for investigation of those lawyers, seems like a justifiable use of law society regulatory power. Although a study based on only four cases does not demonstrate an empirical connection between incivility and other sorts of professional misconduct, the cases do suggest that such a link can exist, and that a pattern of incivility warrants further inquiry and investigation by the law society. The link is not between a discrete incident of incivility (e.g., confined to one matter) and professional misconduct, but between pervasive incivility across a lawyer's practice and other ethical issues with that practice. It should also be noted that the cases do not demonstrate the legitimacy of civility discipline *per se*, because in the cases the incivility was linked so inextricably to the other issues with the lawyers' practice that one cannot independently assess its ethical significance. With those qualifications noted, these cases do justify some law society concern with civility. To the extent pervasive incivility provides a useful signal that a lawyer is in serious professional difficulty, it should motivate further investigation into the practices of those lawyers to determine whether they pose a threat to the public.⁴⁶

III. *Obscuring the real problems*

As noted in the introduction, one of the key arguments in the 2008 civility paper was that when civility is used to describe otherwise unethical conduct it tends to obfuscate rather than illuminate our understanding of

46. One significant issue with this approach—and the *Lyle* case hints at this point, although it does not directly raise it—is that lawyers with pervasive incivility and practices falling into disarray may have mental health issues. As noted by Amy Salyzyn in a comment to me on this paper: “dealing with [mental illness] under the auspices of civility would seem to risk such illnesses not being effectively or humanely addressed in some cases.”

why that conduct was unethical.⁴⁷ Some of the post-2007 civility cases reinforce this perception of the risks of civility regulation.⁴⁸

This is most obvious—and surprising—in the Supreme Court of Canada’s recent judgment regarding the behaviour of Gilles Doré. In 2001, Doré had appeared before Justice Boilard in the Superior Court of Quebec seeking a stay of proceedings against his client or that his client be released on bail. Justice Boilard’s treatment of Doré in that application was improper. He characterized Doré as impudent, his arguments as “idle quibbling,” and his application as “totally ridiculous.”⁴⁹ After the hearing, Doré did three things. First, he wrote an extremely angry and personally abusive letter to Justice Boilard. Second, he wrote a letter to the Chief Justice requesting that he not appear before Justice Boilard again. Third (and a month later), he complained about Justice Boilard to the Canadian Judicial Council. Justice Boilard was reprimanded by the Canadian

47. For a discussion of the extent to which civility codes tend to duplicate existing professional obligations of lawyers see Brenda Smith, “Civility Codes: The Newest Weapons in the ‘Civil’ War Over Proper Attorney Conduct Regulations Miss Their Mark” (1998) 24 *Dayton L Rev* 151 at 162-166. See also Adam Owen Glist, “Enforcing Courtesy: Default Judgments and the Civility Movement” (2000) 69 *Fordham L Rev* 757, suggesting that civility is not the most effective way to prevent the improper use of default judgments.

48. In addition to *Doré* and *Murphy*, discussed here, see *Lanning* and *Ludmer*, *supra* note 11. In *Lanning* the lawyer was disciplined for incivility to an unrepresented litigant. By focusing on Lanning’s incivility, the Law Society did not address the ethical problems arising from the extent to which behaviour like Lanning’s can create real barriers to an unrepresented litigant accessing the justice system. Further, because it did not address that question, it also did not illuminate the complexity that arises for lawyers when dealing with an unrepresented litigant on the other side. In such cases the lawyer may be able to legitimately (i.e., through the operation of law) obtain advantages for her client that she might not be able to obtain were the opposing party represented. That is unlikely to be viewed as an ethical issue provided that the lawyer does not distort the law’s operation. At the other extreme, a lawyer should not engage in intimidation or bullying of an unrepresented litigant; doing so is clearly improper. But what about the middle ground? Does the lawyer have any obligations in dealing with unrepresented litigants that are different when dealing with a represented party? If so, how are those obligations properly defined? In *Ludmer* the lawyer acted for a client in a family law matter where there was an allegation of parental alienation. Ludmer had himself been involved in a family law dispute in which that issue was raised and he felt passionately about it. Indeed, those feelings seem to have motivated his representation of the client since he otherwise had no background in the family law area. He also had had past dealings with the law firm representing the opposing party in his own family matter. Ludmer’s uncivil conduct appears to have arisen from his excessive engagement with the case. Conflicts rules generally prohibit lawyers from acting in any case where they have an interest which is “likely to affect adversely a lawyer’s judgment on behalf of, or loyalty to, a client or prospective client”: The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2000, Rule 2.04(i)(a). An important issue with respect to the conflicts rules is as to when a personal conviction or belief impairs the lawyer’s ability to provide disinterested and professional advice. The facts of *Ludmer* suggest that the lawyer’s personal convictions and beliefs undermined his ability to provide dispassionate and professional advice to his client; the case would have provided the Law Society with an excellent opportunity to provide guidance to lawyers at the point where their over-engagement should preclude representation. The focus on civility meant that that guidance was not provided.

49. *Doré*, *supra* note 5 at para 9.

Judicial Council. For his part, after receiving Doré's letter Justice Boilard made a complaint against Doré to the Barreau du Québec, where it was decided that Doré was guilty of professional misconduct on the basis of incivility; Doré had violated the requirement that he act with "objectivity, moderation and dignity."⁵⁰ Doré challenged that decision to the Supreme Court of Canada. The Supreme Court upheld the Barreau's decision, holding that while lawyers were not required to be "verbal eunuchs" and had a right and (perhaps) a duty to "speak their minds freely," they are nonetheless constrained "to do so with dignified restraint," a restraint that Doré failed to achieve.⁵¹

What neither the Barreau nor the Supreme Court address, however, is the fact that even had Doré written the nicest possible letter to Justice Boilard, perhaps a letter of thanks for Justice Boilard's favourable ruling in a case in which he had appeared, a letter praising Justice Boilard's intelligence, justice, and wisdom, his conduct would have been an improper violation of his professional duties. Our system of justice rests on the premise that the justice it discharges will be both public and impersonal. A judge's life need not be monastic, but the intermixing of the public and impersonal resolution of a case with a personal and private correspondence between participants about that case, even after the fact, undermines the ability of the system to achieve the necessary impartiality. In Doré's situation, the matter on which he was acting was still before the courts. Further, Justice Boilard was presiding over a related trial.⁵² If Doré had sent a praising but also private and personal letter about Justice Boilard's actions in court, there would be reason to be concerned about the propriety of that action and its effect on the fair administration of justice.⁵³ Would the Crown counsel appearing on the prosecution who later learned about the existence of the letter of praise continue to be confident that the case would be decided on the merits? Surely in a matter before the courts we expect that the communication between judges and lawyers about that matter—whether with regard to its substance or with regard to how the judges and lawyers are conducting themselves—will occur transparently

50. *Ibid* at para 60.

51. *Ibid* at para 68.

52. *Ibid* at para 15.

53. See *Re Gleason*, 2012 WL 4857014 CA 11 (Fla), in which the Court held that a lawyer had acted improperly because of his uncivil conduct before a judge but also because of the conciliatory letter and bottle of wine he subsequently sent to that judge. It must be noted, though, that the impropriety in that case arose in part because disciplinary proceedings before the Court were pending against Gleason. See online: <<http://www.ca11.uscourts.gov/unpub/ops/201211433.pdf>>.

in open court or in communications seen by all counsel. This is a basic requirement of natural justice.⁵⁴

Yet at no point does the Supreme Court address this aspect of Doré's conduct.⁵⁵ This omission is unfortunate, because the facts of the case provided an opportunity for the Barreau and the Court to illuminate the question of when the private dealings between lawyers and judges undermine the justice system's impartiality. Does a personal correspondence between a lawyer and judge about a case cause problems only if the matter is ongoing before the courts? Or is it a problem even if the matter has ended? Does it have more significance in a concluded matter if the lawyer is likely to appear before the judge again in other cases? In general, what level of personal relationship is acceptable between lawyers and the judges they appear in front of? Is it a problem, for example, for judges to auction (for charity) a private dinner with the judges at a bar association dinner—i.e., to sell time in their company to lawyers?

Given the comparably small size of many Canadian legal communities, and the inevitable relationships that judges and lawyers will have both before and during the time judges sit on the bench, lawyer-judge relationships create a complex and vexing ethical issue that merits greater attention than it has received from regulatory bodies, either of lawyers or of judges. The *Doré* case's focus on civility denied the Barreau and the Supreme Court the opportunity to appreciate the existence of that issue, or to illuminate it in any way. They missed it altogether.

A less obvious but nonetheless important example of the potential for civility to obscure the complexity of the ethical challenges that lawyers face arises from the 2010 decision *Law Society of Upper Canada v Murphy*. That case addressed the conduct by Kevin Murphy in his defence of Julia Elliott in a murder trial presided over by then Justice Paul Cosgrove. The Law Society suspended Murphy for six months for professional misconduct:

The Lawyer failed to treat opposing counsel and other lawyers and other people with courtesy and civility. He failed to treat opposing counsel and other lawyers with respect and good faith. Instead, he engaged in ill-considered and uninformed criticism of opposing counsel and other lawyers....

54. See, e.g., *International Woodworkers of America v Consolidated Bathurst Packaging Ltd.*, [1990] 1 SCR 282, 68 DLR (4th) 524.

55. This is probably because Doré had no incentive to point out other bases for finding that he had engaged in professional misconduct while the Barreau was equally unlikely to point out inadequacies in its own judgment. It is nonetheless somewhat surprising that no judge on the court independently identified this issue.

The Lawyer's criticism of counsel was outrageous, shameful and undermined the values of the administration of justice. This case was more than a case about incivility. It involved ethical misconduct that reflected adversely on the integrity of the profession and the administration of justice as a whole. The Lawyer's actions were more than merely being fearless and zealously representing his client. He made accusations without foundation and serious allegations of bad faith. He made personal attacks on other counsel.⁵⁶

The Law Society report of its decision does not provide much detail about the nature of Murphy's misconduct because he conceded that he had engaged in professional misconduct, thus the only issue before the Law Society was with respect to penalty. A review of the Inquiry Committee Report into the conduct of Justice Cosgrove at the Elliott trial reveals, however, that Murphy's misconduct largely consisted in bringing forward applications or arguments to the court that were factually weak or legally doubtful. Thus, for example, Murphy argued that the Crown had participated in improper preparatory meetings, but his "position proved unfounded" and was not supported by evidence.⁵⁷ He also argued that counsel for the Crown had misrepresented facts in submissions to the court when in fact the Crown "had been correct in his submissions."⁵⁸ Murphy made other allegations against the Crown and the police "which were extreme and unfounded," including the suggestion that the prosecution of Elliott made the Crown an accessory after the fact for murder, since the case was "enabling the real murderer to escape."⁵⁹ Murphy also engaged in "wholly improper" cross-examination⁶⁰ and used inflammatory language, suggesting, for example, that the conduct of the Ministry of the Attorney General in appointing successive Crown attorneys was akin to the "last days of the Third Reich where Generals and members of the SS were scrambling, literally like rats deserting a sinking ship, to make arrangements for themselves."⁶¹ Earl Cherniak, Independent Counsel retained to investigate the conduct of Justice Cosgrove and present the case against him if there was one,⁶² said that in general Murphy's conduct

56. *Murphy*, *supra* note 10 at para 15.

57. "Report to the Canadian Judicial Council of the Inquiry Committee Appointed under Subsection 63(3) of the *Judges Act* to conduct an investigation into the conduct of Mr. Justice Paul Cosgrove" (27 June 2008), online: <<http://www.cjc-ccm.gc.ca/cmslib/general/Cosgrove%20submissions%20Jan%202009/Tab%201.pdf>> at para 47.

58. *Ibid* at para 62.

59. *Ibid* at para 85.

60. *Ibid* at para 60.

61. *Ibid* at para 88.

62. And also for Joe Groia.

was “one of the most disgraceful exhibitions that has ever been seen in a Canadian courtroom.”⁶³

As noted, the Law Society of Upper Canada found Murphy to be guilty of professional misconduct due to his discourtesy and incivility, but also due to his false, groundless, and personal attacks on opposing counsel (which law societies usually categorize as incivility, but here view as having gone further to the point of bringing the administration of justice into disrepute). The difficulty with the decision—and this is a difficulty which is to some extent explained by Murphy’s admission of guilt—is that it does not grapple with the challenging ethical issues that arise from Murphy’s actual misconduct in the Elliot trial. Incivility is sufficient to capture Murphy’s invocation of Nazis as an ethical comparator, but that was only a small part of what Murphy did wrong, and the majority of his conduct, while improper and quite extreme, raises difficult ethical questions that could have been usefully illuminated had the decision gone beyond its reliance on Murphy’s incivility.

When lawyers appear before the court, they must not misrepresent or mislead the court as to the facts or as to the applicable law. This is a clear and unambiguous ethical duty for any advocate.⁶⁴ It is also clear, however, that lawyers may—must—raise arguments about the interpretation of those facts or that law that will assist their client. Those interpretive arguments must be based on the facts, evidence or law, but may also rely upon the lawyer’s creativity and persuasiveness.⁶⁵ Yet by categorizing the issue with Murphy’s conduct as a general question of “civility,” or as making false, groundless, and personal attacks on opposing counsel, the case does not distinguish between circumstances in which Murphy made up facts⁶⁶ and circumstances in which he simply invited an implausible interpretation or inference from facts as they occurred.⁶⁷ While the first conduct is obviously unethical, finding the second to be unethical requires some specific explanation as to how Murphy’s conduct differed from the ordinary course of behaviour of a lawyer who invites an inference or

63. *Ibid* at para 35.

64. The Federation of Law Societies of Canada, *supra* note 14, Rule 4.01(2).

65. *Young v Young*, [1990] BCJ No 2254, 75 DLR (4th) 46 (BCCA), affirmed on this point [1993] SCJ No 112, [1993] 4 SCR 3 at 41; Federation of Law Societies of Canada, *supra* note 14, Rule 4.01(1) and Commentary.

66. For example, saying that the Crown had misrepresented the facts when it had not, *Murphy*, *supra* note 10 at para 48.

67. For example, Murphy took a remark made by the son of Ms. Elliott’s victim in the cafeteria and used it to argue that the son should be found in contempt. That argument was erroneous, but it does not appear to have been based on a falsehood, *ibid* at para 87.

interpretation of the facts that the court ultimately rejects (and which in that sense could be said to be without substance).⁶⁸

It may also be unclear—and even unclear in terms of Murphy’s own behaviour absent some analysis and explanation—when the lawyer has falsified or misrepresented facts, as opposed to simply inviting the court to view those facts in the way most favourable to the client. For example, Murphy is described as having made “unsubstantiated allegations” that the Crown participated in improper preparatory meetings about which they should be required to testify. The Inquiry Committee Report states that there was “no evidence that any Crown counsel participated in *any meeting warranting his or her being called as a witness*” [emphasis added].⁶⁹ That statement suggests that meetings did take place, but that they did not warrant the characterization offered for them by Murphy. Does that mean that one should infer that some proffered characterizations or interpretations of evidence are so implausible as to be improper when made by counsel—i.e., as tantamount to a misrepresentation? Had the Law Society addressed the specific issues arising from Murphy’s behaviour in making improper representations to the court, it could have established precedent for identifying what constitutes a false assertion of fact, and specifically the point at which a misrepresentation may arise from the lawyer proffering an implausible interpretation of an otherwise accurately presented fact. Instead the Law Society decision provides no guidance on that question.

More significantly, the intersection of Murphy and Cosgrove’s behaviour raises a complex and important ethical issue: what should a lawyer do when he or she appears before a judge who gives the lawyer more than the lawyer knows that, based on the best interpretation of the law or evidence, she ought to have obtained? The lawyer may not do anything improper—she may not have mislead the court as to the facts or the law—but the judge’s inattention, age related diminution in cognitive function, or some other factor leads the judge to accept the lawyer’s relatively less plausible interpretation of the facts or law. The problem in *Murphy* was not just that he made bad arguments and dubious assertions, but that time and time again Cosgrove accepted them. The Law Society noted Cosgrove’s behaviour as something that ameliorated Murphy’s behaviour—he was caught in the “Cosgrove Storm”⁷⁰—but did not address the significance

68. For a general discussion of the duties of lawyers in offering false factual inferences when defending criminal accused see Alice Woolley, *Understanding Lawyers’ Ethics in Canada* (Toronto: LexisNexis, 2011) at 302-308.

69. *Murphy*, *supra* note 10 at para 47.

70. *Ibid* at para 23.

of the intersection between Cosgrove and Murphy in assessing the ethics of what Murphy did.⁷¹ Assume a lawyer with a judge similar to Cosgrove, but who has enough ethical skill to avoid Murphy's misrepresentations of the facts. If appearing before a judge like Cosgrove, the lawyer could nonetheless win a series of legally or factually doubtful victories that might undermine entirely the fairness of the trial and its substantive validity. Does that lawyer have an obligation to ameliorate his advocacy—to shift to something less than ordinary resolute advocacy—to try and prevent that sort of injustice? Strategically the lawyer does need to ensure that the judgment will withstand a challenge on appeal, and winning dubious motions may make that less likely. As a matter of ethics, however, does an unfair judge place a different burden on the counsel appearing before that judge and obtaining the benefit of that unfairness?⁷² Might, for example, a counsel have an obligation to avoid putting forward stereotypical or discriminatory inferences where the lawyer knows that the judge is likely to adopt those inferences even though the judge ought not to do so in law?⁷³ The Law Society decision does not provide any explanation or analysis of those questions, or guidance to lawyers who might face them.

It is certain that when analyzed in light of those issues, Murphy's conduct—or at least the vast majority of it—would be properly characterized as professional misconduct. And, as noted earlier, the fact of Murphy's admission of guilt makes the absence of detailed explanation by the Law Society understandable. Nonetheless, had the issue been framed with emphasis on the primary question of the nature and constraints on the lawyer's duty as an advocate, rather than on Murphy's lack of civility, even brief reasons might have illuminated these difficult ethical questions, and particularly the question of a lawyer's obligations when appearing before a judge who acts improperly or incompetently in the lawyer's favour.

IV. *Expressive differences*

One question raised by the civility movement is the extent to which it valorizes a particular model of the good lawyer, the gentleman lawyer

71. I want to emphasize that I do not think Cosgrove's behaviour in any way excuses Murphy's. The question is simply whether any additional or distinct obligations arise for a lawyer when a judge acts as Cosgrove did—i.e., did Murphy have added duties to try and prevent unjust rulings in his client's favour?

72. On the related question of the ethical duties of lawyers dealing with opposing counsel who are incompetent see Lizabeth L Murrell, "Between Scylla and Charybdis: The Importance of Internal Calibration in Balancing Zeal for One's Client with Duties to the Legal System When Your Adversary is Incompetent" (2011) 23 USF Mar LJ 265.

73. See, e.g., Mike McIntyre, "Judge's Rape Ruling 'Beyond Sexist,'" *Edmonton Journal* (25 February 2011), online: <<http://www2.canada.com/edmontonjournal/news/story.html?id=94bd22e3-474c-4aeb-af3f-123ea87c11d4>>.

who, if he acts for the marginalized or downtrodden, nonetheless advocates with reticence and rectitude.⁷⁴ While anyone would hesitate to criticize the lawyer who aspired to that ideal, the question for the civility movement is whether disciplining lawyers for incivility may render invisible other less conventional forms of lawyer goodness, and characterize difference as deviance.⁷⁵

That possibility is raised by the case of *Law Society of Upper Canada v Guiste*.⁷⁶ Guiste came before the Law Society largely because of a series of interactions with three lawyers from the same firm over the course of two cases. He also had one interaction with a court in which he made comments that were characterized by the judge as disrespectful to the court and to other counsel. None of these interactions involved Guiste in conduct that was substantively unethical, but did involve a variety of behaviour that was both aggressive and outside conventional norms of civil behaviour. Thus during a mediation Guiste repeatedly used the word “fuck.”⁷⁷ He stated that you don’t need to “grab a tit for it to be sexual harassment.”⁷⁸ He told a lawyer to take an offer and “shove it up your ass.”⁷⁹ He described a lawyer as having a client who (in contrast to Guiste’s) is a “CASH COW.”⁸⁰ He suggested that the lawyer had described a motion “like it is the second coming of Jesus Christ!”⁸¹ He further suggested that a lawyer’s logic would mean that “a man would be free to rape a woman in the workplace and her only civil remedy would be to go to the OHRC.”⁸² In correspondence to a lawyer Guiste stated: “This in fact has nothing to do with your client. Play at your own risk.—Play at your own risk! Play at

74. In a paper presented at this year’s International Legal Ethics Conference in Banff, see *supra* note 3, Amy Salyzyn suggested that both the models of the civility movement—the bad lawyer and the good lawyer—are specifically masculine exemplars: Amy Salyzyn, “Gender and the Civility Movement: John Rambo v Atticus Finch.”

75. This possibility arises in part from the difficulty civility advocates have in defining what civility means. In one 2005 article the author declined to define civility, observing in a footnote that “Any attempt to define civility or professionalism will fall short in one form or another”: Bronson Bills, “Civility and the Young Lawyer” (2005) 5 Conn Pub Int LJ 31 at fn 26. That may be observably true, but it does heighten the tendency of civility to be in the eye of the beholder. Campbell, *supra* note 6, reviews the United States regulation of lawyer civility and through that review identifies the ten core concepts that make up the lawyer’s duty of civility. Campbell suggests that judges themselves should make greater efforts to define what they mean by civility and that “courts enforcing civility through sanction should be particularly careful that they are not chilling a lawyer’s valid advocacy,” at 145.

76. *Guiste*, *supra* note 12.

77. *Ibid* at para 6.

78. *Ibid*.

79. *Ibid*.

80. *Ibid* at para 32.

81. *Ibid*.

82. *Ibid*.

your own risk!”⁸³ He was described as having been belligerent and profane to a lawyer’s receptionist.⁸⁴ He commented to a junior female lawyer on a case that it was “funny how big law firms send young female associates on sexual harassment motions.”⁸⁵ There were a number of other examples of similar comments by Guiste.

Lawyers who supported Guiste described him as having demonstrated “passion for access to justice issues” in his practice. The Law Society noted his “commitment to marginalized and downtrodden litigants with modest means.”⁸⁶ Ultimately, though, the Law Society held that Guiste’s incivility amounted to professional misconduct. It reprimanded him, required that he practice with a mentor for two years, and that he provide an unqualified apology to the three lawyers to whom he was rude.⁸⁷

Was Guiste’s behaviour properly characterized as professional misconduct? His comments were forceful, profane, crude, and colourful. They would not have been made by a “gentleman” lawyer. Guiste’s language suggests that he would be hard pressed to fit that mold—he seems most unlikely to tell anyone to go to “H-E-double hockey sticks.”⁸⁸ But his comments were also largely directed at lawyers from a single law firm over the course of protracted and hotly contested litigation, litigation with respect to which the Law Society stated “the Lawyer, acting as counsel for the Plaintiff was attempting to move his matter along the best he could for his client but was frustrated with the opposing counsel’s delay tactics.”⁸⁹ I would suggest that a legal profession committed to substantive justice could accommodate lawyers with a greater degree of crudity and colour than the *Guiste* decision contemplates. Further, refusing to countenance that sort of variety in practice may only legislate a higher class of insult, allowing lawyers to be cutting or rude provided they use the right sort of language. Fiddlesticks, yes; fuck, no.⁹⁰ Finally, and most importantly, it may marginalize lawyers who fall outside the socio-economic, cultural or

83. *Ibid.*

84. *Ibid.*

85. *Ibid.*

86. *Guiste* 2011, *supra* note 12 at para 33.

87. *Ibid* at para 44-46. Costs were determined in a separate proceeding.

88. Michael Barbaro & Ashley Parker, “Gosh, who talks like that now? Romney does,” *New York Times* (20 October 2012), online: <<http://www.nytimes.com/2012/10/21/us/politics/romneys-throwback-language-his-mittisms.html?hp>>.

89. *Guiste*, *supra* note 12 at para 38.

90. As noted below at note 124, criminal defence lawyers have been observed to be especially inclined to profanity. As Abbe Smith notes, “some words are just more *expressive* than others, especially the adjective form of the f-word.” Abbe Smith, *Case of a Lifetime: A Criminal Defense Lawyer’s Story* (New York: Palgrave MacMillan, 2011) at 33.

racial mainstream, whose background and experience gives them different aspirations and perceptions about good advocacy.⁹¹

Perhaps the relatively less significant penalty imposed on Guiste shows that the Law Society recognized these risks to some extent; however, any disciplinary proceeding, with its associated costs, imposed reputational injury, and impairment of the lawyer's practice and mobility, cannot be considered a minor consequence. Guiste's conduct was condemned and the decision sends the message that Guiste cannot be considered to be a good lawyer so long as he practices in this way. That is troubling given Guiste's commitment to the highest ideals of the profession—the representation of the “marginalized and downtrodden.”

V. *Creating the wrong incentives*

The question of whether civility movements excessively constrain our definition of the “good lawyer” is also implicated by the final two cases of note, *Groia* and *Laarakker*. Both *Groia* and *Laarakker*'s asserted incivility came in the context of a just cause, the defence of an innocent⁹² accused and a response to unethical conduct by another lawyer. But both of them were sanctioned because of their failure to pursue those causes in a manner their respective law societies viewed as sufficiently polite.

The cases also raise the important question of whether civility movements create perverse incentives in relation to lawyers' satisfaction of their core ethical obligations, in particular zealous advocacy and fidelity to law. When law societies discipline lawyers who do the right thing in the “wrong” way, imposing both official sanction and unofficial disgrace, they create the possibility that lawyers will forego doing the right thing for fear that they, too, will be seen to have gone about it in the wrong way.

The Law Society's decision in the *Groia* case has been appealed, and certain legal holdings render the decision susceptible to a successful application for judicial review. Specifically, a reviewing court may take exception to the Law Society's reliance on statements made about *Groia* by the courts in applications for judicial review brought by the OSC in *R v Felderhof*. The Law Society based that reliance on the position that *Groia*

91. See Amy Mashburn, “Making Civility Democrat” (2011) 47 Hous L Rev 1147; and Amy Mashburn, “Professionalism as Class Ideology: Civility Codes and Bar Hierarchy” (1994) 28 Val U L Rev 657.

92. A not-guilty verdict does not always demonstrate innocence: see, e.g., OJ Simpson and *R v Mullins-Johnson* (2007), 28 CCC (3d) 505 (Ont CA), in which the Court rejected the argument that an acquittal is tantamount to a finding of innocence. Where, however, an accused has been found not guilty and there has been no material doubt raised about that verdict he is entitled to this descriptor. It should be noted with respect to *Felderhof*, that the RCMP also decided that there was insufficient evidence to bring charges against him. See below note 96.

was a party in “substance” to the applications.⁹³ Given the jurisprudence on the role of the lawyer in the criminal justice system, a reviewing court may also reject the Law Society’s position that defence counsel have a super-added duty to ensure that trials proceed “fairly and efficiently and in an atmosphere of calm.”⁹⁴ The analysis here considers only the determination that Groia was guilty of professional misconduct because of his incivility during the first part of the Felderhof trial, and the implications of that determination for lawyers’ willingness to engage in zealous advocacy in light of the broader context in which Groia’s conduct occurred.⁹⁵

Groia’s client was John Felderhof, a geologist for Bre-X who was accused of securities offences because it was alleged that he had been complicit in a fraudulent scheme to make it appear that Bre-X had found significant gold resources when it had not done so. Felderhof was widely assumed to be guilty by the press and public—even today it is said that he is “the man who cannot clear his name.”⁹⁶ From the outset it would have been obvious that defending Felderhof would be both time consuming and complicated. Although Felderhof had financial resources at the beginning of the prosecution, a reasonable lawyer could have anticipated what actually occurred, which was that Felderhof lost the ability to pay his legal bills long before the conclusion of the trial. Felderhof still owes Groia approximately \$2M in fees.⁹⁷

The approach of the prosecution to the pursuit of Felderhof’s case was aggressive. On the first day of the trial the Director of Communications for the Ontario Securities Commission (OSC) stood on the courthouse steps and told the media that the OSC’s goal was “simply to seek a conviction on the charges that we have laid.”⁹⁸ Two days later the OSC prosecutor Jay Naster responded to a motion filed by the defence seeking better production of documents in accordance with the Crown’s *Stinchcombe* disclosure obligations. In so doing Naster cross-examined the junior lawyer

93. Groia, *supra* note 4 at para 92.

94. *Ibid* at para 37.

95. It should be noted that I was an expert witness for Groia in his law society hearing. My testimony was directed towards the question of the ethical obligations of defence lawyers and criminal prosecutors although I was also questioned by both the Law Society counsel and the panel on the issue of civility. The Law Society did not address my evidence on defence/prosecutor obligations in its decision. It held that with respect to civility my evidence added nothing to my writing on the subject, that my writing was directed towards removing civility obligations from codes of conduct which was not probative for the proceeding, and that I asserted a non-demonstrable connection between civility discipline and a “chill” on zealous advocacy. *Ibid* at para 43-46.

96. Shannon Kari, “Bre-x’s John Felderhof: The Man Who Cannot Clear His Name,” *Financial Post* (12 March 2010), online: <<http://www.cbc.ca/fp/story/2010/03/12/2675139.html#ixzz2A974zalE>>.

97. *Ibid*.

98. Groia, *supra* note 4 at para 111.

who swore the supporting affidavit listing the relevant correspondence “aggressively” for one and a half days.⁹⁹ In the course of the disclosure motion the prosecution acknowledged that it had not produced documents that should have been produced.¹⁰⁰ The judge granted the defence motion on disclosure and stated that the comment by the OSC’s Director of Communications “offends what the Courts have repeatedly said is the role of the prosecution.”¹⁰¹ Later in the trial Naster was “rebuked by the court for...sarcastic comments”¹⁰² made during the course of the trial. He was also censured for suggesting that the court’s rulings were “presumptively wrong and unfair.”¹⁰³ The intensity of the prosecution is also suggested by the conduct of OSC counsel in the course of the judicial applications brought by the OSC seeking to have the trial judge removed in part because of his failure to address Groia’s conduct. In argument on those applications counsel for the OSC accused Groia of telling “bald faced lies” and as being like “someone who drops a bomb and runs.”¹⁰⁴ Those statements drew a “swift rebuke” from the Superior Court judge presiding at the application.¹⁰⁵

In short, this was a difficult case to defend. In conducting Felderhof’s defence, Groia was critical of the ethics and conduct of the prosecutor and used sarcasm and similar rhetorical methods to advance his arguments. While Groia, unlike Naster, was neither rebuked nor censured by the trial judge,¹⁰⁶ at various points he:

99. *Ibid* at para 115.

100. *Ibid*.

101. *Ibid* at para 117.

102. *Ibid* at 160.

103. *Ibid* at 173.

104. Richard Blackwell, “OSC alleges lawyer lied in Bre-X trial,” *Globe and Mail* (22 November 2001) B3.

105. *Ibid*. They were also part of the basis for the statements by Campbell J noted in footnote 106.

106. The District Court and Ontario Court of Appeal were very critical of Groia’s conduct in their judgments denying the OSC’s application to remove the trial judge, although Campbell J at the District Court also stated that “Neither side in this case has any monopoly over incivility or rhetorical excess”: *R v Felderhof*, [2002] OTC 829, 55 WCB (2d) 572 at para 264. As noted, the statements of the District Court and the Ontario Court of Appeal about Groia were a significant basis for the Law Society’s decision that Groia was guilty of professional misconduct. The Law Society’s reliance on those statements is, however, legally dubious since Groia was not a party to those motions; the comments made by the court were in *obiter* since both courts declined to remove the trial judge from the case; and Felderhof and the independent counsel retained by him (Brian Greenspan) made a strategic decision not to make the defence of Groia’s conduct a significant part of their response to the OSC’s motions. The OSC failed to have the trial judge removed. See *Groia*, *supra* note 4 at para 39; *R v Felderhof* (2003), 180 CCC (3d) 498, 235 DLR (4th) 131, 68 OR (3d) 481 (CA).

- Suggested that the prosecution was trying to “win at any costs”¹⁰⁷;
- Stated that the prosecution was seeking an “unfair advantage”¹⁰⁸;
- Said that the prosecution was making it “as difficult as possible” for Felderhof to defend himself¹⁰⁹;
- Suggested that the prosecution was “lazy,” had not “done their job,” had “turned a blind eye,” and had “stuck their head in the sand”;¹¹⁰
- Described the “Crown” as the “government”¹¹¹;
- Suggested that it was not possible to do anything in furtherance of the defence “without the Government wanting to take some advantage or get some other document in”¹¹²;
- Suggested that the prosecutor was using a “conviction filter” with respect to the documents it was willing to allow to be admitted as evidence;
- Accused the prosecutor of conducting the prosecution “in a manner which offends the principle that the duty of the Crown is not to seek a conviction” while not bringing a motion alleging prosecutorial misconduct¹¹³;
- Stated that the “the Government’s case has more holes in it than a lobster trap in Nova Scotia” and that the prosecutor was trying to “frustrate the defence’s attempt to represent Mr. Felderhof”¹¹⁴;
- Stated that the “Government’s promises aren’t worth the transcripts they appear to be written on”¹¹⁵;
- Described the prosecutor as whining about the need to prosecute Mr. Felderhof in “accordance with certain fundamental rules”¹¹⁶;
- Suggested that the court was “no more able to get a straight answer out of the prosecutor than the defence has been”¹¹⁷; and
- Suggested that the prosecution’s approach to document management was “the most nonsensical proposal for a Government prosecutor that one could imagine.”¹¹⁸

107. *Groia*, *supra* note 4 at para 109.

108. *Ibid* at para 106.

109. *Ibid* at para 116.

110. *Ibid* at para 118. See also para 129.

111. *Ibid* at para 123 and 129. As noted below, I am uncertain as to how this was either inaccurate or uncivil.

112. *Ibid* at para 130.

113. *Ibid* at para 134.

114. *Ibid* at para 140.

115. *Ibid* at para 142.

116. *Ibid.* at para 148.

117. *Ibid* at para 155.

118. *Ibid* at para 168.

In support of its position that Mr. Groia had engaged in professional misconduct, the Law Society disciplinary panel noted in particular that Mr. Groia's allegations of prosecutorial misconduct were not brought in the context of a motion for a stay of proceedings. The panel suggested that Groia knew that his allegations of prosecutorial misconduct were legally wrong insofar as a failure to produce documents does not, they said, constitute prosecutorial misconduct.¹¹⁹ The panel further suggested that Groia's statements were part of a "trial strategy aimed at baiting the prosecution into making mistakes or aimed at convincing the trial judge through rhetoric rather than evidence."¹²⁰ It also rejected the argument that civility discipline has the potential to "chill" zealous advocacy. The panel found that requirements of civility have been present in codes of conduct for many years, and that there is no evidence to suggest that zealous advocacy has been chilled as a consequence:

As we have previously observed, the lawyer's obligation of civility and courtesy has been part of our rules of professional conduct for a long time. There is no evidence that these long-standing obligations have fettered or encumbered the lawyer's duty to defend her client resolutely within the limits of the law. Moreover, the *Rules of Professional Conduct* serve to ensure a rational, calm environment, which leads to better and more timely decisions. Thus, when lawyers observe the rules governing professional conduct, civility enhances, rather than detracts from, a more efficient justice system, prevents unfair outcomes and promotes greater access to justice for accused persons.¹²¹

The Law Society is of course correct to observe that there is no empirical evidence that civility discipline has impeded zealous advocacy. It is also fair to suggest that lawyers acting with civility can often have a positive effect on the administration of justice. The argument against civility regulation does not assert that civility is a bad thing; civility can be

119. While it may be fair to say that a failure to disclose will rarely or never lead to a stay of proceedings, the basis for the Law Society's statement that a failure to disclose is not prosecutorial misconduct seems strange. See in general, *Krieger v Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372.

120. *Ibid* at para 89.

121. *Ibid* at para 70.

a legitimate professional aspiration.¹²² The problem with the Law Society's position, however, is that there is also no evidence to suggest that regulation of civility has *not* impeded zealous advocacy. There is no evidence one way or another. Further, the circumstances and result in the *Groia* case invite the logical inference that disciplining lawyers for incivility will make those lawyers less willing to act as zealous advocates in cases like Felderhof's. Knowing the outcome of the *Groia* decision, what would a rational lawyer do if a client like John Felderhof walks into his office—that is, a client presumed guilty by the press, aggressively prosecuted by the OSC, and with a legally and factually complicated case? What would that rational lawyer do if advised that in representing his Felderhof-esque client he would be dealing with a prosecutor who in the first few months of the trial would be reprimanded by the court twice for inappropriate comments, would fail to provide proper disclosure as required by law, would in defence of that inadequate disclosure spend a day and half aggressively cross-examining a junior lawyer on an inconsequential affidavit, and would be presenting the case on behalf of an administrative agency whose Director of Communications stated that its goal was “simply to convict”? What would that rational lawyer do if further advised that in the conduct of the case his allegations that the prosecutor had engaged in prosecutorial misconduct would be viewed as professional misconduct because while the prosecutor *had* acted improperly, that improper conduct was not so egregious as to warrant a stay of proceedings? And that his describing a “Crown” as “government” would, even though a prosecutor is clearly

122. For a discussion of the virtues of civility in society and in legal practice see Russell G Pearce & Eli Wald, “The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law” (2011) 34 U Ark Little Rock L Rev 1. It should be noted that Pearce and Wald's argument requires not just that lawyers be more polite, but that they reconceive their ethical obligations altogether: “Our main contention is that as neutral partisans, lawyers have contributed to the civic malaise, in and outside of the legal profession. No matter how lawyers view their role, they do serve as civics teachers who explain the appropriate responsibilities of citizenship both in their everyday practice and in their civic leadership. Available evidence suggests that many, if not most, lawyers today practice and teach the autonomous self-interest approach of the Holmesian bad man—the individual's obligations to the spirit of the law and the community are only what they can get away with within the bounds of the law. In this way, lawyers as civics teachers have promoted the commitment to autonomous self-interest not only in the private dealings of clients but in culturally manufacturing autonomous self-interest as the dominant paradigm of public discourse and in the resulting erosion of relational self-interest as a countervailing influence. We assert that lawyers should instead draw upon the relational tradition found in professionalism and the lawyer's historic role to encourage public dialogue, help repair our civic culture, and suggest to clients relational means of pursuing their interests,” at 5. This may indirectly support the suggestion here that civility tends to run against norms of zealous advocacy.

a state actor, be viewed as falling “below the standard of professional conduct required by the lawyer before the court”?¹²³

If that rational lawyer knows all of that, and is self-aware enough to recognize that he has the typical pugnacious and defensive persona of the successful criminal defence counsel,¹²⁴ then surely he would at least be strongly tempted to suggest that his Felderhof-esque client look elsewhere for representation.

Undoubtedly Groia could—and perhaps should—have acted with greater restraint in his representation of Felderhof. His language was sarcastic and belittled the integrity and conduct of Naster¹²⁵ in a way that did not in and of itself help to progress the trial. His representation of Felderhof was, as he has acknowledged,¹²⁶ not perfect. But failing to grant any leeway to lawyers acting in cases as difficult as Felderhof’s leads to the logical inference that, if lawyers are rational and self-aware, they will avoid those sorts of cases.

That is a problem in any criminal case since even a guilty client is entitled to a defence, but it must also be remembered that Felderhof was in fact acquitted. He was a client whose case represented a major challenge but who was not guilty and who in that sense could claim a particular entitlement to legal representation.¹²⁷ This is the incentive problem created by civility regulation. The Law Society believes that civility regulation will create incentives for lawyers to be more polite when they zealously advocate for clients. But if a lawyer knows that the circumstances of a case and his own temperament make that outcome unlikely, his rational response will be simply to avoid the hard cases where the risks of engaging in behaviour the Law Society disapproves of are too high.

123. *Groia*, *supra* note 4 at para 123.

124. One American commentator has amusingly summarized the “identifying attributes” of the criminal defence lawyer. They include being “mostly Italian, Jewish, or Irish males,” being “often quite short” so that they “were forced to fight for their honor among bigger, stronger classmates, thus becoming ‘defensive’” and that they “can’t complete a sentence that doesn’t include the F-word. The more frequently and creatively it’s used, the more effectively they feel they’ve communicated (e.g., ‘I ordered a f__ing tuna salad on wheat, and that flea-brained f__ brought me a ham and cheese on pumper-f__ing-nickel.’” Mary Halloran, “An Ode to Criminal Lawyers” (1998) *California Lawyer* 96 cited in Smith, *Case of a Lifetime*, *supra* note 90. It should be noted that in my own experience Groia is not actually profane.

125. *Ibid* at para 139. Who, for his part, suggested that Groia was lacking in “consistency” and “fairness.”

126. When Groia made a presentation to a legal ethics class at the University of Calgary in the fall of 2010 he acknowledged this point.

127. Whether or not a client’s innocence should be a valid consideration in the lawyer’s decision to represent that client is a matter of philosophical dispute. Under the Canadian law governing lawyers, a lawyer may select clients on the basis of his or her conscience. See Woolley, *Understanding Lawyers’ Ethics in Canada*, *supra* note 68 at 46-52; Allan Hutchinson, “Taking it Personally: Legal Ethics and Client Selection” (1998) 1 *Legal Ethics* 168-183.

Further, even within a representation a lawyer may face circumstances where the requirements of zealous advocacy rub against the law societies' requirement of civility. In a paper presented at the International Legal Ethics Conference,¹²⁸ Mary Eberts recounted her experience acting in a matter where the judge invoked a racist stereotype in relation to the validity of her client's case. Eberts responded with civility—addressing the judge's point but not rebuking his use of the stereotype in open court. She now regrets that choice, believing that her client's later (successful) complaint to the Canadian Judicial Council, while accompanied with publicity, was insufficient to address the client's strongly felt belittlement and betrayal. Her response did not effectively rectify the injury to her client's confidence in the fair administration of justice. Yet Eberts also recognizes that having responded differently could have placed her offside the requirements of lawyer civility; however inadequate for her client's goals, her muted response was the one that the civility movement contemplates. Although the Law Society in *Groia* denies that civility and advocacy conflict, the Eberts story illustrates that at the point of risk assessment—that is, at the point when choosing whether to do something to advocate for a client that *might* be viewed as uncivil—the conflict is real, irreducible, and created by the Law Society's regulatory choices.

That key point of this final section—that civility discipline creates incentives for lawyers to emphasize civility at the expense of central professional obligations—is further demonstrated by the final case, *Law Society of British Columbia v Laarakker*. I have discussed the *Laarakker* case in detail elsewhere¹²⁹ and will focus only on the main issues here. Laarakker's client received a demand letter seeking recovery for "losses" suffered by a retailer as a consequence of the client's daughter's shoplifting. Such letters are of dubious legal validity: where goods are recovered it is not obvious that a retailer has suffered any legally cognizable loss, and parents are only responsible for losses occasioned by their children's wrongdoing in exceptional cases. A Manitoba judge once said of a lawyer who sent a similar letter that, "as a competent and responsible lawyer, he knew or ought to have known that the claim had no prospect whatsoever of succeeding in court and that it would be futile to pursue it."¹³⁰

128. Mary Eberts, "Counsel's Dilemma." This description was further confirmed in an e-mail exchange with Ms Eberts on 23 October 2012.

129. See Alice Woolley, "Lawyers Regulating Lawyers," *ABlawg* (3 November 2011), online: <http://ablawg.ca/wp-content/uploads/2011/11/blog_aw_laarakker_nov2011.pdf> and "Lawyers Regulating Lawyers (Redux)," *ABlawg* (11 June 2012), online: <http://ablawg.ca/wp-content/uploads/2012/06/blog_aw_lsuc_complaint_june2012.pdf>.

130. *DCB v Zellers Inc*, [1996] MJ No 362 (QB) at para 18, [1996] 10 WWR 689.

In response to this demand letter Laarakker wrote a post on a blog criticizing lawyers who send such letters as “sleazy operators” and also wrote a rude letter to the lawyer who sent the letter saying that he had instructed his client “not to pay a penny and to put your insulting and frankly stupid letter to the only use for which it might be suitable, however uncomfortably.” He also described the lawyer as a “bully” and suggested that he had graduated “bottom of his class.”¹³¹ Laarakker was found to have engaged in professional misconduct by reason of his incivility and was reprimanded and fined. Laarakker later complained to the Law Society of Upper Canada about the conduct of the lawyer who wrote the demand letters, but the Law Society declined to take any action against that lawyer.¹³²

By publicly identifying the legal invalidity of the claims made in the demand letter, and by shaming the lawyer who sent it, Laarakker took informal steps to help maintain the rule of law, steps that the law societies themselves appear unwilling to take. It would have been more professional to be polite, but politeness might have been less powerful. Moreover, while Laarakker was not polite, he invoked no extra-legal mechanisms to get his way. He offered neither threat nor violence.

What sort of lawyers do we want? Do we want lawyers who call out other lawyers for misconduct? Or do we want lawyers who fail to do so for fear that their criticisms will be sanctionable? Law societies may prefer the latter; they may believe that the reputation of the profession will be best preserved if lawyers act with decorum or silence in the face of other lawyers’ misbehaviour. But the argument here is that the only hope for retaining public respect is if the public believes that lawyers and the legal profession will protect them from wrongdoing by other lawyers through formal regulation and through informal social sanctions like shaming and shunning. The law societies should be rewarding the lawyers who have the courage and determination to take on that task rather than sanctioning them for their choice of words.

Conclusion

When my father was a boy he visited the office of his father’s lawyer. On the wall was a sign: “if all by law were right, and all by statute good,

131. *Laarakker*, *supra* note 13 at para 12.

132. Woolley, “Lawyers Regulating Lawyers (Redux),” *supra* note 129.

I could not breathe the impeccable air, nor would I if I could.”¹³³ The sign was, I think, a plea for humility in our ambitions in law and as lawyers, asking us to recognize that the law does not create human goodness, that its attempts to perfect the world may do as much harm as good, and that sometimes we simply have to live with and accept things about our fellow citizens we might wish we could legislate away. It is the elegant counterpoint to the claim, “there oughta be a law!”

Civility by lawyers to all those with whom they interact is generally a good thing. But that does not determine whether regulation designed to ensure civility, and to punish lawyers who are uncivil, is itself a social good. To the extent that civility regulation helps identify and bring under regulatory control lawyers who have a practice in ethical disarray, it serves a useful purpose. Beyond that, however, civility regulation creates significant problems by leading regulators to avoid or miss the ethical complexity of legal practice, by unduly narrowing the conception of the “good lawyer” and by creating disincentives for lawyers to do things they ought to do. Law societies do not need to remove civility requirements from their largely aspirational codes of conduct,¹³⁴ and they may wish to continue to promote the virtues of civility amongst their membership. They should also, however, heed the warning of my grandfather’s lawyer, and be cautious when attempting to create through operation of law the society and class of lawyers of which they dream.

133. Appropriately for a lawyer with farmer clients, there was also a picture of a cow with one man pulling the horns, another man pulling the tail and a third man milking—the cow was labelled “lawsuit” and the man milking was labeled “lawyer.” The lawyer’s name was David Hughes, and his firm continues today with offices in North Wales and Cheshire: <<http://www.allingtonhughes.co.uk/allington-hughes-solicitors.php>>.

134. As many commentators have noted, most provisions of the codes of conduct are never or rarely enforced.

