Civility: An Important Tool of the Advocate's Trialcraft

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Maintaining civility in the courtroom is completely consistent with vigorous advocacy. A trial lawyer can be a forceful and effective advocate by practicing his or her craft with civility. Indeed, civility often enhances advocacy, while incivility impairs persuasiveness and may alienate judges and juries, potentially even undermining fair trials. A perceived lack of civility has been seen as a cause of the loss of the public's faith in the legal profession. Courts and the legal profession's regulators are increasingly sanctioning lawyers for being uncivil.

Courtesy and respect to the court is required, but not sufficient. Civility needs to extend to everyone in the courtroom, including clerks, registrars, courtroom attachés, opposing counsel, parties, witnesses and the public. However, determining the parameters for such civil conduct is sometimes difficult. Some counsel adhere to the "handshake test", where the goal in every case is to conduct oneself professionally, inspiring and encouraging opposing counsel to do likewise, so that the matter can be concluded with a handshake. Unfortunately, such a test leaves considerable room for interpretation and subjective analysis. In addition, many definitions of civility are nebulous, leading some to suggest that the best that can be said about uncivil behaviour is that "you know it when you see it".[1] One commentator has noted that in "the legal context, "civility" does not have a precise meaning. Rather, it is a judicial construct signifying an attitude of respect."[2]

There are practical guidelines for civility and decorum in the courtroom and, particularly, at trial, (see Appendix A, *Principles of Professionalism for Advocates; Principles of Civility for Advocates*, The Advocates' Society, Institute for Civility & Professionalism, 2009). This paper will focus on identifying core concepts of civility in the courtroom. It will provide examples of civil and (by comparison, uncivil) behaviour, with a view to promoting vigorous advocacy, consistent with professional obligations to advocate fully, forcefully and fearlessly on behalf of

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[1] Robert N. Slayer, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79.

[2] 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 at 1202-03.

clients. While some jurisdictions have codified certain rules of civility, the core concepts of civility are universal in nature and are relevant across all jurisdictions.

A. FEW "OBVIOUS" POINTS OF CIVILITY

1) Maintaining Honesty and Candour

Of utmost importance, you must candidly describe the relevant facts and case law in your representations to the court. Refrain from misciting, distorting, exaggerating or improperly "spinning" the facts or the law. Inadvertent misstatements of law or the facts should be corrected. During trial, do not allude to a fact, or matter, with respect to which no admissible evidence will be advanced.

2) Communicating with the Bench

Fundamentally, you must act with respect and deference when interacting with the court. Always be respectful when questioning the court, using an appropriate manner and tone. Argue *to* the court, not *with* the court, adhering to the maxim "attack the argument, not the speaker". The aim should be to identify the defects in the other party's position or arguments, not the failings in the court's questions or preliminary opinions. Discourtesy in delivery can undermine an otherwise strong argument.

Likewise, respond directly to the court's questions. Questions are to be welcomed, even if they appear unfavorable to the client's position. Well-prepared counsel will anticipate most questions and will view questions as an opportunity to clarify the client's position and argument. Avoid putting off questions until later. Rather, attempt to answer them as they come, as they are often indications of the court's most pressing concerns.

Unless an appropriate objection is required, do not interrupt the court, opposing counsel, or a witness. Do not speak over other counsel or over the court.

Further, do not initiate communications with a judge without the knowledge or presence of opposing counsel concerning a matter at issue before the court.

3) Dealing with High (and Low) Emotions

Client emotions should not be allowed to override professional duties. Client emotions are, with good reason, often high during litigation. Do not let those emotions interfere with your duties as an officer of the court. Also, do not allow ill feelings between the parties to affect your own actions.

Civility requires a lawyer for a struggling or losing party to refrain from expressing disrespect for the court, adversaries or parties. Avoid exaggerated visual displays of dissatisfaction or disagreement, including gestures or body language that could be construed as undue disapproval of opposing counsel, or disapproval of the court or its rulings. Be aware of how you manifest displeasure and learn to control the messages communicated by facial expressions and body language. Huffing, puffing and eye-rolling generally do little to advance a client’s position.

Do not react emotionally to adverse rulings as if they are personal affronts. Bear in mind that it is your client's case and that you are in court to advance that case as a committed professional. Maintain objectivity in order to effectively represent your client. When the court has made an adverse ruling on a matter, do not attempt inappropriately to re-argue the point or attempt to circumvent the effect of the ruling by other means.

4) Dealing with Opposing Counsel

Do not refuse reasonable requests for accommodation simply to play "hardball" or where client rights are not prejudiced. It is unnecessary to withhold consent to reasonable requests based on arbitrary or unreasonable considerations. If requests by opposing counsel will jeopardize client rights, do not accede to such requests, even if premised on "professional courtesy". And only agree to commitments that you reasonably believe you can honour.

Personal attacks on opposing counsel can compromise the trial process and are unacceptable. Do not, without adequate factual basis, attribute to other counsel improper motives, purpose or conduct. Avoid making statements solely to embarrass, including statements or insinuations related to personal peculiarities or idiosyncrasies of other lawyers. Uncivil conduct includes conduct that is rude, unnecessarily abrasive, overly sarcastic, demeaning, abusive or of any like

quality, in that it attacks the personal integrity of opponents, in the absence of good faith or where the good faith belief is unreasonable.

Disparaging opposing counsel by remarks or gestures will usually damage your own reputation in the court's eyes and may escalate a counter-attack. At a minimum, engaging in personal attacks will distract the court from the matters at issue. Likewise, sarcasm and irony, if used, should be used judiciously.

Attacks from opponents should be met with dignity and reason. A difficult or rude lawyer is sometimes best "killed with politeness", since incivility is often used to camouflage insecurity or a lack of preparation. The more professionalism and integrity one shows, the greater the contrast with an opposing uncivil lawyer. As the Supreme Court of Canada has stated, "it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility."[3] And, practically, a court is perhaps more likely to note and penalize a retaliatory strike than the initial incivility.

That said, civility does not require you to act like a doormat and you should not tolerate abusive, uncivil behaviour. As also stated by the Supreme Court of Canada: "lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so."[4]

Do not lightly seek sanctions. Do not seek to disqualify opposing counsel for an improper purpose, arguably including situations where if the motivation is primarily designed to obtain a tactical advantage or create a diversion from litigating the merits. A decision to move to disqualify opposing counsel must be carefully weighed and you should not make or threaten such motions unless they are both warranted and in the client's best interests. Motions for sanctions or disqualification can destroy the necessary working relationships between opposing counsel and encourage tit-for-tat uncivil conduct. Make good faith efforts to resolve issues with opposing counsel directly before resorting to extreme remedies.

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[3] *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 68.
[4] *Ibid.*

5) Dealing with Witnesses

Treat witnesses in a civil and courteous manner. Do not harass, demean or inappropriately intimidate witnesses. Unjustified personal attacks on parties and witnesses are generally unacceptable. Where impeachment is warranted and appropriate, as it often is, it should be conducted without inappropriate attacks. None of this compromises the overriding need to represent your client forcefully and fearlessly. Consider this recent description in a memorial on the passing of a pre-eminent Ontario criminal counsel:

> In a courtroom, he was fierce. He wasn't there to be liked by the judge or the witness or the Crown. He was there to protect his client unequivocally and sometimes unabashedly. If he had to be provocative, he would be. If he had to ruffle feathers, he would do it. If he had to conduct a tough cross, there were no holds barred.
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> …
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> He was never apologetic in his defence of a client. And never an apologist for his client. That's what he instilled – an unwavering commitment to the job, the vocation, of defending. A single-mindedness in the understanding that his obligation, his loyalty, was to defend his client. Without a shred of cynicism or hesitance. At the risk of not being liked, and at the risk of upsetting some.[5]

With respect to your own witnesses, remember to advise them how to address the court and educate them about the procedures that will be followed in eliciting their evidence. While you should draw your witness' attention to relevant issues, assist in refreshing their memories by referring to evidence and prepare them for a hostile cross-examination, you should not suborn perjury, persuade witnesses to avoid summonses or obstruct access to witnesses by other parties. Witnesses should not be presented in a misleading way.

6) Dealing with Clients

Civility extends beyond the obligation of regulating your own conduct. You should inform clients of the importance of civility in the legal process. A lawyer's display of civil conduct helps ensure that other participants in the legal process also maintain due respect for the courts, the legal process and the administration of justice.

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[5] Marie Henein, "Icon and Iconoclast" (A Tribute to Eddie Greenspan) (2015) Vol. 33 No. 4, *The Advocates' Journal* 13.

If necessary, explain to clients that civil conduct does not reflect a lack of zeal in advancing their interests, but rather promotes successful advancement of their interests. Weakness does not follow from civility. Incivility is not a valid form of vigorous advocacy or effective representation. Clients should be advised of the proper courtroom conduct that is expected and required in order to share due respect for the court.

B. CIVILITY IS A TOOL FOR VIGOROUS ADVOCACY

A common objection to civility is that it diminishes advocacy for the client. Lawyers accused of incivility often cite their ethical obligations to be zealous advocates for their clients' interests and note that what is incivility in the eyes of one person is zealous advocacy in the eyes of another. Those who oppose the broad "civility movement" point to risks that regulators will meddle in the conduct of trials, place limits on the independence of lawyers, and interfere with the freedom of expression of lawyers in argument.[6] They fear wasted and diverted judicial resources and a chilling effect on the willingness to bring applications for abuse of process and prosecutorial misconduct. It has been argued that civility is often used to discourage full, frank and necessary criticism of the legal process.

We say, of course, with the utmost respect – "It ain't so!"

Indeed, in an adversarial system, it is expected that lawyers will pursue claims zealously, but such pursuits must be made within the boundaries of the law and ethical obligations. More often, the reality is that incivility wastes time and energy through unwarranted attacks on opposing counsel, rather than focusing on the issues and the merits of the case. Escalating tensions are often matched by escalating fees. Nothing relating to civil conduct requires that a lawyer's interests or the system's interests be put ahead of the client's interests. Uncivil conduct is not "zealous advocacy": it is conduct that unnecessarily calls into question the integrity of the court process and of the players involved in that process. It brings the administration of justice into dispute. Damage to the administration of justice cannot be tolerated and is not necessary in order for a trial lawyer to serve as a fearless and loyal advocate. Indeed, principles of civility are consistent with such goals.

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[6] See, for example, Joseph Groia, Nic Wall and Elizabeth Carter, *Shades of Mediocrity: The Perils of Civility*, presented at the Canadian Bar Association Legal Conference, August 17, 2014.

C. CONCLUSION

Trials are not "tea parties." Feelings will be hurt. We must strive to advance and protect our client's interests without compromise. But trials do not need to be conducted in a personalized atmosphere of hostility, which diverts attention from the real issues in cases. Civility is in fact a strategic tool for vigorous advocacy, part of a trial lawyer's trialcraft. And when you refer to your opponent as "my friend," it won't just be because you can't remember his or her name. You might actually mean it – at least in the context of demonstrating respect for our system of justice.

Principles *of* [illegible]m *for* Advocates

Institute *for* Civility & Professionalism

Principles *of* Civility *for* Advocates

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OVERVIEW

I commend The Advocates' Society for producing *Principles of Professionalism for Advocates* and *Principles of Civility for Advocates.* The guidelines contained in this booklet reflect the experience and good judgment of senior members of the litigation bar and the judiciary and should be mandatory reading for all those who practise as advocates.

For as long as I can remember, lawyers have been talking about the decline in civility and professionalism among members of the bar. It is frequently said that in the past, lawyers were more professional than they are today. They placed greater emphasis on public service, idealism and the importance of treating everybody, including their opponents, with courtesy and respect. The concern these days is that the pressures created by the business model of legal practice have overridden many of the values which distinguish a profession from a business.

To its great credit, The Advocates' Society has implemented a number of initiatives to address this concern. In 2000, it convened a symposium on ways to promote civility. The symposium led to the creation of what became a very popular booklet entitled *Principles of Civility for Advocates.* This booklet has been distributed in Canada, the United States and other countries and has been frequently referred to by courts.

In 2008, The Advocates' Society established the Institute for Civility and Professionalism. The premise of the Institute is that the fostering of civility and professionalism involves more than a regulatory regime. Fundamentally it involves the development and maintenance of a certain kind of culture in the legal profession. I am honoured that the Society asked me to be the Honorary Chair of the Institute.

It is noteworthy that the Institute is an initiative of senior members of the litigation bar. This is important because it is senior lawyers who most directly shape the culture of the profession. No matter how well young lawyers have been taught, if the values of professionalism are not reinforced in the firms where they work, they will not take root.

The Advocates' Society believes that a culture where civility and professionalism are respected and valued can be cultivated through training and mentoring on an ongoing and persistent basis. Accordingly, the objective of the Institute is to generate and monitor opportunities for training and mentoring in civility and professionalism. Through a separate and permanent Institute, the Society expects these areas to receive further prominence as well as focused and specialized attention.

In January 2009, the Institute held a symposium addressing the principles of professionalism. Senior members of the bar and the judiciary participated. The symposium was an important first step in developing a set of principles on professionalism. Those principles are intended to complement the principles on civility I mentioned above. Taken together, they constitute the guidelines set out in this booklet. They provide a sound, comprehensive

framework to guide all advocates in the manner in which they conduct their practices.

In conclusion, I commend The Advocates' Society for publishing this booklet. I am confident that it will make an important contribution towards ensuring that we have the kind of culture in the practice of litigation that is so important in preserving the honour and respect that our profession deserves.

The Honourable Dennis R. O'Connor
Associate Chief Justice of Ontario
April 2009

PRINCIPLES *of* PROFESSIONALISM *for* ADVOCATES

INTRODUCTION

The meaning of legal professionalism is often debated among academics, practitioners and jurists. It is a difficult concept to articulate and even more difficult to codify. At a very high level, professionalism has been defined as an attitude or an approach that will inform a lawyer in his or her day to day work. Its elements have been described to include scholarship, integrity, honour, leadership, independence, pride, spirit, collegiality, service and balanced commercialism. Professionalism is understood to be at the heart of being an ethical lawyer, and the basis upon which we uphold public confidence in the justice system and meet our obligations to serve the public, defend the rule of law, and promote true access to justice.

While our understanding and definitions of professionalism will no doubt evolve over time, our challenge today is to effectively promote and sustain the ethical ideals of professionalism within the bar. Our approaches must be relevant and practical for both new lawyers and more experienced ones. Ethical lawyering must also be recognized as something wholly compatible with the realities of practising law within an adversarial system. For it is our shared recognition of values, and our duties to society, to the profession, to clients, to the court, and to opposing counsel, which are the foundation of the legal profession.

I am very pleased to have the opportunity to introduce The Advocates' Society's new publication, *Principles of Professionalism for Advocates.* The leadership role that The Advocates' Society is taking within the legal profession on these issues is highly commendable, and will no doubt play a large role in enhancing and sustaining professional responsibility within the legal profession. The commitment and enthusiasm of the Society is underscored by both the development of this booklet and the creation of The Advocates' Society Institute for Civility and Professionalism. This work is fundamental to the legal profession and to the administration of justice -- both in the present and the future.

The Honourable Warren K. Winkler
Chief Justice of Ontario
April 2009

PREAMBLE

History discloses that what distinguishes a "profession" from a trade or other calling is the taking of an oath. We did that when we were called to the bar and, in so doing, we bound ourselves to the conduct mandated by the *Rules of Professional Conduct* as promulgated by our Law Society from time to time. Failure to do so results in varying degrees of sanction including disbarment. The *Rules* set the minimum expected of us and are regulatory in nature.

The *Principles of Civility for Advocates* were published by The Advocates' Society to provide a tool for advocates to guide their conduct beyond what is provided in the *Rules of Professional Conduct.* They have struck a chord with the members of the bench and the bar not only in Ontario but also throughout Canada and even in other jurisdictions around the world. Civility is essential to the proper functioning of our judicial system and to foster and maintain respect for the rule of law.

Civility, while critical, is still but one aspect of professionalism. In presenting the *Principles of Professionalism for Advocates* in conjunction with the *Principles of Civility for Advocates,* the intent is to broaden the scope of guidance provided to advocates. It is to take the collective knowledge of the leaders of the bench and the bar and to distil it into a discrete set of principles which we believe are the hallmarks of the exemplar advocate. These principles are couched in the language of instruction, not compulsion. In that sense, they are aspirational in nature, intended to serve as a guide for all who seek to achieve professionalism in their role as an advocate.

Peter J. E. Cronyn
President, The Advocates' Society
April 2009

The PRINCIPLES

An Advocate's Duty *to* Society

1. Advocates should support the development, sustainment, and evolution of democratic principles and the rule of law in Canada and elsewhere.

2. Advocates should promote the fair and effective administration of justice.

3. Advocates should promote diversity and equality within the profession.

4. Advocates should be engaged in their community through activities including philanthropy, volunteerism, education, and public service.

An Advocate's Duty *to* the Profession

1. Advocates should participate in continuing legal education programs.

2. Advocates should actively seek out and make time to mentor junior colleagues in their workplace and in the profession at large.

3. Advocates should promote and participate in self-governance and self-regulation of the profession.

4. Advocates should enhance the public's regard for the legal profession. They should not engage in activities that tend to bring the profession into disrepute.

5. Advocates must, where possible, assist in creating opportunities for new advocates. They should offer quality articling programs to meet the demand of graduating law students and to ensure that the public is provided with well-trained and qualified Advocates.

An Advocate's Duty *to* Clients *and* Witnesses

1. Advocates should pursue the interests of their clients resolutely, within the bounds of the law and the rules of professional conduct, and to the best of their abilities. Advocates must "raise fearlessly every issue, advance every argument, and ask every question."[1] At all times, however, they must represent their clients responsibly and with civility and integrity. The duty of zealous representation must be balanced with duties to the court, to opposing counsel and to the administration of justice.

2. Advocates should be skilled, knowledgeable, capable and competent within the area of law that they practise. They should remain current regarding developments in the law relevant to their practice.

3. Advocates must at all times advise their clients with honesty and candour.

4. Advocates should not allow personal judgments as to the morality of a client and the client's cause to impede their representation of the client to the best of their abilities within the boundaries of the law and the rules of professional conduct.

5. Advocates should refrain from acting on instructions from a client that are in conflict with their duty to the court, opposing counsel or others.

6. Advocates should continue to act for a client, unless there is good cause to terminate the relationship, such as a breakdown in communication or failure of the client to pay fees, and advocates should only terminate the relationship on notice to the client.

7. Advocates should avoid conflicts of interest in advising and representing clients and, where permitted by law to do so, shall act or continue to act in a matter where there is a conflict of interest only after adequate disclosure to, and with the consent of, the affected clients.

8. Advocates should treat all witnesses with fairness, courtesy and respect, and should not abuse, intimidate or harass a witness.

9. When seeking information from a witness, advocates should avoid deceiving or otherwise misleading the witness and should avoid asserting improper influence over the witness' recollection of events.

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[1]. The Law Society of Upper Canada, *Rules of Professional Conduct*, R. 4.01(1)

An Advocate's Duty *to* the Court

1. Advocates should use tactics that are legal, honest and respectful of courts and tribunals.

2. Advocates should act with integrity and professionalism, maintaining their overarching responsibility to ensure civil conduct in accordance with the *Principles of Civility for Advocates*.

3. Advocates should educate clients and others about the court processes and promote the public's confidence in the administration of justice.

4. Advocates should promote the efficient and effective operation of the judicial system. They should not seek adjournments without proper reason and should cooperate with opposing counsel in achieving the most expeditious and least costly resolution of proceedings.

5. Advocates should not knowingly permit the giving of false evidence or engage in any other conduct calculated to induce the court to act under a misapprehension of the facts.

6. Advocates should ensure that the court is apprised of changes in the law and important judicial authority on the legal questions in at issue in a proceeding.

An Advocate's Duty *to* Opposing Counsel

1. The proper administration of justice requires the orderly and civil conduct of proceedings. Advocates should, at all times, act with civility in accordance with the *Principles of Civility for Advocates*. They should engage with opposing counsel in a civil manner even when faced with challenging issues, conflict and disagreement.

2. Discussion about opposing counsel with others, including clients and the court, is permitted. Reasoned criticism based on

evidence of a lawyer's incompetence or unprofessional acts may be made. Conversely, ill-considered or uninformed comments about opposing counsel should not be made.

3. Advocates should extend professional courtesies to opposing counsel. Such courtesies include extending assistance, to which opposing counsel are not entitled by law, that does not prejudice their own client.

4. Advocates must not attempt to gain a benefit for their client solely due to the fact that a litigant is self-represented. Counsel should cooperate with the court in ensuring that a self-represented litigant receives a fair hearing.

5. At trial, advocates are entitled to raise proper and legitimate objections but should not take advantage of technical deficiencies in a self-represented litigant's case which do not prejudice the rights and interests of their client.

An Advocate's Duty *to* Ensure Access *to* Justice

1. Advocates should support or contribute to organizations, initiatives and other efforts on the part of the profession intended to improve access to justice and make legal services available to persons of limited means.

2. Advocates should provide legal services on a *pro bono*, reduced fee or alternative basis for those unable to pay and who would otherwise be deprived of adequate legal advice or representation.

3. Advocates should act so as to decrease the costs of litigation, including by adhering to the *Principles of Civility for Advocates*.

4. In their conduct of litigation and in their advice to clients, advocates should have regard for the principle of proportionality.

PRINCIPLES *of* CIVILITY *for* ADVOCATES

INTRODUCTION

I am pleased to have been invited to write an introduction to The Advocates' Society *Principles of Civility* publication. The Society is to be congratulated for the production of a document with which every advocate should be familiar.

For decades, a significant segment of the public, often unfairly, has viewed lawyers as difficult, contentious individuals. The result is that lawyers and judges often become attractive political targets, a process that can undermine the very foundations of our democratic society which is, of course, an independent justice system that enjoys the confidence of the citizenry.

In my view, the level of civility at the bar relates directly to the level of professionalism of the legal profession. The principles of civility are therefore of great importance to all members of the bar. The success of our greatest advocates has been characterized by civility. Among many, I think of the late John J. Robinette and the late G. Arthur Martin whose courtesy towards fellow advocates, the judiciary and court staff played a major role in their effectiveness as advocates.

It is also important to remember that the paths of lawyers may cross and re-cross over and over again. Lawyers have long memories, particularly about the conduct of colleagues, and in my experience there can be nothing more important than the reputation enjoyed by an advocate amongst his or her colleagues.

Judges are entitled to expect that counsel will treat the court and each other with candour, fairness and courtesy. A failure to do so usually will create a much heavier burden of persuasion on an advocate which may well undermine the interests of his or her client.

The concluding section of the *Principles of Civility* is entitled "What Advocates are Entitled to Expect of the Judiciary." This section is, of course, of particular interest to me as it will be to all members of the judiciary. In my opinion, these *Principles* represent very reasonable expectations on the part of the bar and the public. Indeed, they accurately reflect the *Principles of Judicial Ethics,* which were recently published by the Canadian Judicial Council.

In conclusion, I strongly endorse and support the ideal that "civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system."

The Honourable R. Roy McMurtry
Chief Justice of Ontario
May 2001

PREAMBLE

Since the initial publication of The Advocates' Society *Principles of Civility for Advocates*, the issue of civility amongst counsel has been a topic of increasing importance. Since the initial publication, several courts have addressed the issue of civility and the responsibility placed on counsel when interacting with other counsel and parties. In *Queen* v. *John Bernard Felderhof*, [2003] O.J. 819, the Court of Appeal for Ontario commented on the importance of civility:

> *"It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forcible advocacy on behalf of a client and is as important in the criminal and quasi criminal context as in the civil context."*

The growing awareness of civility as an important aspect of advocacy has resulted in the *Principles of Civility* being relied upon by courts when discussing the proper conduct of counsel both in and outside of the courtroom. Indeed, in *Baksh* v. *Sun Media (Toronto) Corp.* (2003), 63 O.R. (3d) 51, the court relied upon the *Principles of Civility* and the *Rules of Professional Conduct* in awarding costs on a substantial indemnity basis for a motion where counsel's conduct was considered improper. In doing so, the court said, "Counsel who appear before Ontario Courts are expected to comply with the *Rules of Professional Conduct*, and in my view should also adhere to the *Principles of Civility*, or risk sanctions by the court."

In *Penney* v. *Penney*, [2006] O.J. No. 4802, unsubstantiated allegations of misconduct and dishonesty, made by one advocate against another, attracted costs being awarded directly against the advocate making the allegations. In arriving at her decision, Justice Pardu cited both the *Rules of Professional Conduct* published by the Law Society and the *Principles of Civility*. The trend appears to be that the *Principles* will be considered by the courts in assessing the conduct of counsel which, in exceptional cases, may result in increased cost awards.

Whether conduct contrary to the *Principles of Civility* that takes place outside the courtroom is capable of judicial sanction is less clear. In *Close Up International Ltd.* v. *1444943 Ontario Ltd.*,[2006] O.J. No. 4225, the court considered communication between the parties outside of the court that was condescending and personally disparaging of opposing counsel. While the court indicated that there was no place for such comments, it did not order sanctions since the court indicated that it was not the function of a judge or a master "to police counsel's unprofessional behaviour out of court."

The *Principles of Civility* may be applicable, not only to lawyers but also to anyone coming before the court. In *Radonicich* v. *Reamey*, [2008] O.J. No. 2210, the court determined that the conduct of a self-represented litigant was inappropriate and advised him to abide by the *Principles of Civility*.

In communicating on the *Principles*, the court stated:

"As these principles take the form of guidelines rather than rules, per se, *I see no reason why self-represented litigants should not be expected to conduct themselves in a similar manner when dealing with counsel. These principles are really about mutual respect, something that all parties and counsel who come before this court should be entitled to expect from one another. Membership in the Law Society of Upper Canada should not be a requisite for such an expectation."*

At its core, it is this notion of respect that underlies the *Principles of Civility* respect for the system of justice and the players in the system. This is why civility is especially important for those of us who practice before the courts. What we must show our community is that we ourselves have enough confidence in the rule of law and the administration of justice to accord a place of respect to the competing view. In short, the *Principles* are based on some of the most foundational of the values of our legal system.

Institute for Civility and Professionalism
April 2009

The PRINCIPLES

RELATIONS *with* OPPOSING COUNSEL

General Guidelines

1. Advocates should always be courteous and civil to counsel engaged on the other side of the lawsuit or dispute. It is their responsibility to require those under their supervision to conduct themselves with courtesy and civility as well.

2. Ill feelings that may exist between clients, particularly during litigation, should not influence advocates in their conduct and demeanour toward opposing counsel.

3. Advocates should always be honest and truthful with opposing counsel.

4. Advocates should conduct themselves similarly towards lay persons lawfully representing themselves or others.

Cooperating *with* Opposing Counsel

5. Advocates should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with opposing counsel whenever practicable.

6. When advocates are about to send written or electronic communication, or take a fresh step in a proceeding which may reasonably be unexpected, they should provide opposing counsel with some advance notice where to do so does not compromise a client's interests.

Communications *with* Opposing Counsel

7. Advocates should respond promptly to correspondence and communications, including electronic communications, from opposing counsel.

Promises, Agreements, Undertakings *and* Trust Conditions Given *to* Opposing Counsel

8. Advocates should fulfill or comply with all promises to, or agreements with, opposing counsel, whether oral or in writing.

9. Advocates should not give any undertaking that, to their knowledge or belief, cannot be fulfilled and should fulfill every undertaking given. Undertakings should be confirmed in writing and should be unambiguous in their terms. Undertakings should also be fulfilled as promptly as circumstances permit.

10. If an advocate giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom an undertaking is given is entitled to expect that the advocate will honour it personally.

Cooperating *with* Opposing Counsel *on* Scheduling Matters

11. Advocates should consult opposing counsel regarding scheduling matters in a genuine effort to avoid conflicts.

12. In doing so, advocates should attempt to accommodate the calendar conflicts of opposing counsel previously scheduled in good faith for hearings, examinations, meetings, conferences, vacations, seminars or other functions.

13. Advocates should agree to reasonable requests for scheduling changes, such as extensions of time, provided the client's legitimate interests will not be materially and adversely affected.

14. Advocates should not attach unfair or extraneous conditions to extensions of time. However, they are entitled to impose conditions appropriate to preserve rights that an extension might otherwise jeopardize. Advocates may also request reciprocal scheduling concessions but should not unreasonably insist on them.

15. Advocates should promptly notify opposing counsel when hearings, examinations, meetings or conferences are to be cancelled or postponed.

Agreement *on* Draft Orders

16. When a draft order is to be prepared to reflect a Court ruling, advocates should draft an order that accurately and completely reflects the Court's ruling. They should promptly prepare and submit a proposed order to opposing counsel and attempt to reconcile any differences before the draft order is presented to the Court.

Conduct That Undermines Cooperation *among* Advocates

17. Advocates should avoid sharp practice. They should not take advantage of, or act without fair warning to opposing counsel, upon slips, irregularities, mistakes or inadvertence.

18. Advocates should not falsely hold out the possibility of settlement as a means of adjourning a discovery or delaying a trial.

19. Subject to the Rules of Practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.

20. Advocates should not record conversations with opposing counsel without consent of all persons involved in the conversation.

Conduct *at* Examinations *for* Discovery

21. Advocates, during examination for discovery, should at all times conduct themselves as if a judge were present. This includes avoiding inappropriate objections to questions, discourteous exchanges amongst counsel and excessive interruptions to the examination process.

22. Advocates should not ask repetitive or argumentative questions or engage in making excessive or inappropriate self-serving statements during examination for discovery.

23. The witness who is being examined should be treated with appropriate respect and should not be exposed to discourteous comments by opposing counsel or their clients.

24. Advocates should instruct their witnesses as to the appropriate conduct on examination and the requirement for courtesy and civility to opposing counsel and their clients.

25. Advocates should not engage in examinations for discovery that are not necessary to elicit facts or preserve testimony but rather have as their purpose the imposition of a financial burden on the opposite party.

Comments Made *about* Opposing Counsel

26. Advocates should avoid ill-considered or uninformed criticism of the competence, conduct, advice, appearance or charges of other advocates; however, they should be prepared, when requested, to advise and represent a client in a complaint involving another advocate.

27. Advocates should not attribute bad motives or improper conduct to opposing counsel, except when relevant to the issues of the case and well-founded. If such improper conduct amounts to a violation of applicable disciplinary rules, however, advocates should report such conduct to the appropriate professional disciplinary authority.

28. Advocates should avoid disparaging personal remarks or acrimony toward opposing counsel.

29. Advocates should not ascribe a position to opposing counsel that they have not taken, or otherwise seek to create an unjustified inference based on opposing counsel's statements or conduct.

Accommodating Requests *from* Opposing Counsel

30. Advocates, and not the client, have the sole discretion to determine the accommodations to be granted to opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights. This includes, but is not limited to, reasonable requests for extensions of time, adjournments, scheduling of events, and admissions of facts. Advocates should not accede to the client's demands that they act in a discourteous or uncooperative manner toward opposing counsel.

31. Advocates should abstain from obstructing any examination or court process.

32. Subject to applicable practice rules, advocates should give opposing counsel, on reasonable request, an opportunity in advance to inspect all evidence or all non-impeaching evidence.

COMMUNICATIONS *with* OTHERS

Communications *with* Other Parties *and* Witnesses

33. Advocates should not communicate upon, attempt to negotiate, or compromise a matter directly with any party who is represented by counsel except through or with the consent of that counsel.

34. Advocates may tell any witness that he or she does not have any duty to submit to an interview or to answer questions posed by opposing counsel, unless required to do so by judicial or legal practice; however, advocates should not advise a witness to evade or ignore service of a summons.

35. Advocates should always be courteous and civil in their communications with witnesses.

Communications *with* the Judiciary Outside *of* Court

36. As a general principle, unless specifically provided in the Rules of Practice, a Practice Direction or a Notice to the Profession, advocates should not communicate directly with a judge out of court about a pending case, unless invited or instructed to do so by the court.

37. Advocates should not contact a judge in regard to administrative matters, unless otherwise invited or instructed by the judge. Requests to schedule urgent matters should be made through the court office to the scheduling coordinator or an administrative judge. Other matters such as management, scheduling, etc. should be arranged through the judge's assistant.

38. Prior to a hearing, when dealing with process and procedure, advocates who wish to communicate with a judge should do so through the judge's assistant and advise whether opposing counsel has been notified and whether consent to the communication has been obtained. The judge will then determine the appropriate manner of receiving the communication and advise counsel. Advocates should respond promptly to a request from opposing counsel for permission to communicate with the court or the judge.

39. Advocates should not contact a presiding judge about the case during the course of a hearing unless invited to do so.

40. Unless invited or permitted by the judiciary, correspondence, e-mail or voicemail between advocates should not be copied to the court.

41. Telephone conferences that include a judge are court proceedings and, while less formal, are subject to the same principles of civility as any other Court proceeding.

42. Advocates and judges should be able to expect from each other that all their relations will be governed by courtesy and respect. While advocates and judges who know each other outside of the proceedings may be cordial in their relations when in court or chambers, neither should exhibit a level of informality which could give rise to an appearance of special consideration.

TRIAL CONDUCT

Trial Preparation

43. Advocates should not attempt to handle a trial or matter that they are not by experience or training competent to do. Nor should they attempt to handle a trial or matter without preparation appropriate to the circumstances.

44. Advocates should cooperate with other counsel in the timely preparation of a trial brief of documents to facilitate the management of documentary evidence at trial by the court, witnesses and counsel.

45. Advocates should cooperate in the timely exchange with opposing counsel of any required witness lists and witness "will-say" statements.

46. If adjournment is sought, advocates should provide as much notice as possible to the court and other counsel, together with the reason the adjournment is requested.

47. Advocates should avoid hostile and intemperate communication amongst themselves at all times, particularly close to trial when stress levels are high. Such communication will only deteriorate further during the trial and adversely affect the administration of justice in the case.

During Trial

48. Advocates should introduce themselves to the court staff at the opening of trial, if not already known to them. The court staff should be treated with appropriate courtesy and respect at all times.

49. When addressed by the judge in the courtroom, advocates should rise. When one advocate is speaking, the other(s) should sit down until called upon. Advocates should never remain with their back turned when the judge is speaking.

50. During trial, advocates should not allude to any fact or matter which is not relevant or with respect to which no admissible evidence will be advanced.

51. Advocates should not engage in acrimonious exchanges with opposing counsel or otherwise engage in undignified or discourteous conduct that is degrading to their profession and to the court.

52. During trial, advocates should not make any accusation of impropriety against opposing counsel unless such accusation is well-founded and without first giving reasonable notice so that opposing counsel has an adequate opportunity to respond.

53. Objections, requests and observations during trial should always be addressed to the court, not to other advocates.

54. Objections during trial are properly made as follows:

(1) Advocates rise and calmly state, "Your Honour, I have an objection.";

(2) When advocates rise to make an objection or to address the judge, other advocates should be seated until the judge asks for a response. Under no circumstances should two or more advocates be addressing the court at the same time;

(3) The basis for the objection should be briefly and clearly stated. Following a clear statement of the objection, advocates should present argument in support of it and then sit down;

(4) Advocates opposing the objection shall in turn, or as directed by the judge, rise and clearly state their position. They will then make their argument, if any, in support and sit down; and

(5) Usually, advocates who made the objection will then be given an opportunity to reply. The reply should address only those points raised by opposing counsel and avoid repetitious reargument of the issues.

55. When the court has made a ruling on a matter, advocates should in no way attempt to re-argue the point or attempt to cir-

cumvent the effect of the ruling by other means.

56. In the absence of a jury, a question to a witness by counsel should not be interrupted before the question is completed for the purposes of objection or otherwise, unless the question is patently inappropriate.

Evidence

57. Advocates should never attempt to get before the court evidence which is improper. If advocates intend to lead evidence about which there may be some question of admissibility, then they should alert opposing counsel and the court of that intention.

58. Advocates cannot condone the use of perjured evidence and, if they become aware of perjury at any time, they must immediately seek the client's consent to bring it to the attention of the court. Failing that, advocates must withdraw. Nothing is more antithetical to the role of counsel than to advance the client's case before the court, directly or indirectly, on the basis of perjured evidence.

59. Advocates, or any member of their firm, should not give evidence relating to any contentious issue in a trial.

Best Trial Practices

60. In trials where they are acting as counsel, advocates should not take part in any demonstrations or experiments in which their own person is involved except to illustrate what has already been admitted in evidence.

61. Advocates should be considerate of time constraints which they have agreed to or which have been imposed by the court.

62. Advocates should not communicate with a judge following a hearing and during deliberation unless specifically invited or directed to do so. A request for consideration of additional factual or legal material should be brought by motion on notice to opposing counsel.

Any additional legal authority may occasionally be brought to the attention of the judge and opposing counsel at the same time but without further comment by counsel.

If there is a request to make further submissions, the judge will determine whether further submissions are justified.

63. Advocates who are successful in a case should shake the hand of their opponent if it is offered. They should offer theirs if it is not. Advocates who lose the case should not whine. However painful, advocates should offer their hand to their successful opponent. If the case is reserved and they have lost, they should call their opponent with their congratulations.

COUNSEL'S RELATIONS *with* THE JUDICIARY

What Judges Can Expect *from* Advocates

64. Judges are entitled to expect that advocates will treat the court with candour, fairness and courtesy.

65. Judges are entitled to expect that advocates appearing are, by

training and experience, competent to handle the matter before the court.

66. Notwithstanding that the parties are engaged in an adversarial process, judges are entitled to expect that advocates will assist the court in doing justice to the case.

67. Judges are entitled to expect advocates to assist in maintaining the dignity and decorum of the courtroom and their profession and to avoid disorder and disruption.

68. Judges are entitled to expect advocates to be punctual, appropriately attired and adequately prepared in all matters before the courts.

69. Judges may expect advocates to properly instruct their clients as to behaviour in the court room, and any court-related proceedings. Advocates are expected to take what steps are necessary to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

70. Judges are entitled to expect that advocates, in their public statements, will not engage in personal attacks on the judiciary or unfairly criticize judicial decisions.

What Advocates Are Entitled *to* Expect *of* the Judiciary

71 Advocates are entitled to expect judges to treat everyone before the courts with appropriate courtesy.

72. Advocates are entitled to expect that judges understand that while settlement is always desirable, there are some cases that require judicial resolution, and that in balancing interests, neither advocates nor the parties should be unduly urged to settle in such cases.

73. Advocates are entitled to expect judges to maintain firm control of court proceedings and ensure that they are conducted in an orderly, efficient and civil manner by counsel and others engaged in the process.

74. Advocates are entitled to expect that judges will not engage in unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour.

75. Advocates are entitled to expect judges, to the extent consistent with the efficient conduct of litigation and other demands on the court, to be considerate of the schedules of counsel, parties and witnesses when scheduling hearings, meetings or conferences.

76. Advocates are entitled to expect judges to be punctual in convening all trials, hearings, meetings and conferences. If judges are delayed, they should notify counsel when possible.

77. Advocates are entitled to expect judges to endeavour to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness.

78. Advocates are entitled to expect judges to use their best efforts to ensure that court personnel under their direction act civilly towards counsel, parties and witnesses.

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The *Principles of Civility for Advocates* were initially created in 2001 by a committee of The Advocates' Society. The *Principles* were updated in 2009 by members of the Society's "Institute for Civility and Professionalism."

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