



lawyer incivility

How clients – and the bar – pay the consequences

The perception that the legal profession is becoming less civil has attracted widespread comment – from the judiciary to legal associations to regulatory bodies. The common concern: the potentially damaging consequences of a lack of civility on the individual matter, on the lawyer-client relationship (and on the quality of the service that the lawyer provides the client) and, ultimately, on the reputation of the bar as a whole.

In 2000, The Advocates' Society shouldered some of the responsibility for turning the tide by creating a set of Principles of Civility. Despite lacking the force of law, the widely-praised principles have been cited not only

by Canadian judges, but also in judicial systems internationally.

Much has been written about the impact of incivility on the administration of justice and on the public image of the profession. But as Mark Lerner, president of the The Advocates' Society explained during a recent interview, incivility "ultimately comes back to the client" who must live with the consequences of a lawyer's conduct, both in court and at other stages of legal proceedings.

LAWPRO: Some lawyers suggest that clients are partly to blame for lawyer incivility. Do clients urge lawyers to be aggressive or uncivil?

Mark Lerner: Sometimes clients may be behind it: Some clients, particularly in matrimonial law, want lawyers to be "gunslingers." But lawyers need to be able to withstand that kind of pressure. Lawyers need to manage client expectations; and by expectations, I mean not only expectations about results, but also expectations about the lawyer's style.

LP: What can lawyers do to manage client expectations?

Lerner: I tell my clients: "my role is to resolve a dispute." A lawyer should not be a puppet to the client's wishes. The lawyer is a professional adviser.



Mark Lerner

Sometimes a client may suggest that a lawyer is not being difficult enough. But if you're pushing back just to push back – or just to irritate the other side – it's going to have a negative impact. I said to one client [who had requested a more aggressive stance in his employment law matter] "you're still working without restrictions. If you want to be difficult, these are the possible consequences: You may lose your job."

If the client wants a scorched-earth policy, the lawyer needs to explain that there are consequences that will flow from that.

LP: What are some of the potential consequences of a lawyer's uncivil conduct?

Lerner: It affects the way lawyers are viewed by opposing counsel, and the way they're dealt with by judges. Lawyers talk. Judges talk. That kind of reputation gets around.

Nobody has ever been successful just by being a bully. Some lawyers come in all guns blazing: I've seen it myself, and I've never understood it. I don't know whether it's a lack of self-esteem, or whether it's a lack of mentoring in the early years of practice, or whether they just think that that's the way lawyers should act based on television. But there are levels of professionalism and civility that need to be maintained. You can be firm, but also be fair.

LP: Can mentors help lawyers learn to be civil?

Lerner: It depends on what the mentor is like. Lawyers who aren't exposed to good mentors or who don't observe senior counsel demonstrating an appropriate tone of civility don't always learn appropriate conduct. Mentors can make a difference.

LP: Does lawyer incivility tend to prolong litigation or negotiations?

Lerner: Absolutely. I think that being inflexible, not being accommodating, bringing unnecessary motions, taking unreasonable positions without appropriate grounds, just for spite – it all ultimately comes back to hurt the client.

LP: Why is discovery such a common context for civility problems?

Lerner: There is no judge or referee present. You've got your client sitting right beside you, watching you perform. If the other lawyer is being aggressive, you may feel like you have to rise to the bait, because the client is right there, measuring your performance. But you can't "pick up every nugget on the road."

LP: What do you mean?

Lerner: If you don't pick your battles, you're not doing your job. Experience, temperament, personality – and more importantly, judgment – should remind you where to draw the line.

LP: If you could give one piece of advice to lawyers about how to avoid pitfalls in relationships with clients, what would it be?

Lerner: If lawyers start to develop a relationship of confidence and trust with their clients right from the first minute that the lawyer is retained, it will go a very long way toward eliminating complaints to the Law Society or lawsuits against the lawyer.

It's very difficult, if not impossible, to begin to work on the lawyer-client relationship halfway through the litigation. Ultimately, the lawyer is going to want to make a recommendation to a client, or take instructions from the client; but if the client doesn't have any confidence in, or respect for, the lawyer, it's very difficult to develop that later on. Confidence and trust are absolutely fundamental. First impressions really do count.

Ed. note: The Principles of Civility are available on The Advocates' Society website at: www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf. practicePRO's *Managing a Mentoring Relationship* booklet is available at www.practicepro.ca/mentoringbooklet. ■

The claims consequences

At LAWPRO, we've seen a growing proportion of incivility allegations cropping up in claims. For example, lawyers may find themselves personally liable to pay a party's costs under Rule 57.07 (*Rules of Civil Procedure*) where the court has found that the lawyer's actions contributed to running up the bill.

Incivility can also lead to other consequences. The client's case may be prejudiced because the lawyer is unfavourably viewed by a jury; or a prospect of settlement may evaporate in the face of a lawyer's rigid posturing. Finally, a court may make an order designed to rectify an abuse of process: For example, an order terminating discoveries, or dismissing motions deemed excessive. It's not difficult to understand that these consequences of uncivil behaviour often culminate in a claim against the lawyer.

Here are some consequences of incivility that LAWPRO has noted:

Self-represented lawyer must still behave like a lawyer

While representing himself in a defamation action against a publisher, a lawyer made "intemperate" statements about the defendant organization in his pleadings, including accusing it of "evil profiling." In correspondence with the defendant's counsel, he accused them of sharp practice, and suggested that they were personally motivated to ruin or embarrass him. The court found that the lawyer's statements violated Rule 6.03 of the *Rules of Professional Conduct*, and ran contrary to Principle 27 of the Principles of Civility published by The Advocates' Society, which provide that a lawyer should not: "...attribute bad motives or improper conduct to opposing Counsel, except when relevant to the issues of the case and well-founded."

In dismissing the litigation due to the plaintiff's non-compliance with certain court

orders, the court ordered that the plaintiff pay costs on a substantial indemnity scale, but only for the motion in which the inappropriate comments were made.

The lawyer protested that he was appearing not as counsel, but as a self-represented litigant, and so should not be subject to punitive cost awards designed to curb lawyer misbehaviour. The court disagreed, holding that "...a lawyer who is representing himself is still acting as a lawyer (as well as a litigant) and is bound by the rules that apply to lawyers."

Civility to clients is at least as important as civility to members of the justice system

In another case, the discipline committee of the Law Society of Upper Canada considered seven separate allegations of professional misconduct made against a lawyer.

Three of the five allegations related to the lawyer's relationship with clients. The first two centered on the tone of a letter sent to the client in an attempt to collect fees. In the letter, the lawyer made a racist remark about the client and threatened criminal proceedings if the client failed to pay the lawyer's bill.

The final allegation described the lawyer's refusal, after being removed as the solicitor of record, to transfer the client's file to the successor lawyer. The Law Society found that all of these actions constituted professional misconduct. In addition to the penalty imposed by the Law Society, a successful claim was made against the lawyer's malpractice insurance.

In our experience, incivility to clients is an important trigger for claims. Even though the claim may ultimately be framed in negligence, it is not uncommon for the

claim to be filed in reaction to an incident of incivility. As noted by Mark Lerner, establishing a relationship of mutual respect and trust at the outset of the lawyer-client relationship can prevent much misery further down the road.

Rule 57.07 intended not to punish, but to compensate

An important message about the purpose of Rule 57.07 (costs against a lawyer) was reinforced in the judge's reasons in a case that ended up in an insurance claim.

In this case, the court found that while the lawyer's deportment was quite civil (with one minor exception), the lawyer was ill-prepared for the litigation. His weak grasp of evidence law and the *Rules of Civil Procedure* led to considerable time and effort spent by opposing counsel to address matters (for example, the testimony of "experts" that the court ultimately refused to qualify as experts) that never amounted to anything. In characterizing the lawyer's case as "a moving target," the court found that the lawyer's lack of preparation increased the costs for the other side, justifying a Rule 57.07 order. The court made it clear that, as established in *Walsh v. 1124660 Ontario Ltd.* ([2007] O.J. No. 639, Lane J.), Rule 57.07 is designed not to discipline lawyers, but to compensate aggrieved parties for wasted costs.

Whether or not it flows from incivility, fighting a Rule 57.07 order often means the lawyer must make an insurance claim to cover not only the costs ordered in the litigation, but also the lawyer's own defence costs.

The bottom line here: Being professional means not only being civil, but also being prepared – a duty lawyers owe not only to their clients, but also to opponents and to the court. ■

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