Judicial Sanction of Uncivil and Unprofessional Conduct

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Much has been said and written in recent years about the importance of civility and professionalism from a normative standpoint: lawyers owe a moral and ethical duty to treat the litigation process and the actors interested therein with a suitable degree of respect, all of whom, lawyers included, benefit as a result of the collegial and effective atmosphere that results from a civil, professional approach. Conversely, if incivility and disrespect persist, public regard for the justice system is threatened, cases become mired down, and lawyers are forced to endure toxic work environments.

At times, deviating from the norms of civility and professionalism can have more direct, immediately tangible consequences. Perhaps the most obvious is the threat of disciplinary proceedings before the Law Society. But direct consequences are not limited to the realm of administrative sanction: where misconduct has a practical impact on the litigation process, courts can and will respond in ways that sanction the offending lawyer, his or her client, or both.

This paper addresses the question of how the courts can and do address incivility and unprofessionalism. Specifically, it reviews what conduct the courts considers uncivil or unprofessional, the circumstances under which they will order sanctions in response to such conduct, and the types of sanctions that are most commonly seen as appropriate.

What Conduct is Uncivil or Unprofessional?

The courts have overlapping inherent and statutory jurisdiction to sanction uncivil and unprofessional conduct by counsel.[1] But how are counsel or members of the bench to identify conduct that crosses the line? Are there substantive legal rules of civility and professionalism that courts can enforce? Or is improper behaviour worthy of sanction to be determined by a vague "I know it when I see it" standard?

While there are no precise legislated standards, there are specific enumerated norms developed within the Ontario litigation bar to which members of the bench and bar can and do look for a delineation of the bounds of proper behaviour.

In 2001, the Advocates' Society published the *Principles of Civility for Advocates* ("*Principles of Civility*"), a pamphlet setting out 78 practical do's and don't's of civil conduct. In 2009, the Advocates' Society and the newly established Institute for Civility and Professionalism supplemented these with the *Principles of Professionalism for Advocates* ("*Principles of*

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[1] For a detailed discussion of the sources and scope of this jurisdiction, see Justice Perell 2008 paper, "The Civil Law of Civility" (2008), presented at the Law Society's *10th Colloquium on the Legal Profession* and currently available online at http://www.lsuc.on.ca/media/tenth_colloquium_perell.pdf.

Professionalism", collectively, the *Principles*).[2] While no list of principles can be exhaustive, this pamphlet addresses most common complaints. Although published by a private organization and therefore does not have formal legal force, the *Principles* have been broadly and repeatedly endorsed by commentators, masters and judges.

Etobicoke Noodles Inc. v. Rajah, [2002] O.J. No. 5157 at paras. 2 and 50 (Master) was among the first rulings to consider the status of the *Principles of Civility* after its release. In that case, Master Haberman observed that the *Principles of Civility* do not have legal force, but, noting then-Chief Justice McMurtry's endorsement of the *Principles of Civility* in the pamphlet's Introduction (as Chief Justice Winkler has since endorsed the *Principles of Professionalism*), used them to identify and classify behaviour that was "so lacking professionalism and fair play that the court must demonstrate its disapproval in a tangible way."

In *Lisik v. Personal Insurance Co. of Canada*, [2006] O.J. No. 4816 at paras. 26-29 (S.C.J.), Justice David Brown developed a theory that imports the *Principles* into the interpretation of the *Rules of Civil Procedure*. That theory contains three propositions:

1. Application and interpretation of *Rules of Civil Procedure* are informed by, *inter alia*, ethical norms.
2. Therefore, the *Rules of Professional Conduct* "guide" the application of the *Rules of Civil Procedure*.
3. The *Principles of Civility* fit into this scheme via Rule 4.01(1) of the *Rules of Professional Conduct*, which requires lawyers to "represent the client resolutely and honourably within the limits of the law…," – the *Principles of Civility* "sets out many of the principles of honourable conduct expected of barristers in this province."

In other words, Brown J. endorsed the *Principles of Civility* as norms of conduct to be borne in mind when assessing compliance with the *Rules of Civil Procedure*.[3] In *Lisik*, one party obtained default judgment after its counsel advised that he would not do so without prior notice. Although the default judgment complied with the strict wording of the *Rules*, Brown J. criticized counsel's violation of Principle 6 of the *Principles of Civility*, which provides,

> When advocates are about... to 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.

As a result, Brown J. awarded elevated costs against the party who had obtained the judgment, notwithstanding that the motion to set it aside proceeded on consent.

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[2] The *Principles* are available on the Advocates' Society's website at http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf.

[3] *Lisik* was decided prior to the publication of the *Principles of Professionalism*, but it would seem that Brown J.'s reasoning applies to those as well.

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Finally, the Superior Court of Justice maintains a webpage entitled "Best Practices for Civil Applications and Motions" (http://www.ontariocourts.on.ca/scj/en/civil/bestpractices.htm)," on which it states:

> The Court expects counsel to conduct applications and motions having regard to the *Principles of Professionalism for Advocates* and the *Principles of Civility for Advocates* published by The Advocates' Society, found at: http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf

When will Uncivil or Unprofessional Conduct Attract Court Sanction?

The Preamble to the *Principles of Civility* observes, "Whether conduct contrary to the *Principles of Civility* that takes place outside the courtroom is capable of judicial sanction is less clear." As a general rule, the courts will leave the task of addressing uncivil and unprofessional conduct to the Law Society, but can and will intervene if the conduct affects the proper or efficient conduct of a proceeding.

Master Dash's decisions in *Baksh v. Sun Media (Toronto) Corp.*, (2003), 63 O.R. (3d) 51 and *Close Up International Ltd. v. 1444943 Ontario Ltd.*, [2006] O.J. No. 4225 provide a good illustration of the distinction. In both cases, counsel for one party made rude, disparaging comments about opposing counsel. Master Dash held that an award of costs on a substantial indemnity scale was an appropriate response in *Baksh* but not in *Close Up International*, on the rationale that in the former case, the disparaging comments were made in court submissions in an effort to sway the Master's ruling, while in the latter the comments were limited to out-of-court correspondence.

Similarly, in *Kordic v. Bernachi*, [2007] O.J. No. 3212 at paras. 68-70 (S.C.J.), aff'd 2008 ONCA 282, Ferguson J. declined to order elevated costs in response to rude and insulting comments in correspondence between counsel, on the reasoning (at paras. 69-70) that:

> I believe the court should generally leave it to the Law Society to sanction unprofessional conduct of counsel outside the courtroom unless it has increased costs of the proceeding or has constituted a threat to the proceeding or was a contempt of court… I leave it to the Applicant and her counsel as to whether they wish to refer this matter to the Law Society.

In *Kobre v. Sun Life Assurance Co. of Canada*, [2005] O.J. No. 4235 (Master), the plaintiff moved for the re-attendance for discovery of the defendants' representative at the defendant's expense. When asked at the hearing about his rude and obstructionist behaviour at the previous examination, defendant's counsel argued that the Law Society, not the court, was the proper forum to address any alleged breaches of the *Rules of Professional Conduct*. Master MacLeod granted the order sought, observing (at paras. 18-19):

> The fact that conduct that is unacceptable to the court might also be a matter for the Law Society does not in any way disentitle the court from dealing with it. Discovery is a process pursuant to the Rules of Court and it is under court supervision. Barristers and Solicitors are officers of this court. They are liable to answer to the court for the manner in which they are conducting the litigation and that includes conduct of such procedures as discovery or documentary production that do not take place in the court room.
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> Government of its members is of course the province of the Law Society and breach of the Rules may attract professional discipline. That does not mean that the Rules will not inform the decisions of the court nor that the court is powerless to enforce appropriate conduct in matters before the courts. The standard expected by the court of its officers is a distinct question from the question of whether or not the governing body should become involved. Certainly the court is unlikely to countenance a standard lower than that expected by the Society. [*Citation omitted*] The distinction however is that the Law Society is concerned to protect the public by promulgating and enforcing standards of conduct. The court for the most part is only concerned with the particular matter before it.

In addition to imposing sanctions through orders, judges and masters have considerable discretion in controlling uncivil or unprofessional behaviour by counsel in the courtroom, a point the Court of Appeal has made in dismissing appeals grounded on assertions of either inadequate or over-reaching intervention. Judges and masters are free to intervene to scold and correct uncivil behaviour so long as that intervention does not rise to a level that would give rise to a reasonable apprehension of bias, but are not obligated to intervene unless the behaviour of counsel threatens trial fairness.

Thus, in *Authorson (Litigation Guardian of) v. Canada (Attorney General)* (2002), 161 O.A.C. 1, 32 C.P.C. (5th) 357 at paras. 46-54 (Div. Ct.), the Divisional Court dismissed the government's appeal from a class action case management judge's refusal to recuse himself for a reasonable apprehension of bias after he yelled at Crown counsel during a case conference, on the reasoning that counsel had it coming.

The incident at issue arose after Crown counsel had been granted a four-month adjournment on an undertaking to obtain expert evidence as to damages, based on a seemingly undisputed class definition. He then obtained an opinion based on a different class definition it intended to assert, without advising opposing counsel or the judge and without informing them of his new theory of the case. As the Divisional Court put it, when the case management judge learned of this at a case conference, he "bluntly and forcefully reprimand[ed] the defence team. It may be that he used language which with the benefit of hindsight and calmer waters should not have been used, or that we would not have used." Nevertheless, the Divisional Court found:

> It is of course the counsel of perfection that judges ought not to let anything surprise them and that they should act calmly and dispassionately, no matter what happens and no matter how aggravating the activities and behaviour of others. Notwithstanding that we are of the view that the Judge here exhibited an

> understandably human response... Under these circumstances we would think the reasonable and fully informed person would understand the human reaction of the Judge and further would not fault the Judge for so reacting... Rather that observer would expect the Judge to appropriately reprimand Crown counsel.

More recently, the Court of Appeal has affirmed that "[i]solated expressions of impatience or annoyance by a trial judge as a result of frustrations, particularly with counsel, do not of themselves create unfairness."[4]

The Court of Appeal's ruling in *R. v. Felderhof* (2003), 68 O.R. (3d) 481 at paras. 78-97 demonstrates the extent of judicial discretion *not* to intervene in response to uncivil conduct. In that now infamous case, the Ontario Securities Commission ("OSC") was prosecuting a senior officer of Bre-X charged with insider trading and authorizing or acquiescing in misleading public statements. Counsel for the OSC applied mid-trial to discontinue trial and start over before a different judge on the argument that the trial judge had lost jurisdiction for failing to curb repeated, particularly egregious uncivil comments made by counsel for the defence both in the courtroom and in his written submissions. Affirming the application judge's dismissal of the application, the Court of Appeal held that judges have broad discretion to manage their courtrooms, and that jurisdiction is not lost by a failure to curb uncivil conduct unless that conduct prevents a fair trial.

What Types of Sanctions Will the Court Impose?

Where uncivil or unprofessional conduct impacts the conduct of a proceeding, courts will respond with sanctions appropriate to the conduct in issue. Sanctions can include costs awards against the offending lawyer's client, costs awards against the lawyer personally, the removal of gains obtained in a proceeding through sharp conduct, and even the constraint of a party's examination rights.

1. Costs Awards against the Offending Lawyer's Client

The Preamble to the *Principles of Civility* observes, "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."

A review of the case law proves this observation accurate: the most common judicial response to uncivil conduct is to vary the costs award that would ordinarily follow the result. Where counsel for the unsuccessful party has conducted itself inappropriately, courts have elevated the amount

[4] *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47, 265 O.A.C. 247 at para. 243, leave to appeal to S.C.C. ref'd, 2010 S.C.C.A. No. 91.

of costs payable to the successful party;[5] where the conduct of counsel for the successful party has been deemed worthy of sanction, courts have reduced the costs payable to that party, refused to award costs, or even awarded costs to the unsuccessful party.

Many of the *Principles* have been cited by courts awarding costs sanctions. Those whose violation can most obviously impact court proceedings, and which have a corresponding tendency to attract costs sanctions (often in rulings explicitly citing the Principles), include Principles 5 (avoiding unnecessary motion practice through cooperation),[6] 6 (advance notice of a reasonably unexpected step),[7] 7 (prompt response to correspondence and communications),[8] 11-13 (consultation and accommodation regarding scheduling and agreeing to reasonable requests for schedule changes),[9] and 19 (advance notice of default or dismissal).[10] Courts ordering costs sanctions often also take into account violations of the *Principles* that may not affect the conduct of the proceeding but are committed in conjunction with other violations that do, such as uncivil communications to and about opposing counsel (Principles 1-3 and 26-29) and communication with a judge or master without the opposing party's consent.[11]

For example, in *ABC Metal Products, supra*, the successful party on a motion to determine the order of examinations for discovery failed to ask for a case conference early on that would have avoided the dispute on the motion, was rude in correspondence, and repeatedly adjourned examinations and delayed his productions. Citing these improprieties and Principle 5 (avoiding unnecessary motion practice) of the *Principles of Civility*, Master Haberman declined to order costs notwithstanding the uncivil lawyer's success on the motion.

In *Naumovich v. Edwards*, *supra*, the plaintiff sought costs on a substantial indemnity basis against the defendant or her solicitor personally, after defendant's counsel failed to attend a refusals motion. Plaintiff's counsel had brought the refusals motion soon after demanding answers to undertakings and refusals despite the respondent's counsel's advice that she was considering the request and would respond shortly, and proceeded with the motion despite counsel's advice that she was unavailable on the date unilaterally scheduled. Ultimately, another lawyer from respondent's counsel's firm was able to attend the motion several hours late, and agreed to most of the relief requested. Justice Paisley awarded costs of the costs hearing against the plaintiff, quoting much of the Preamble and Introduction to the *Principles of Civility*, as well

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[5] The general rule is that the conduct of a party or its counsel will warrant an award of costs on a substantial indemnity basis only if that conduct is "reprehensible" and deserving of chastisement: *McBride Metal Fabricating Corp. v. H&W Sales Company Inc.* (2002), 59 O.R. (3d) 97 at paras. 38-39 (C.A.).

[6] For example, *Kostruba and Sons Inc. v. Pervez*, 2011 ONSC 2411 at paras. 39-40 and 66 (S.C.J.); *ABC Metal Products Inc. v. Franzem*, [2003] O.J. No. 4077 at paras. 2 and 8 (Master); *Naumovich v. Edwards*, [2004] O.J. No. 1472 at para. 35 (S.C.J.); *Etobicoke Noodles*, *supra* at paras. 36-41.

[7] For example, *Lisik*, *supra* at paras. 28-31; *Etobicoke Noodles*, *supra* at paras. 36-41.

[8] For example, *Kostruba and Sons Inc. v. Pervez*, *supra* at paras. 39-40 and 66 (S.C.J.); *Chapell v. Marshall Estate* (2001), 15 C.P.C. (5th) 54 at paras. 30-34 (Ont. S.C.J.); *Etobicoke Noodles*, *supra* at para. 42.

[9] For example, *Plackmann v. 1399436 Ontario Inc. et al*, [2007] O.J. No. 2463 at para. 5 (Master); *Etobicoke Noodles*, *supra* at paras. 36-41; *Penney v. Penney*, [2006] O.J. No. 4802 (S.C.J.).

[10] For example, *Lisik*, *supra* at paras. 28-31; *Schreiber v. Mulroney*, [2007] O.J. No. 3191 at paras. 7-12 (S.C.J.).

[11] For example, *Plackmann*, *supra* at para. 5; *Etobicoke Noodles*, *supra* at paras. 43-49.

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as Principles 5 (avoiding unnecessary motion practice) and 11-13 (consultation and accommodation regarding scheduling and agreeing to reasonable requests for schedule changes).

Although the *Principles of Professionalism* are generally less directly connected with court processes than the *Principles of Civility*, they have been cited in at least one case applying costs sanctions for their violation. In *Batistella v. Rossi*, 2010 ONSC 6729 at paras. 9-12 (S.C.J.), counsel for the successful party relied on a case that had been overturned, and which he apparently failed to note up. In reducing the costs award to the successful party, Mulligan J. cited Principle 6 under the heading "An Advocate's Duty to the Court" ("Advocates should ensure that the court is apprised of changes in the law and important judicial authority on the legal questions at issue in a proceeding.")

Similarly, in *Kordic v. Bernachi*, *supra*, a case decided before the publication of the *Rules of Professonalism*, Ferguson J. awarded full indemnity costs as a result of misleading and uncited factual submissions in the factum prepared by its counsel, today a violation of Principle 5 under the heading "An Advocate's Duty to the Court" (avoidance of conduct calculated to induce the court to act under a misapprehension of the facts).

Membership in the bar imposes civility requirements even on lawyers appearing as litigants rather than on behalf of a client. In *Baksh v. Sun Media (Toronto) Corp.*, *supra*, Master Dash awarded costs on a substantial indemnity basis against a self-represented lawyer whose defamation action had been struck and who, in the meantime, had made unsubstantiated negative, offensive and prejudicial personal comments about opposing counsel and failed to comply with numerous costs and procedural orders. In making the elevated award, Master Dash stated:

> In my view 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. The court must show its disapprobation of such conduct.

2. Cost Awards against the Offending Lawyer Personally

Rule 57.07(1) of the *Rules of Civil Procedure* and Rule 24(9) of the *Family Law Rules* grant the court statutory authority to impose costs against a lawyer personally where that lawyer has caused costs to be incurred without reasonable cause or to be wasted "by undue delay, negligence or other default."

Such sanctions are rarer than costs against a party, reflecting the recognition of the possibility that awards of personal costs could interfere with the zealous performance of lawyers' duties to their clients and their willingness to bring forward unpopular or difficult cases. The courts however have emphasized the need to balance the duties of a lawyer to the client with their duty to the legal profession and to the courts to be professional and civil. For this reason, lawyers cannot avoid personal costs awards with an argument that they were merely following their client's directions, a point reflected in Principle 30 of the *Principles of Civility* ("Counsel, and

not the client, has the sole discretion to determine the accommodations to be granted to opposing Counsel in all matters not directly affecting the merits of the case or prejudicing the client's rights") and Principle 5 of the *Principles of Professionalism* under the heading "An Advocate's Duty to Clients and Witnesses" ("Advocates should refrain from acting on instructions from a client that are in conflict with their duty to the court, opposing counsel or others").[12]

In *Schreiber v. Mulroney*, *supra* at paras. 26-43, Newbould J., citing Principles 19 (advance notice of default or dismissal) and 30 (accommodations within discretion of counsel, not client), ordered the plaintiff's lawyer 25% liable, jointly and severally with his client, for the full indemnity costs of the defendant's motion to set aside default judgment in circumstances where he had agreed with defendant's counsel not to note the defendant in default. Justice Newbould held that he should be personally liable for costs notwithstanding that his client had instructed him to seek the default.

In *Beardy*, *supra*, Pierce J. awarded costs on a substantial indemnity basis against the plaintiffs' lawyer personally for a pattern of conduct evidencing "disregard for case management directives, for the orderly process of the case, and for professional obligations of courtesy and civility to other lawyers." The lawyer's misdeeds included failing to attend two examinations (one for which the opposing parties had travelled out of town) after great difficulty in their arrangement; failing to return telephone calls; and not responding to letters concerning scheduling.

Similarly, in *Rand Estate v. Lenton*, [2007] O.J. No. 831 (S.C.J.), aff'd 2009 ONCA 251, McGarry, J. awarded costs on a substantial indemnity scale against a lawyer who showed a pattern of inappropriate and unprofessional conduct by using delay tactics, bringing unnecessary motions, being inadequately prepared, failing to appear, presenting arguments that had no merit, being uncivil and discourteous, acting despite a clear conflict of interest and disregarding court orders.

In the case of *Penney v. Penney*, *supra*, the wife's lawyer in a matrimonial matter pursued an order for production against a third party, Canada Post. She was aware that Canada Post wanted to respond, but proceeded without proper notice and without confirming her motion to the court such that it did not appear on the court schedule, causing Canada Post to believe the motion would be adjourned. She also made unfounded allegations of dishonest conduct by counsel for Canada Post. Canada Post successfully moved to set the production order aside, and sought costs against the wife's lawyer personally. Citing a dozen of the *Principles of Civility*, Pardu J. awarded full indemnity costs, with the majority payable by the wife's lawyer, and reported the wife's lawyer to the Law Society. (The wife's lawyer likely did not help her case by filing a complaint to the United Nations alleging that Pardu J. had intercepted phone calls between her and her client.)

Lawyers conducting themselves uncivilly or unprofessionally may find themselves penalized financially even if their conduct does not quite reach the threshold for an award of personal

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[12] *Etobicoke Noodles*, *supra* at para. 35; *Beardy v. The Attorney General of Canada*, [2003] O.J. No. 3940 at para. 71 (S.C.J.); *Schreiber v. Mulroney*, *supra* at paras. 29-30 and 34.

costs: in *Kordic v. Bernachi*, *supra*, Ferguson J. declined to award costs personally against a lawyer who had been rude and condescending to opposing counsel on the basis that his conduct, although inexcusably uncivil, did not interfere with proceedings to a sufficient degree to warrant the award. However, Ferguson J. suggested in his reasons that his client should have his account assessed. Indeed, court criticism of a lawyer's conduct can be a precursor to a claim against the lawyer by his or her client.

Counsel should be wary of over-aggressive pursuit of costs against opposing counsel personally. In *Terrasses Amélie v. J. Stuart Hall and Associates Ltd.*, [2009] O.J. No. 5341, Master MacLeod criticized a motion for costs against a lawyer personally on the basis of incivility (a particularly weak argument on the facts of that case) in the following terms:

> Mr. Doucet's behaviour may not have been perfect. The response in seeking an order under Rule 57.07(1) is disproportionate and unreasonable. There cannot be a more fundamental failure of civility than launching a needless and unreasonable personal attack against opposing counsel.

In the result, Master MacLeod denied the moving party its costs of the underlying motion, and ordered the moving party to pay costs of the Rule 57.07 motion to the respondent lawyers.

Many of the cases involving motions where costs are sought against a lawyer are reported to LAWPRO for consideration. However, lawyers who face sanction by the courts through a costs order because of their incivility may not qualify for coverage under the LAWPRO Policy because the order sought may constitute a penalty or because their conduct rises to the level of a malicious act. (see: LAWPRO Policy Part 1 C).

The cost to LAWPRO of managing these types of claims can become substantial as quite often parties' emotions run high and the allegations of uncivil conduct are hard fought. As mentioned, judicial sanctions against misbehaving lawyers often leads to lawsuits against them by their clients, generating additional costs to LawPRO. In other words, the cost of incivility is ultimately shared among all practising lawyers in Ontario.

3. Unwinding of Gains

The courts will set aside gains obtained in a proceeding through sharp practice. These cases most commonly involve violations of Principles 6 (advance notice of a reasonably unexpected step) or 19 (advance notice of default or dismissal) of the *Principles of Civility*.

Schreiber v. Mulroney, *Lisik* and *Penney v. Penney*, all described above, are three examples. Another is *Battistella v. Italian Home Bakery*, 2011 ONSC 4964 (S.C.J.), in which Brown J. set aside another order obtained in an unprofessional manner, although arguably in compliance with the strict wording of the *Rules of Civil Procedure*.

In that case, the son of a judgment creditor successfully moved to delete a writ of execution filed against a property that had been registered jointly in his name and that of his mother, the judgment debtor. After the writ had been filed, the property was transferred to the son's name alone and he sought consent to have it lifted, which the judgment creditor refused through counsel. The son then commenced an application to delete the writ. He was successful after the judgment creditor did not respond or attend the hearing. He then immediately refinanced the property.

The judgment creditor moved to set aside the deletion order after learning of it some time later. Justice Brown set aside the order on the basis that even if the application record had been served on the judgment creditor as alleged (a fact in dispute on the motion), notice should have been given to its counsel, with whom the son's lawyer had previously discussed deleting the writ (a violation of Principle 6, advance notice of a reasonably unexpected step), and the deletion order should have been served pursuant to Rule 37.07(4), which it never was.

The case of *Etobicoke Noodles*, *supra*, engaged many of the *Principles* and sanctions addressed in this paper. In that case, counsel for the plaintiffs by counterclaim noted the defendants to the counterclaim in default without notice even though their lawyer had advised that she intended to bring a Rule 21 motion to dismiss the counterclaim and that one of the defendants was an undischarged bankrupt. He then misled opposing counsel into thinking he had not done so. Opposing counsel eventually discovered the noting in default and asked for his consent to set them aside, advising at the same time that one of the defendants had never been served. In response, counsel rudely and insultingly refused to set the defaults aside unless unreasonable concessions were made. He also ignored communications from opposing counsel, sometimes returning her letters with handwritten criticisms of her writing but no response to their substance, and he wrote directly to the court to advise that he expected to receive "dirt" that would provide the basis for a future motion to remove opposing counsel from the record.

Master Haberman set aside the defaults and awarded costs on a substantial indemnity basis, payable by the lawyer and his clients jointly. She based her ruling on breaches of numerous *Principles of Civility*: Principles 1 (courtesy and civility towards opposing counsel), 2 (not permitting ill feelings between clients to affect counsel's conduct or demeanour toward opposing counsel), 3 (truth and honesty in dealing with opposing counsel), 5 (avoiding unnecessary motion practice through cooperation), 6 (advance notice of a reasonably unexpected step), 7 (prompt response to correspondence and communications), 19 (advance notice of default or dismissal), 26 (avoiding ill-considered and uninformed criticism of opposing counsel), 27 (avoiding disparaging personal remarks or acrimony toward opposing counsel), and 30 (non-prejudicial accommodations to be determined by counsel, not clients).

4. Constraint of Examination Rights

In some cases, a lawyer's uncivil or unprofessional conduct may prejudice his or her client's procedural rights. Rule 34.14 permits the court to sanction inappropriate conduct at out-of-court examinations, a subject addressed by Principle 21 of the *Principles of Civility* ("Advocates,

during examination for discovery, should at all times conduct themselves as if a judge were present").

Kobre v. Sun Life, *supra*, is an example an order under Rule 34.14 requiring a party re-attend an examination at its own expense due to the rude and obstructionist behaviour of its counsel. But such behaviour can also result in the loss of rights: in *Flying Saucer v. Lick's Leasing*, [2001] O.J. No. 3388 (S.C.J.), Master Haberman denied the plaintiff's motion to compel re-attendance for discovery, brought on an allegation of excessive answering and improper refusals by defence counsel, in part because plaintiff's counsel was rude and condescending to defence counsel at the initial examination.

Conclusion

In the decade since the publication of the *Principles of Civility*, consciousness of the importance of civility and professionalism among members of the bar has grown considerably. Over this period, the *Principles* have emerged as an authoritative set of substantive norms by which incivility and unprofessionalism can be assessed. At the same time, the courts have done their part to ensure that uncivil and unprofessional conduct does not hinder the conduct of proceedings, and that if it does affect proceedings, it is appropriately sanctioned.

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