

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. ■

Nora Rock is corporate writer/policy analyst at LAWPRO.