Advocacy 608 – Ethics and Civility

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What does “Justice” Mean?

Definition of Just: - *Having a basis in or conforming to fact or reason : REASONABLENESS*

-Conforming to a standard of correctness: PROPER

-Acting or being in conformity with what is morally upright or good: RIGHTEOUS

-Being what is merited: DESERVED

-Legally correct

-Miriam-Webster.com

Injustice: An act that causes undeserved injury

Mattie Ross:

Do you need a good lawyer?

Ned Pepper:

I need a good judge!

Ethics in Advocacy

Discussion:

- A wise person once said, if you want justice, got to church. This is a legal system, run by people. The best we get is reasonable.
- If the truth is what you prove, what duty do we have to pursue the truth? Is that our job?
- Does the “Justice System” create “just” results? Does it satisfy the need for justice?
- What is the role of the advocate in maintaining the ‘justice’ of the Justice System?

Minimums

Law Society of Alberta Code of Professional Conduct

- Minimums to not get you disbarred.
- Read 2.1, 5.1, 5.4, 5.6.

Ethics in Advocacy: What does the Code say?

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the **tribunal** with candour, fairness, courtesy and respect.

Commentary:

[1] In adversarial proceedings, the lawyer has a duty to the client to raise **fearlessly every issue**, advance **every argument** and ask **every question**, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of **every remedy** and **defence** authorized by law.

The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' **right to a fair hearing** in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

Continued-

Applies to Courtrooms, boards, tribunals, arbitrations, mediations and any other dispute resolution process.

Commentary continued…

[**3] The lawyer's function as advocate is openly and necessarily partisan.** Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

Outside of the disclosure rules, without notice applications, and the limits in the Code, there is no obligation on an advocate to help the other side!

Further Commentary:

[10] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

What does this limit? Can you object in a Questioning just to fluster the other lawyer? To intimidate? What if there is a legitimate basis for the objection…

5.1-2 When acting as an advocate, a lawyer must not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are **clearly motivated by malice** on the part of the client *and* are brought solely for the **purpose of injuring** the other party;

(b) take any step in the representation of a client that is **clearly** without merit;

(c) **unreasonably** delay the process of the tribunal;

(d) knowingly assist or permit a client to do anything that the **lawyer considers** to be **dishonest or dishonourable**;

(e) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(f) endeavour or allow anyone else to endeavour, directly or indirectly, to **influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate**;

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(g) **knowingly** attempt to deceive a tribunal or influence the course of justice by offering **false evidence**, **misstating facts or law**, **presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct**;

(h) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(i) **knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence** or as a matter of which notice may be taken by the tribunal;

(j) **introduce or otherwise bring to the tribunal's attention facts or evidence that the lawyer knows to be inadmissible**;

(k) make suggestions to a witness **recklessly** or **knowing** them to be false;

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(l) permit or participate in a payment or other benefit to a witness in excess of reasonable compensation;

(m) counsel a witness to give evidence that is untruthful or misleading; **deliberately refrain from informing a tribunal of any relevant adverse authority that the lawyer considers to be directly on point and that has not been mentioned by another party**;

(o) improperly dissuade a witness from communicating with other parties or from giving evidence, or advise a witness to be absent;

(p) **knowingly permit a witness or party to be presented in a false or misleading way** or to impersonate another;

(q) discuss the testimony of a witness with a person excluded by the tribunal during such testimony;

(r) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;

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(s) **needlessly** abuse, hector or harass a witness;

(t) **when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-criminal charge or complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi- criminal charge or complaint to a regulatory authority**;

(u) **needlessly** inconvenience a witness; or

(v) appear before a court or tribunal while under the influence of alcohol or a drug or when it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.

Commentary

the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

– Perringer or Mary Carter Agreement

[2] **Relevant adverse authority**: A decision is relevant where it refers to any point of law on which the case in question might turn. Relevance does not include cases that have merely some resemblance to the case before the court on the facts; it "means cases which decide a point of law" on which the current case depends. With respect to the lawyer's obligation to discover the relevant law, the duty does not extend to searching out unreported cases. The lawyer does have an obligation to bring to the court's attention cases of which the lawyer has knowledge and, as well, the lawyer cannot discharge this duty by not bothering to determine whether there is a relevant authority.

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Lawyers are not obliged to bring forward facts that the other side has omitted to bring to the court's attention. They are not obliged to make the other side's case. They are, simply, obliged to make sure that the court has before it all relevant legal authority, whether helpful or not.

[4] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also Rules 3.2-11 to 3.2-12 and accompanying commentary.

[5] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

5.1-5 (a) Disclosure of Error or Omission

A lawyer must not lead a tribunal, nor assist a client or witness to do so.

(b) Upon becoming aware that a tribunal is under a misapprehension as a result of submissions made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must, subject to Rule 3.3 (Confidentiality), immediately correct the misapprehension.

Commentary

[1] If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to Rule 3.7 (Withdrawal from Representation), withdraw or seek leave to do so.

[2] It is an obvious contravention of the rule for an advocate to lie to a tribunal. The rule applies as well, however, to an indirect misrepresentation. For example, a lawyer may not respond to a question from a tribunal in a technically correct manner that creates a deliberately misleading impression.

[3] On the other hand, a lawyer is not required to inform a tribunal of facts that should have been brought forth by opposing counsel. If it becomes apparent that the tribunal is uninformed or misinformed on a factual matter through no fault of the lawyer or the lawyer's client or witness, a lawyer is justified in remaining silent.

Does this get us to Justice?

Continued -

[4] A lawyer has a **duty to correct a misapprehension arising from an honest mistake on the part of counsel or from perjury by the lawyer's client or witness**. It may be a sufficient discharge of this duty to merely advise the tribunal not to rely on the impugned information.

[5] The principle applies not only to statements that were untrue at the time they were made, but to those that were true when made but have subsequently become inaccurate due to a change in circumstance. For example, it may have been represented that a personal injury plaintiff is permanently disabled. If, prior to judgment, the plaintiff's condition undergoes material improvement, the lawyer must, subject to confidentiality, convey this information to the court.

[6] Even if a matter has been judicially determined, the discovery of an error that may reasonably be viewed as having materially affected the outcome may oblige a lawyer to advise opposing counsel of the error. This may be the case notwithstanding that the appeal period has expired, since another remedy may be available to redress the mistake in whole or in part.

[7] Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw.

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

[1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. **A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations.** The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

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[3] Criticizing Tribunals – Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

[4] A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Courtesy and Good Faith

- Who likes dealing with difficult people?
- Do you catch more flies with honey?
- Work hard and be kind?
- Gentleperson Lawyer

Courtesy

5.1-6 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Commentary

[1] Legal contempt of court and the professional obligation outlined here are not identical, and a **consistent pattern of rude, provocative or disruptive conduct by a lawyer**, even though unpunished as contempt, may constitute professional misconduct.

7.2 Responsibility to Lawyers and Others

Courtesy and Good Faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

[1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

[4] A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

7.2-2 A lawyer must not lie to or mislead another lawyer.

Commentary

[1] This rule expresses an obvious aspect of integrity and a fundamental principle. In **no** situation, including negotiation, is a lawyer entitled to **deliberately mislead a colleague**. When a lawyer (in response to a question, for example) is prevented by rules of confidentiality from actively disclosing the truth, a falsehood is not justified. The lawyer has other alternatives, such as declining to answer. If this approach would in itself be misleading, the lawyer must seek the client's consent to such disclosure of confidential information as is necessary to prevent the other lawyer from being misled. The concept of "misleading" includes creating a misconception through oral or written statements, other communications, actions or conduct, failure to act, or silence (See Rule 7.2-5, Correcting Misinformation).

7.2-3

A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.
[1] This rule is directed at sharp practice. It becomes operative when two elements are present: an obvious mistake by opposing counsel, and a benefit flowing from that mistake to which the lawyer's client is clearly not entitled.

[2] **A clerical or arithmetical error is an example of an obvious mistake**. However, an act or omission by another lawyer that appears questionable but that may have involved a conscious exercise of judgment is not a mistake of the kind contemplated by this rule. For example, an opponent's acceptance of an apparently unfavourable contract or settlement offer, or the failure of a Crown prosecutor to raise the criminal record of an accused, may have been the result of careful consideration, including factors of which the lawyer is not aware.

[3] A client has no legal entitlement to a benefit created solely through error. Consequently, it is improper for a lawyer to knowingly proceed on the basis of an incorrect statement of adjustments or a transfer that misdescribes the property intended to be bought and sold. The benefit that would be obtained by the client is unwarranted and without independent legal support.

[4] On the other hand, a defendant in a lawsuit has a legal right to insist that proceedings be brought within a certain period of time. Accordingly, while the missing of a limitation date by plaintiff's counsel may be an obvious mistake, the defendant's lawyer does not violate this rule by allowing the limitation period to expire.

Correcting Misinformation

7.2-5 If a lawyer becomes aware during the course of a representation that:

(a) the lawyer has inadvertently misled an opposing party, or

(b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or

(c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate, then, subject to confidentiality, **the lawyer must immediately correct the resulting misapprehension on the part of the opposing party**.

Commentary
"Subject to confidentiality”

[1] Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw. The terminology used in this rule is to be broadly interpreted. A lawyer may have provided technically accurate information that is rendered misleading by the withholding of other information; in such a case, there is an obligation to correct the situation. In paragraph (c), the concept of an inaccurate representation is not limited to a misrepresentation that would be actionable at law.

[2] See Rule 5.1-5, in respect of correcting misinformation in advocacy settings.

Communications

7.2-6 A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is **abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.**

7.2-7 A lawyer must answer with **reasonable promptness** all professional letters and communications from other lawyers that require an answer, and **a lawyer must be punctual in fulfilling all commitments**.

7.2-8 Subject to Rules 7.2-9 and 7.2-10, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

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7.2-9 Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

7.2-10 A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by another lawyer with respect to that matter.

Commentary

[1] Rule 7.2-8 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. Lawyers should be careful about email communications. For example, if a lawyer copies the client with an email sent to the opposing lawyer, then a response using "Reply to All" may result in an unintended communication by the opposing lawyer with the client. This rule does not prevent parties to a matter from communicating directly with each other.

[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by ignoring the obvious.

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[3] Where notice as described in Rule 7.2-9 has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

[4] Rule 7.2-10 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary, consult the first lawyer unless the client instructs otherwise.

[5] In appropriate circumstances, a lawyer must assist the client in obtaining a second opinion if requested by a client. The lawyer providing the initial advice should respond in a cooperative and positive manner. For example, sufficient information must be provided to the other lawyer upon request to render the second opinion an informed one. A lawyer is not obliged to assist in obtaining a second opinion when the client is attempting to coerce the formulation of a favourable opinion or is acting unreasonably in another respect. However, the obligation to be cooperative and to review objectively and in good faith any second opinion obtained is unaffected.

Groia *v.* Law Society of Upper Canada, 2018 SCC 27, [2018] 1 S.C.R. 772

Groia was accused of being un-civil.

He made personal attacks, sarcastic outbursts and allegations of professional impropriety.

All based on a dispute regarding the OSC's disclosure obligations.

Groia honestly believed his position.

Turned out, he was wrong.

LSUC found him liable of conduct unbecoming and suspended him for 2 months + fine of hearing costs of $247,000.

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SCC allowed the appeal

Duty of Courtesy and Good Faith is based on subjective belief

Affirmed the LSUC methodology for assessing uncivil behavior:

- Factors to consider when assessing a lawyer's behavior:
- Fundamentally fact specific and contextual - Not a stand-alone test

1. What the lawyer said
    1. …prosecutorial misconduct allegations, or other challenges to opposing counsel's integrity, cross the line into professional misconduct unless they are made in good faith *and* have a reasonable basis…In other words, allegations that are *either* made in bad faith *or* without a reasonable basis amount to professional misconduct. [81]
    2. …cannot use a lawyer's legal errors to conclude that his or her allegations lack a reasonable basis [90]
    3. The "good faith" inquiry asks what the lawyer *actually* believed when making the allegations [94]
2. The Manner and Frequency of the Lawyer's Behaviour
    1. Repetitive? Single outburst? Provoked?
3. The Trial Judge's Reaction
    1. Contextual factor

Continued -

[63] **To begin, when developing its approach, the Appeal Panel recognized the importance of civility to the legal profession and the corresponding need to target behaviour that detrimentally affects the administration of justice and the fairness of a particular proceeding. The duty to practice with civility has long been embodied in the legal profession's collective conscience[2] — and for good reason. Civility has been described as "the glue that holds the adversary system together, that keeps it from imploding**": Morden A.C.J.O., "Notes for Convocation Address — Law Society of Upper Canada, February 22, 2001", in Law Society of Upper Canada, ed., *Plea Negotiations: Achieving a "Win-Win" Result* (2003), at pp. 1-10 to 1-11. Practicing law with civility brings with it a host of benefits, both personal and to the profession as a whole. Conversely, incivility is damaging to trial fairness and the administration of justice in a number of ways.

[64] **First, incivility can prejudice a client's cause.** Overly aggressive, sarcastic, or demeaning courtroom language may lead triers of fact, be they judge or jury, to view the lawyer — and therefore the client's case — unfavourably. Uncivil communications with opposing counsel can cause a breakdown in the relationship, eliminating any prospect of settlement and increasing the client's legal costs by forcing unnecessary court proceedings to adjudicate disputes that could have been resolved with a simple phone call. As one American commentator aptly wrote:

Conduct that may be characterized as uncivil, abrasive, hostile, or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice . . . . This mindset eliminates peaceable dealings and often forces dilatory, inconsiderate tactics that detract from just resolution.

(K. A. Nagorney, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 *Geo. J. Legal Ethics* 815, at p. 817)

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[65] **Second, incivility is distracting.** A lawyer forced to defend against constant allegations of impropriety will naturally be less focused on arguing the case. Uncivil behaviour also distracts the triers of fact by diverting their attention away from the substantive merits of the case. The trial judge risks becoming preoccupied with policing counsel's conduct instead of focusing on the evidence and legal issues: Justice Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 105.

[66] **Third, incivility adversely impacts other justice system participants.** Disparaging personal attacks from lawyers — whether or not they are directed at a witness — can exacerbate the already stressful task of testifying at trial.

[67] **Finally, incivility can erode public confidence in the administration of justice** — a vital component of an effective justice system: *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 689. Inappropriate vitriol, sarcasm and baseless allegations of impropriety in a courtroom can cause the parties, and the public at large, to question the reliability of the result: see *Felderhof ONCA*, at para. 83; *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, at para. 148. Incivility thus diminishes the public's perception of the justice system as a fair dispute-resolution and truth-seeking mechanism.

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[70] Second, in developing its approach, the Appeal Panel was sensitive to the lawyer's duty of resolute advocacy and the client's constitutional right to make full answer and defence. It held that "the word 'civility' should not be used to discourage fearless advocacy" (par. 211) and was careful to create an approach which ensured "that the vicissitudes that confront courtroom advocates are fairly accounted for so as not to create a chilling effect on zealous advocacy" (para. 232).

[71] Although of doubtless importance, the duty to practice with civility is not a lawyer's sole ethical mandate. Rather, it exists in concert with a series of professional obligations that both constrain and compel a lawyer's behaviour. The duty of civility must be understood in light of these other obligations. In particular, standards of civility cannot compromise the lawyer's duty of resolute advocacy.

[72] **The importance of resolute advocacy cannot be overstated. It is a vital ingredient in our adversarial justice system — a system premised on the idea that forceful partisan advocacy facilitates truth-seeking**: see e.g. *Phillips v. Ford Motor Co.* (1971), 18 D.L.R. (3d) 641, at p. 661. Moreover, resolute advocacy is a key component of the lawyer's commitment to the client's cause, a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms* : *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401, at paras. 83-84.

[73] Resolute advocacy requires lawyers to "raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case": Federation of Law Societies of Canada, *Model Code of Professional Conduct* (online), r. 5.1-1 commentary 1. This is no small order. **Lawyers are regularly called on to make submissions on behalf of their clients that are unpopular and at times uncomfortable**. These submissions can be met with harsh criticism — from the public, the bar, and even the court. Lawyers must stand resolute in the face of this adversity by continuing to advocate on their clients' behalf, despite popular opinion to the contrary.

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[76] **In saying this, I should not be taken as endorsing incivility in the name of resolute advocacy. In this regard, I agree with both Cronk J.A. and Rosenberg J.A. that civility and resolute advocacy are not incompatible**: see *Groia ONCA*, at paras. 131-39; *Felderhof ONCA*, at paras. 83 and 94. **To the contrary, civility is often the most effective form of advocacy. Nevertheless, when defining incivility and assessing whether a lawyer's behaviour crosses the line, care must be taken to set a sufficiently high threshold that will not chill the kind of fearless advocacy that is at times necessary to advance a client's cause.** The Appeal Panel recognized the need to develop an approach that would avoid such a chilling effect.

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Kirk / Kelly – Advocacy 2023

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