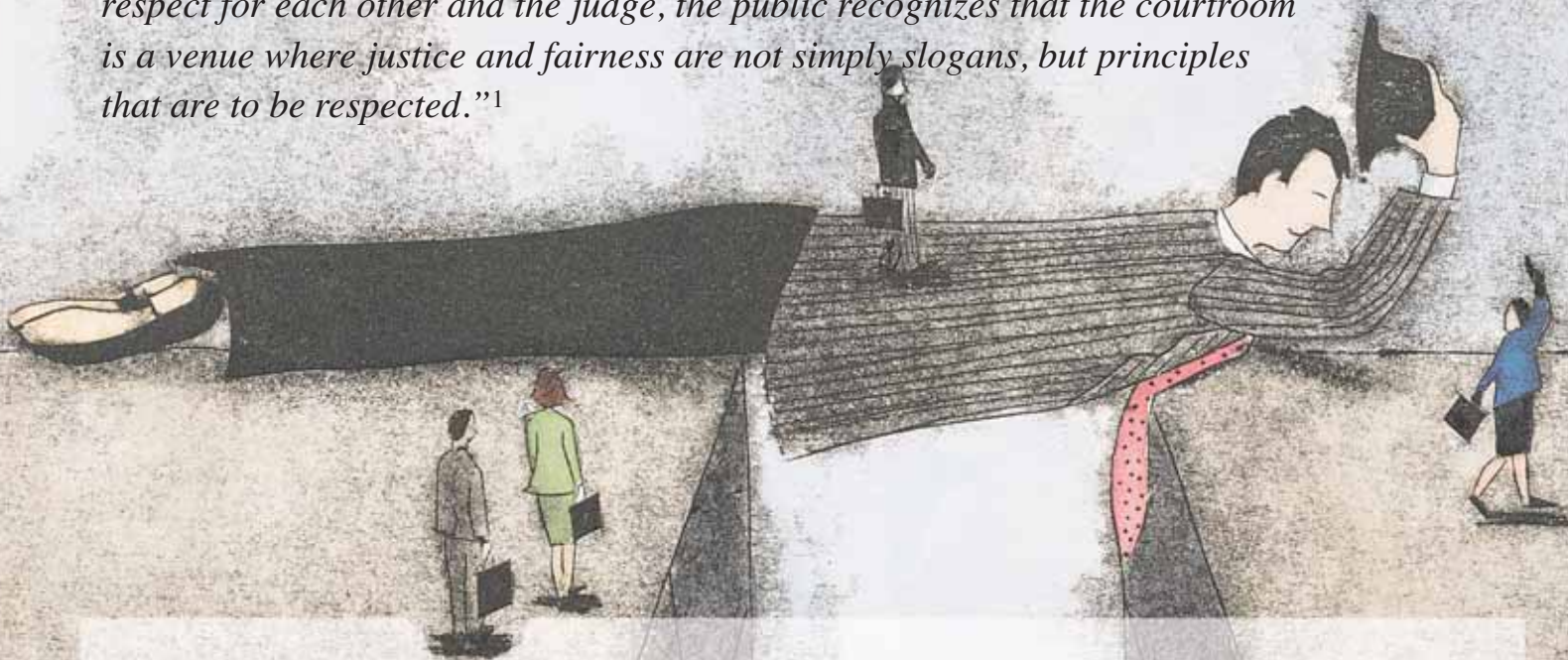


# Civility: A Cornerstone of Professionalism

*Civility can be defined as a range of behaviours including courtesy, dignity, acting in good faith and respect. As officers of the court, lawyers are expected to extend respect for the bench, each other, clients, witnesses, the justice system and the profession itself. In the words of former Chief Justice the Honourable Patrick LeSage, “When lawyers show respect for each other and the judge, the public recognizes that the courtroom is a venue where justice and fairness are not simply slogans, but principles that are to be respected.”<sup>1</sup>*



## **The problems of incivility**

Two recent reports have focused attention on the lack of civility in the legal profession. Former Associate Chief Justice the Honourable Coulter Osborne, in his report on the *Civil Justice Reform Project*, referred to incivility and the culture of litigation as contributing to a process that is often “too expensive, too complex and too slow,” with adverse effects on access to justice. *The Report of the Review of Large and Complex Case Procedures*, by the Honourable Patrick LeSage and Professor Michael Code released at the end of November, examined how incivility contributes to the complexity and cost of criminal proceedings.

Lawyers have a responsibility, as outlined in the *Rules of Professional Conduct*, “to uphold the standards and

reputation of the legal profession and to assist in the advancement of its goals, organizations, and institutions.” Any incivility shown by lawyers diminishes the public’s respect for the court and the administration of justice, and can destroy the reputation of the lawyer and the profession. With the loss of respect comes a loss of trust. When the public loses trust in lawyers and in the profession, access to justice is threatened.

By definition, members of a profession are held to standards of behaviour. As a self-governing profession, lawyers have traditionally held themselves to high standards of conduct, including ethics and professionalism. If lawyers fail to live up to those standards, then the public begins to question lawyers’ ability and right to continue to be independently governed.

## The underlying causes of incivility

Some commentators point to a decline in civility within society generally, with a lack of standards of behaviour beginning in the home, spreading to schools and then into the workplace. As a part of society, lawyers reflect that changing standard.

“As a society, we question doctors, we question lawyers. With a rights-based society, a sense of entitlement can translate to a determination to get what you want, whatever the cost on the part of both clients and counsel,” says Danny Melamed, a family litigator with *Torkin Manes LLP*.

The sheer size of the bar contributes to the phenomenon of incivility in the legal profession as well, resulting in a potential for less collegiality. “In a small town, you have to be careful because you are going to

be seeing the same lawyers and judges throughout your career,” says senior litigator Earl Cherniak of *Lerners LLP*. “It’s a bigger issue in bigger centres where you can deal with people you don’t know.”

“The business of law has changed and that is a huge contributing factor,”

***“Unfortunately, they are unable to draw the distinction between being tough-minded and aggressive.”***

adds Sean Dewart, a litigator with *Sack Goldblatt Mitchell LLP*. “Clients are demanding more results for lower fees.” A focus on the bottom line can lead to the use of sharp and aggressive tactics that are not necessarily going to affect the outcome of the case but may

add to delay and cost.

Clifford Lax of *Lax O’Sullivan Scott*, agrees, “There are some lawyers who fall into uncivil behaviour naturally because it’s a part of their personality to be unduly aggressive. And there are others who fall into it for fear of not being seen to be tough enough in order to win clients. Unfortunately, they are unable to draw the distinction between being tough-minded and aggressive.”

Cherniak points to a lack of mentoring as another major cause of incivility. “In my early years at the bar, it was very unusual for people not to have mentors or to be exposed to senior lawyers. When junior lawyers work with senior lawyers they can be trained, they can talk about cases, and learn how to deal appropriately with situations where the other side may not be as civil as one would hope,” he says.

## What is incivility?

From a regulatory perspective, there are three categories of complaints that raise professionalism issues: 1) incivility; 2) counselling or behaving dishonourably; and 3) misleading the court, another lawyer, the Law Society, a client or other member of the public.

Incivility can include failing to be courteous, failing to be civil or failing to act in good faith. Failing to maintain the integrity of the profession and unprofessional communications are other examples.

Law Society statistics from 2004 to 2007 show that complaints about professionalism have grown over the period from 11 per cent to 30 per cent of all complaints received. As one might expect, the largest portion relates to civil litigation (31 per cent), followed by matrimonial and family law (26 per cent) and real estate (18 per cent).

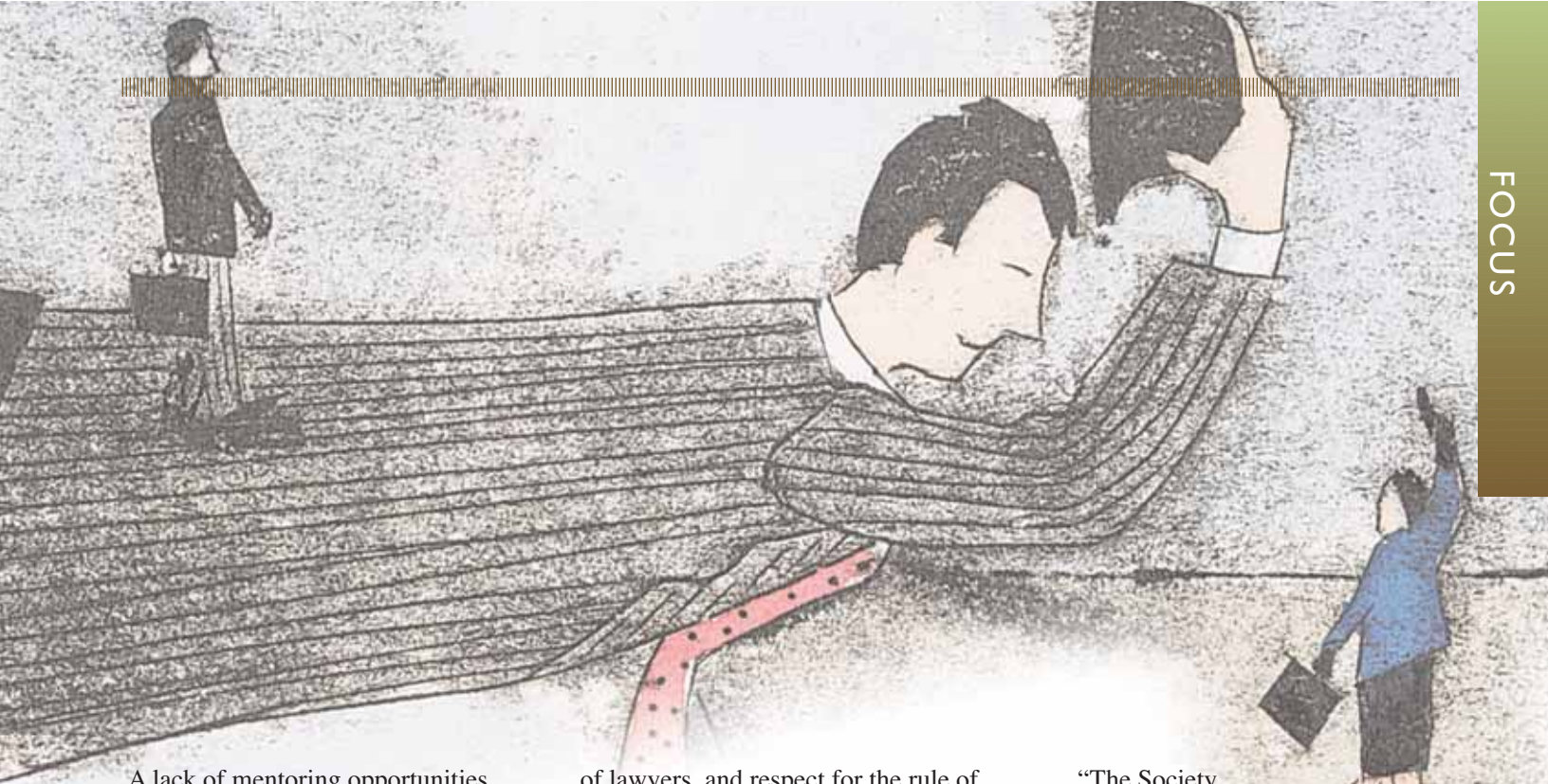
Incivility can exist between solicitors. In one file, the lawyer acting for a vendor refused to provide a statement of amount owing on a lien registered on the property being sold, and repeatedly insisted that the purchaser should accept his personal undertaking to remove it after closing without a discharge statement. When the purchaser’s

solicitor refused to accept this, the vendor’s solicitor was sarcastic and abrasive and hung up the phone.

Rudeness, swearing and the use of derogatory language raise obvious concerns. But equally pernicious are behaviours which are more difficult to prove, but lead to feelings of aggravation on the part of opposing counsel, clients and the judiciary, as well as increased costs, delays and frustration in the legal system.

Litigator Sean Dewart of *Sack Goldblatt Mitchell LLP* paints the following picture:

*“Opposing counsel serves a motion that is not remotely urgent on four or five days’ notice. You find that you’re not available, and call them to seek a short adjournment, but there is no return phone call. Because you haven’t heard, you arrange to have someone attend court to request an adjournment, but just in case, you also prepare them to speak to the motion. At court, the judge says, ‘Well you’re here now, let’s proceed.’ By failing to observe the usual courtesies, opposing counsel has driven up costs and basically barged to the front of the line. This type of conduct is every bit as uncivil as abusive correspondence and foul language, and far more common.”*



A lack of mentoring opportunities means that sometimes junior lawyers are not receiving the training and advice that can help them learn to defuse antagonistic situations.

“The single biggest cause of incivility is incompetence compounded by a lack of courage,” says Dewart. “Lawyers who are unsure of themselves lack the courage to get to the issue, and use tactics to play games. Sophisticated clients understand that gamesmanship and wasted costs are inversely proportional to the competence of opposing counsel. Good lawyers get to the issues. Bad lawyers play games and bicker because they don’t know what else to do, or are too afraid to act decisively. You have to zero in on the issues, then have the courage to stand up to your client and say this is what we are going to fight for. A lawyer should not be a mindless champion for their clients, they have to bring a level of control to the table.”

### ***Enforcing standards***

The *Rules of Professional Conduct* clearly set out the behaviours expected

of lawyers, and respect for the rule of law and for the administration of justice are integral principles. Lawyers should refer to the specific rules listed on page 10 which set out a lawyer’s obligations around civility when advising clients, when acting as an

***“A lawyer should not be a mindless champion for their clients, they have to bring a level of control to the table.”***

advocate, in dealing with tribunals and all parties in the course of litigation and in the course of his or her practice, as well as in maintaining the integrity of the profession.

As the regulator, one of the Law Society’s primary responsibilities is to enforce these rules by responding to complaints in a transparent and fair manner. The Professional Regulation division reviews and responds to all complaints it receives, including those that raise issues of civility.

“The Society takes the issues of civility and professionalism very seriously,” says Zeynep Onen, Director of Professional Regulation. “We address complaints about civility and professionalism through both formal and remedial proceedings, depending on factors like the nature and seriousness of the allegation, the lawyer’s response and the lawyer’s history of complaints. But we can only initiate a response once a complaint has been received.”

In the most severe cases, the Proceedings Authorization Committee can order a prosecution, which leads to a Law Society hearing, at which the full range of penalties may be imposed, from warning to licence restrictions, including suspension or loss of licence.

### ***The Public Record***

Under the *Law Society Act*, information about complaints and non-disciplinary solutions is confidential. However, this information remains a permanent part

of a lawyer's or paralegal's record with the Law Society and if further complaints indicate a pattern of conduct, Law Society staff will take the record into consideration. Most disciplinary hearings are open to the public, and the hearing schedule and decisions are posted on the Law Society website.

"As the regulator of the profession, the Law Society obviously has a major role to play in enforcing standards," says Treasurer W.A. Derry Millar. "The Law Society needs to work in collaboration with others, including practising lawyers and the courts in establishing and maintaining standards of civil conduct."

Organizations like The Advocates' Society and the Canadian Bar Association have also issued codes of behaviour for their members. The Advocates' Society's publication, *Principles of Civility*, which was developed after widespread consultation with the profession and the judiciary, is highly regarded as setting standards for relationships with opposing counsel and the conduct of trials.

***"The Society takes the issues of civility and professionalism very seriously."***

### **Professionalism and education**

Education and collaboration with other legal organizations and law schools offer proactive means of disseminating the standards that the legal profession has agreed are proper. These initiatives also help to instil within the profession the importance of maintaining civility at all times, with clients and colleagues.

#### ***The Chief Justice of Ontario's Advisory Committee on Professionalism***

The Law Society works with the Chief Justice of Ontario's Advisory Committee on Professionalism, which was established in 2000. Composed of representatives of the judiciary, the Law Society and various legal organizations, the Committee acts as a steering committee and clearinghouse for initiatives in education to enhance

professionalism. The committee's goals are to promote professionalism, civility and a spirit of community and collegiality in the legal profession. Colloquia are held twice a year at different law schools. The papers from the committee's colloquia on professionalism are available at [www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism](http://www.lsuc.on.ca/latest-news/a/hottopics/committee-on-professionalism).

#### ***Continuing Legal Education***

Lifelong learning recognizes that there are different development needs that arise at stages throughout a legal career. The Law Society's continuing legal education program contextualizes information about professionalism in substantive courses.

The Advocates' Society recently launched the Institute for Civility and Professionalism with the mandate of developing civility-related CLE, and also offers practical workshops on how to maintain civility when dealing with difficult situations.

Another recent innovation is the Centre for the Legal Profession located at the University of Toronto Faculty of Law, partly funded by the Law Foundation, which, according to

Academic Director Lorne Sossin, will bridge academia and the profession to identify where the best learning can happen and develop resources offering contextualized learning.

## Going forward

Co-operation among the Law Society, the profession and the judiciary is necessary to facilitate the effective exchange of information and ensure there is ongoing dialogue around the issue of civility. On its part, the Law Society is continuing to work with other stakeholders to deal more effectively with this issue.

Treasurer Millar has arranged a meeting with the Chief Justices, and the presidents of the Criminal Lawyers' Association, the Crown Attorneys' Association and The Advocates' Society to improve the reporting of conduct issues that arise in courts, and to ensure that the results of the Law Society's actions are effectively communicated to the judiciary, the defence bar, Crown attorneys and the public. This initiative is also intended to ensure that

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the Law Society is kept aware of the current issues facing lawyers and judges in the courts and benefits from their advice and comments.

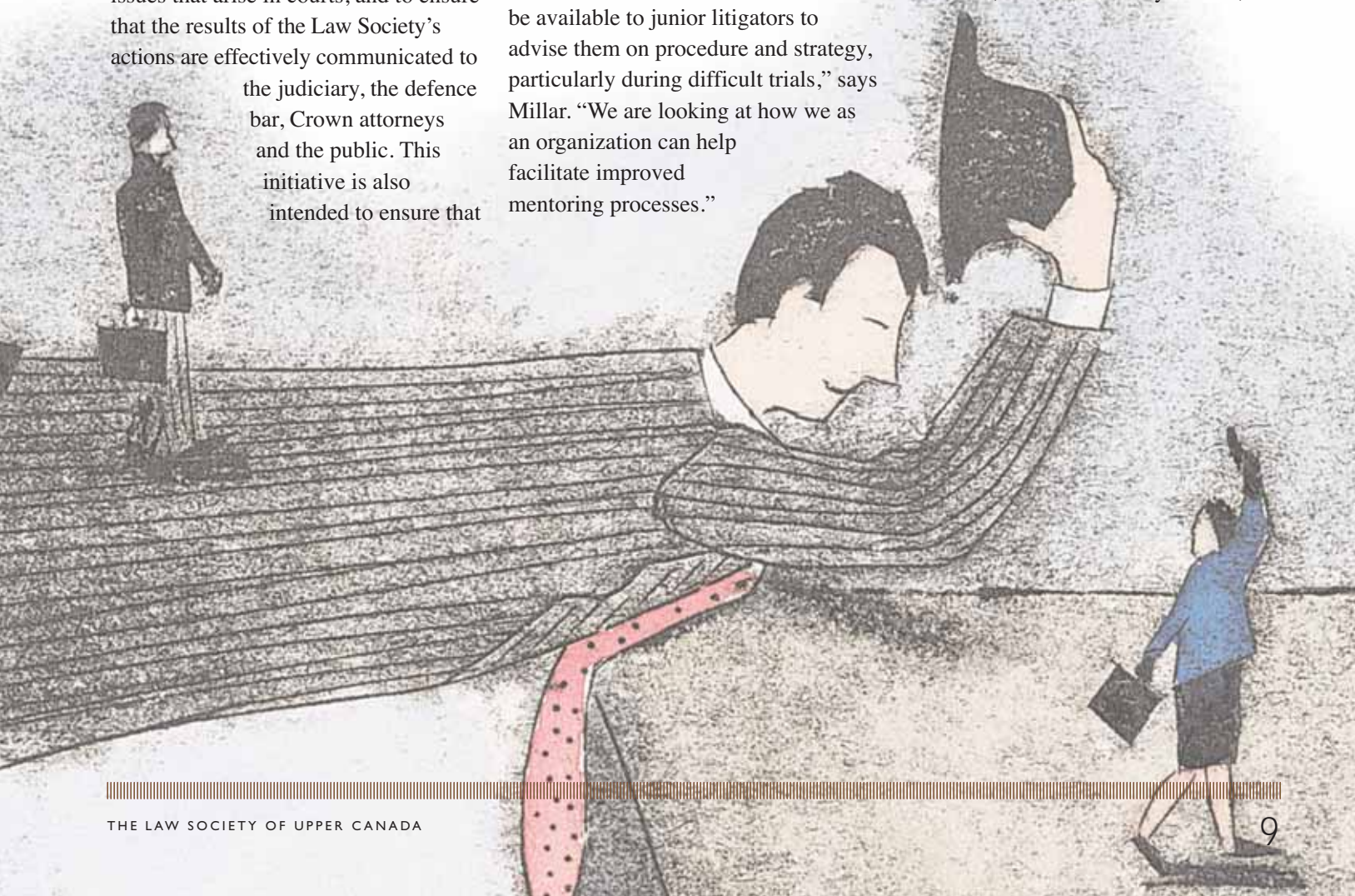
The Treasurer has already met with the president of the Criminal Lawyers' Association to discuss how our two organizations can work together to develop additional mentoring support for the criminal bar. “The Law Society agrees with the point made in *The Report of the Review of Large and Complex Case Procedures* that it is essential that senior members of the bar be available to junior litigators to advise them on procedure and strategy, particularly during difficult trials,” says Millar. “We are looking at how we as an organization can help facilitate improved mentoring processes.”

He has also referred the report to the Professional Regulation Committee, and asked them to review the report and the present approach to lawyer misconduct, and report back to Convocation as to what additional measures the Law Society should take with respect to conduct issues.

“The Law Society takes the issues of civility and professionalism very seriously and is committed to continuing to work with the Attorney General and all who are involved directly in the justice system so that it better serves the people of Ontario,” says Treasurer Millar.

The legal profession as a whole has a vital role to play in ensuring that its membership conducts itself in a professional manner.

“Lawyers, like the laws that enable our livelihoods, exist for the purposes of clients, not the other way around,”



said legal commentator Jordan Furlong at the March 2008 Colloquium on the Legal Profession. “We must work individually and collectively to rehabilitate the public perception of our profession by starting at first principles. We must remind ourselves why we became lawyers in the first place.

For most of us it was to serve the public interest through the pursuit of justice.”<sup>2</sup> ■

<sup>1</sup> The Hon. Patrick LeSage, Q.C. *How to Protect Your Professional Reputation*. (Paper presented at the Advocacy Retreat, May 13, 2005.)

<sup>2</sup> Furlong, Jordan, *Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure*. (Paper delivered to the 10th Colloquium of the Chief Justice of Ontario’s Advisory Committee on Professionalism, March 2008.)

## Extracts from the *Rules of Professional Conduct*

### Honesty and Candour

**2.02 (1)** When advising clients, a lawyer shall be honest and candid.

### Advocacy

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

**4.01 (2)** When acting as an advocate, a lawyer shall not

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, 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) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,
- (c) 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,
- (d) 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,
- (e) 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,
- (f) 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,
- (g) 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,

(h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(i) dissuade a witness from giving evidence or advise a witness to be absent,

(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(k) needlessly abuse, hector, or harass a witness,

(l) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and

(m) needlessly inconvenience a witness.

### Courtesy

**4.01 (6)** A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

### Encouraging Respect for the Administration of Justice

**4.06 (1)** A lawyer shall encourage public respect for and try to improve the administration of justice. Provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.

### Integrity

**6.01 (1)** A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

### Courtesy and Good Faith

**6.03 (1)** A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.