The Chief Justice of Ontario's Advisory Committee on Professionalism

Seventh Colloquium on the Legal Profession, October 20, 2006

Divided Loyalties

I. Proposition: The Era of the Zealous Advocate is and ought to be at an end.

Professor Marilyn Pilkington: for the Affirmative
Jay L. Naster: for the Negative

II. In controlling its own process, the judiciary can and should control the zealous advocate.

Jay L. Naster: for the Affirmative
Professor Marilyn Pilkington: for the Negative

Remarks of Jay L. Naster

The Era of the Zealous Advocate is not at an End.

When I first received the call from the convenor to participate in a debate at the Chief Justice's 7th Colloquium on professionalism I was honoured.

I was told I was to participate in a debate with my distinguished opponent Professor Pilkington, on the proposition: "The Era of the Zealous Advocate is and ought to be at an end".

This is an issue that has taken on ever increasing importance in legal circles; an issue that has been made the subject of "rules", "codes" and "principles"; an issue that has become not only a question of professionalism and ethics, but an issue that has become in many respects "a question of law".

When I was told by the convenor that I would be assigned to defend the proposition; to argue that the era of the zealous advocate is and ought to be at an end, without hesitation, I agreed to participate and to argue with zeal...I mean vigour, that the era of the zealous advocate is and ought to be at an end!

No sooner did I get off the phone did I realize who I was, and what I had only recently become....I am a criminal defence counsel. What was I

doing agreeing to defend the notion that the era of zealous advocacy was at an end?

As a prosecutor for almost twenty years, I was constantly reminded that although an advocate, “the role of the prosecutor excludes any notion of winning or losing”.

As a prosecutor I was also a “Minister of Justice”, responsible for ensuring that justice be done and be seen to be done.

As a prosecutor, while my personal goal may have been to send the defendant to jail, I was required to conduct myself with restraint; to say and do nothing that would sully my role as a Crown law officer.

There was no place, I was told, for zeal in the conduct of prosecutions; I was required to be “fair”.

But as a defence counsel this was no longer my role or my duty; for my client winning is everything.

As I sat in my office I pondered my dilemma: how would it appear for this newly minted defence counsel, intent on building a practice and garnering the respect of my colleagues in the defence bar to come out in defence of the notion that the era of the zealous advocate was at an end?

My new colleagues in the defence bar would surely express their disdain for this “Johnny-Cochrane-come-lately” daring to suggest that the era of zealous advocacy was at an end. I would undoubtedly be barred from ever entering the barristers lounge again; branded as an infidel; or even worse: a closet Crown.

As my new colleagues revel in talking about preparing to go to “war”, or their strategy for “killing” the next Crown witness, I will be shunned as a walking oxymoron; the not-so-zealous defence counsel. I will be required to change into my robes while standing in the hallway of the courthouse; when I enter the courtroom I will be told to “go sit with the Crown”.

Too sheepish to admit my error to the convenor in agreeing to support a proposition that could spell the end of my short lived career as a defence counsel, I resigned myself to my fate....at least until I had the chance to talk to my gracious opponent, Professor Marilyn Pilkington, who agreed to take on the task of defending the proposition that zealous advocacy was at an end.

So I say, with zeal, “long live the era of the zealous advocate”!!!

The Issue has been decided?

I must also acknowledge that in agreeing to take on the brief, arguing in favour of the end of zealous advocacy, Professor Pilkington has assumed the unenviable task of taking issue with a point that has already been authoritatively decided by the Supreme Court of Canada.

In the case of *Neil*[1], Mr. Justice Binnie on behalf of a unanimous court considered the vexing issue of what is encompassed by a lawyers "duty of loyalty". The issue arose in the context of a case concerning conflict of interest and whether former representation of a client in one case created a conflict that prohibited counsel from acting for a different client in a subsequent case.

The Court in *Neil* set out its views in clear and unambiguous terms as to what is expected of counsel in order to fulfill the duty of loyalty and good faith that was owed to the former client. Justice Binnie describes three distinct components of the duty of loyalty including: the duty to avoid conflicting interests, the duty of candour in dealing with the client, and "a duty of commitment to the client's cause (sometimes referred to as "zealous representation")[2].

"Zealous representation"; is that something different than "zealous advocacy"? I don't think so. Were I required to advance such a distinction in a court of law, I am quite confident that the court would have little patience with me, and politely suggest that I move on to my next point.

Any doubts after *Nei*l that the era of zealous advocacy is alive and well were put to rest by the Court of Appeal for Ontario's subsequent decision in *Felderhof*[3], where Justice Rosenberg on behalf of a unanimous Court, states[4]:

> Zealous advocacy on behalf of a client, to advance the client's case and protect the client's rights, is a cornerstone of our adversary system.

What both *Neil* and *Felderhof* make clear is that zealous advocacy is not only an ethical obligation of counsel, it is a legal obligation intrinsic to

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[1] Regina v. Neil, [2002] 3 S.C.R. 631
[2] Supra, at para.19
[3] Regina v. Felderhof (2003), 68 O.R. (3d) 481 (Ont. C.A.)
[4] Supra, at para.84

the role of counsel; recognized by the Court as no less than a "cornerstone of our adversary system".

Where does the debate truly lie: The Limits of Zealous Advocacy

As with many propositions of law, to state the proposition is easy; to understand what it actually means is something completely different.

What the Supreme Court recognizes is that zealous advocacy has limits and that these limits are crucial to appreciating the fundamental difference between a zealous advocate and an advocate who is a zealot.

The zealot knows no boundary, prepared to do whatever is required to advance their cause. For the zealot, the end always justifies the means.

In contrast, the zealous advocate understands and knows that there are boundaries which must be respected; that there is a limit to the zeal he or she may bring to the courtroom; a limit that may not admit to precise definition but nonetheless a limit that must be respected.

In *Neil*, Justice Binnie recognizes that zealous representation does indeed have its limits, which he describes in the following way[5]:

> The appellant was entitled to a level of commitment from his lawyer that whatever could **properly** be done on his behalf would be done as surely as it would have been done if the appellant had had the skills and training to do the job personally. [emphasis added]

The distinction that Justice Binnie draws is fundamental to the role of counsel. Justice Binnie recognizes that the difference between the client representing themselves and the client being represented by counsel, is that counsel has both the skill and training to ensure that the client's case is put forward "properly" within the limits of the law. The zealous advocate understands that our duty to our client is confined to what may "properly" be done to advance the client's cause.

In an essay by the Honourable G. Arthur Martin entitled "The Role and Responsibility of Defence Counsel"[6], he made the same point, stating:

> The defence counsel is not the alter ego of the client. The function of defence counsel is to provide professional assistance and advice. He must, accordingly, exercise his

[5] Supra, note 1, para.24
[6] "The Role and Responsibility of Defence Counsel", (1970), 12 C.L.Q. 376 at 382

> professional skill and judgement in the conduct of the case and not allow himself to be a mere mouthpiece for the client.

In another address of the distinguished counsel and jurist entitled, "The Practice of Criminal Law as a Career"[7], Justice Martin observes that:

> The existence of a strong, vigorous and **responsible** defence bar is essential in a free society. [and I emphasize in this regard his use of the word "responsible"]

What both Justice Binnie and Justice Martin acknowledge is that there are limits to what may be done in the name of zealous advocacy that all counsel must respect.

Where the debate truly lies is not whether "zealous advocacy" is at an end, but rather what are the "proper" or "responsible" limits of such advocacy and how do we enforce those limits. This is the real issue over which the profession and the Court's must continue to wrestle.

In Controlling its Own Process, the Judiciary can and should Control the Zealous Advocate.

It is often useful when struggling with the details of a vague legal or ethical proposition, such as enforcing the limits of zealous advocacy, to place the issue in a broader context.

We have come to accept that in a civilized society the rule of law is essential to the preservation of the values we hold dear: peace, order and good government.

When a dispute occurs we have determined that protecting the rights of the parties to that dispute is to be left to the administration of justice. We have established forums—courts--where it is believed that essential components to the dispute resolution process include the maintenance of dignity, decorum and courtesy while nevertheless engaging in what we call the "adversarial process".

To the client unfamiliar with our process, this may seem incongruous. If someone, be it the state or another member of the public, wants to pick a fight, what kind of fight is conducted with dignity, decorum and courtesy?

My response is a "fair fight".

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[7] "The Practice of Criminal Law as a Career", reprinted in 2002 Law Society of Upper Canada Gazette at p.93

I believe that the courts are intended to provide a forum where the strongest do not always win and where disputes are resolved by evidence, persuasion and a fair application of the rules of law, rather than by force.

We as advocates of a client's cause, must take up the challenge of zealously advancing the client's interests while at the same time ensuring we do so with the requisite dignity, decorum and courtesy that are the hallmarks of a fair fight.

For the client whose fate rests on the outcome of this fight, surely they must think it odd, if not outright offensive when we refer to our opponent as "my friend"; or when we preference our reply to our opponent's outrageous submission by saying "with the greatest of respect"; or where after hearing the courts judgement finding against the client, we politely rise, thank the court, and bow as the judge returns to their chambers.

The entire process must leave the client wondering; 'why did I ever bother to hire a lawyer to conduct this fight if in the end all the lawyer was going to do was bend over…'.

The reason the client hired the lawyer is because the lawyer, unlike the client, is suppose to have the requisite skill to do "properly" whatever he or she can do on a client's behalf even if it may mean bending over.

The lawyer is trained to understand that zealous representation, on the one hand, and dignity, decorum and courtesy on the other are not mutually exclusive.

Who Must Set and Enforce the Limits of Zealous Advocacy

The problem as I see it is how do we determine what is "proper" and "responsible"? How do we know what are the acceptable limits of a fair fight? How do we know when we have crossed the line from being a zealous advocate to an overzealous advocate?

While I do believe that educating counsel through the promulgation of codes of conduct and principles of civility are helpful, as with any fair fight, there is no substitute for a good referee. In our tradition, that referee is the judge.

I believe that we continue to wrestle with issues respecting the proper scope of zealous representation because, and I may come to regret this, we have not been well served by our referees who continue to send mixed signals as to the importance of respecting the limits of zealous advocacy.

When a boxer enters the ring he knows the rules: no hitting below the belt. If the boxer throws a low blow the referee will award a point to the other side. If the boxer persists, the referee will disqualify the boxer and award the fight to his opponent.

What we need is a Court willing to consistently take counsel to task for throwing low blows and more importantly, a Court that is willing to hold counsel accountable.

Instead, we appear to have accepted that in a courtroom, our belts are worn not at the waist, but at our ankles, where it is almost impossible for counsel to throw a low blow.

I believe that unless and until the referee, the judge, tells us that overzealous advocacy compromises a fair trial, I believe that counsel will continue to exceed the limits of what is proper and responsible advocacy largely with impunity.

The Problem of In-Civility: Is it More than an "Adornment"?

While improper or overzealous advocacy can take various forms, it most frequently manifests itself in issues regarding the question of civility.

What the authorities on this subject reflect is that the question of who ultimately bears responsibility for the comportment of counsel, to ensure that zealous advocacy does not exceed proper bounds, remains something of a hot potato being passed between the Courts on one side, and the Law Society on the other.

While I believe that the issue requires that both the Court and the Law Society share responsibility, it is imperative that the Court take the lead.

Judges are on the frontlines of the administration of justice and most able to redress the implications of improper conduct in real time; where the consequence of overzealous advocacy infects the fairness of the proceedings in which it occurs.

The best that the Law Society can do is to revisit the issue after the fact; when, after conducting an investigation and initiating proceedings several months or even years after the trial has ended later, a decision is made as to whether counsel's conduct exceeded the proper bounds of zealous advocacy.

While I acknowledge that Law Society proceedings may indeed have a salutary effect, they are no substitute for effective judicial intervention while the trial is ongoing. Only the courts have the jurisdiction and

means to drive home the point that incivility is incompatible with a fair trial, and to take the required measures to control the process in a manner consonant with the administration of justice.

Unfortunately, the approach that has been taken by our Court of Appeal to date in cases where incivility is at issue, is to focus on the conduct of the trial judge to discern whether, despite the improper conduct of counsel, the trial judge remained above the fray and conducted a fair trial.

This has resulted in my opinion in a willingness to effectively condone conduct which far exceeds the proper limits of zealous advocacy and to leave the consequences of such conduct to the Law Society to address. It is an approach which essentially confirms the notion that a trial lacking in dignity, decorum and respect can nevertheless amount to a fair trial.

Ultimately, it is the Court of Appeal that provides direction to the trial courts. It is the Court of Appeal that has the ability to empower the trial judge to intervene and to make clear the consequences of failing to do so.

My concern is that if the Court of Appeal is satisfied that conduct akin to "guerrilla theatre" does not compromise the fairness of the trial, there remains little incentive for a trial judge to intervene. Arguably there may even be a disincentive as such intervention could be construed by some as manifesting a bias.

Marchand v. Public General Hospital Society of Chatham

The first clear indication that the Court of Appeal would defer responsibility for enforcing the limits of zealous advocacy was in the Ontario Court of Appeals November 2000 decision in *Marchand*[8].

In *Marchand* the Court of Appeal considered an appeal from a 167 day trial in an action for medical negligence wherein the court found that the conduct engaged in by counsel for the defendants was "conduct that by any reasonable standards of civility was unacceptable for any counsel, let alone senior counsel who should know better"[9]. The appellant argued that this conduct, and the failure of the trial judge to stop it, resulted in an unfair trial.

[8] Marchand v. Public General Hospital Society of Chatham (2000), 51 O.R. (3d) 97.
[9] Supra, at para.139

Despite the Court finding that counsel's conduct clearly crossed the line, the Court dismissed the plaintiff's appeal characterizing the issue as follows[10]:

> The unprofessional conduct of counsel is a matter for the Law Society of Upper Canada. The issue before us, however, centers not on the conduct of counsel but its impact on the fairness of the trial. Our focus centers on the conduct of the trial judge. The question we must answer is whether an informed person viewing the matter realistically would conclude that the way the trial judge dealt with defence counsel's attacks on [plaintiff's counsel] created a reasonable apprehension of bias and thus deprived the appellants of a fair trial. We are not persuaded that the trial judge's conduct supports a finding of bias.

Rather then addressing how the pervasive incivility of counsel in and of itself was fundamentally inconsistent with a fair trial, the Court focused on the conduct of the trial judge to discern whether, notwithstanding counsel's nasty behaviour, the judge was able to rise above the fray.

This is not to say that the Court of Appeal in *Marchand* turned a blind eye to counsel's conduct. The Court of Appeal admonished counsel for their conduct and made it clear that it did like the fact that low blows were thrown. However, the Court of Appeal also made it clear that it was satisfied that counsel's overzealous advocacy was not incompatible with a fair trial, and dismissed the appeal, leaving it to the Law Society to address.

It must be stressed that in *Marchand* and the decisions that follow, the Court of Appeal has said all the right things about the importance of civility to the administration of justice. What the Court does appear willing to do is establish boundaries that make a real difference; boundaries that, if crossed, will result in material consequences.

The Court in *Marchand* states as follows[11]:

> We recognize that other trial judges might well have dealt with the acrimony in the courtroom differently and perhaps more effectively. This trial judge chose to be relatively passive, indeed, probably too passive. He was well aware of the acrimony and chose largely to ignore it.

[10] Supra, at para.141
[11] Supra, at para.17-8

> Just as civility in the courtroom is very much the responsibility of counsel, it is also very much the responsibility of the trial judge. It is a shared responsibility **of profound importance to the administration of justice** and its standing in the eyes of the public it serves. Unfortunately, we have no doubt that the failure to satisfactorily discharge this responsibility in this case **tarnished the reputation of the administration of justice**. This case underlies the importance being given by leaders of the bench and bar in improving civility in the courtroom. [emphasis added]

Unfortunately, while the court in *Marchand* was satisfied that counsels conduct was "unacceptable" and "unprofessional" and that this conduct and the judge's failure to restrain it "tarnished the reputation of the administration of justice", the Court was nevertheless satisfied that the fairness of the trial was not affected.

With great respect to the Court of Appeal, if civility is a matter of profound importance to the administration of justice, it is imperative that the Court of Appeal take the necessary measures to make it clear to both the court's below and the counsel appearing in those courts that exceeding the bounds of zealous advocacy will come at a price; a price that will serve as a sufficient deterrent to not only counsel inclined to engage in incivility, but also to the trial judge who may be inclined to sit passively, as if a mere spectator to the process.

As counsel we are officers of the court; we have a duty not only to our clients but also to the court. However one may wish to describe that duty I think we can all agree that it should at least encompass the obligation not to engage in conduct that tarnishes the reputation of the administration of justice. There is no good reason why the Court cannot demand that counsel respect that duty.

We must all take to heart the admonishment of former Associate Chief Justice Morden, in his Call to the Bar Address[12] that "civility" is not a mere "adornment" but "the glue that holds the adversary system together and keeps it from imploding". It is the duty of the trial judge to demand civility and to take appropriate measures to enforce it.

By accepting that a Court's failure to insist on civility in the courtroom is not incompatible with a fair trial, we have, despite the admonishment of Justice Morden, rendered civility to the status of an adornment;

[12] ACJO Morden, "Call to the Bar Address" , Feb. 2001

something that we would all prefer but not something that the courts are prepared to regard as being of profound importance to a fair trial.

Creating Incentives: An Economic Perspective of the Issue

As with any boundary, be it ethical or otherwise, there must be an incentive to comply; the system must be capable of imposing a cost or a penalty that will serve as a disincentive to exceed the proper bounds of zealous advocacy.

In a paper presented at the First Colloquium by Professor Randal Graham entitled "Defining the Good Lawyer: An Economic Account of Legal Ethics"[13], he persuasively argues that economic theory presents a viable means to understand professionalism and the commitment to ethics, stating as follows:

> ...an individual who decides to pursue an unethical course of action will typically do so because he or she believes that the net gains generated by unethical conduct will be greater than the gains that would have accrued to the actor had he or she adopted an ethical stance. In other words, the decision to be ethical or unethical is rooted in self interest.

Quoting from Professor David Friedman's text, Law's Order[14], Professor Graham makes the simple point that "ethical systems can be judged by the structure of incentives they establish and the consequences of people altering their behaviour in response to those incentives."

To ensure that civility is regarded as more than a mere "adornment", there must be incentives to ensure that counsel believes that it is not in their interest, or their client's interest, to exceed the proper limits of zealous advocacy. I do not believe that such incentives currently exist and that as a result the call for civility which has been sounded by the bench and bar will unfortunately remain a hollow one.

Regina v. Felderhof

Three years after *Marchand*, the Court of Appeal for Ontario had the opportunity to revisit the issue of civility in the case of *Felderhof*[15] (2003) 68 O.R. (3d) 481. Felderhof was an appeal from a failed application for prerogative relief in which it was argued that the overzealous advocacy of

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[13] Randall Graham, "Defining the Good Lawyer: An Economic Account of Legal Ethics", presented to the First Colloquium, at p.4-18

[14] Supra at p.4-19, citing David Friedman, Law's Order (Princeton University Press, 2000)

[15] Supra, note 3.

counsel for the accused coupled with the trial judge's failure to intervene had resulted in a unfair trial, and as a result a loss of jurisdiction.

As in *Marchand*, the Court of Appeal said all the right things about civility and its importance to the administration of justice, but again declined to do anything about it (with the possible exception of addressing the issue under costs, which I will return to below).

Despite the Court deploring counsel's conduct, which both the application judge and the Court of Appeal described as "unrestrained", "unprofessional" and "more resembling guerrilla theatre than advocacy in a court of law", the Court found that such conduct did not impair the fairness of the proceedings.

In short, extreme incivility did not, in the Court's view, compromise the fairness of the proceeding.

This is not to say that the Court of Appeal did nothing in the face of incivility. It is only to say that in my submission they did not do enough to ensure that counsel comprehend, to paraphrase Professor Graham, that the net gains of ethical conduct in fact outweigh the perceived gains of unethical conduct.

While the Court of Appeal did not disturb either the findings or result arrived at by the application judge, it did part company in one important respect: whether the trial judge has an obligation to intervene and enforce the proper limits of zealous advocacy.

It was the view of the application judge, as reviewed by the Court of Appeal that[16]:

> ...it is a matter of judgement in every case whether it is best to intervene, and risk further inflaming a counsel whose zeal exceeds his civility or his judgement, or simply to let the storm past...; and
>
> It is also open to [a judge] to choose the path of complete non-intervention on the basis that judicial intervention might simply excite further provocation.

While these comments may have reflected an appropriate characterization of the role of a trial judge in an earlier day when the bar was smaller and counsel may have been better able to exercise

[16] Supra, at para. 81

appropriate restraint, we must accept that the times, and the bar, have changed.

Efforts by professional organizations such as the Advocates' Society (which has recently published "The Principles of Civility for Advocates") and the Canadian Bar Association (which has recently published the "Code of Professional Conduct") are in my view an acknowledgement that counsel cannot be left to their own devices to understand the limits of zealous advocacy and must now be instructed when they have exceeded those limits.

The Court of Appeal, in my view, recognized that self-policing will not suffice in the current climate; that if counsel is not willing to conduct themselves within the proper bounds of zealous advocacy, then it will be incumbent on the Court to insist that they do.

To permit judges to remain passive in the face of overzealous advocacy would be tantamount to endorsing a position of judicial acquiescence, if not indifference, to conduct that the Court's have claimed is of "profound importance to the administration of justice and its standing in the eyes of the public it serves"[17].

Arguably the application judge's views on the matter were informed by his notion, that "a hard fought trial is not a tea party" and that counsel require "thick skin"[18]. I agree with these sentiments.

The point that I seek to make, and one which I believe finds support in the Preamble to the Principles of Civility adopted by the Advocates' Society[19], is that respecting the boundaries of zealous advocacy does not reduce the adversarial process to a "tea party"; civility and the duty to vigorously advance a client's position are not mutually exclusive concepts.

The Court of Appeal in *Felderhof* recognized this reality, stating[20]:

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[17] Supra, note 11.

[18] Supra, para.91.

[19] The Preamble to the Advocates' Society "Principles of Civility for Advocates" states in part:

> "Civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system. Civility ensures matters before the court are resolved in an orderly way and helps preserve the role of counsel in the justice system as an honourable one. Litigation, however, whether before a court or tribunal is not a "tea party". Counsel are bound to vigorously advance the client's case, fairly and honourably".

[20] Supra, para. 96.

> This has nothing to do with trials not being "tea parties". Every counsel and litigant has the right to expect that counsel will conduct themselves in accordance with the Law Society of Upper Canada, Rules of Professional Conduct. Those rules are crystal clear. Counsel are to treat witnesses, counsel and the court with fairness, courtesy and respect. See Rules 4 and 6 and Commentaries.

In contrast to the application judge, the Court of Appeal held[21] that the trial judge ought to have instructed defence counsel "to stop"; in other words non-intervention is not an option for the trial judge; it is their duty to intervene.

Where the Court of Appeal's decision in *Felderhof*, as with *Marchand*, fell short is in making clear what the consequences are in the event that a judge should fail in their duty to intervene.

Is the Message of Felderhof Clear?

In a paper presented by Justice Gary Trotter at the Fifth Colloquium[22], he argues that the "message" of the Court of Appeal's decision in Felderhof "is clear": "judges are responsible for the manner and tone of proceedings in the courtroom and must not remain idle in the face of misconduct".

Regrettably, I do not share Justice Trotter's optimism because while this is indeed what the Court of Appeal has instructed, there remains one glaring omission in the Court's message: a clear statement of the consequences of failing in that duty.

The imposition of a duty which admits to no real consequence for a failure to comply, does not in my opinion convey a "clear message"; to the contrary, I would argue it only serves to reinforce the message that civility may not be an integral component of a fair trial.

In support of his position respecting the message of Felderhof, Justice Trotter quotes[23] from the following passage of the Court of Appeal's decision:

> It is a very serious matter to make allegations of improper motives or bad faith against counsel. Such allegations must

[21] Supra, para.93.
[22] Gary Trotter, "Integrity and Honour in Criminal Litigation: Hollow Aspirations or Enforceable Standards", at p.23.
[23] Supra, at p.16

> only be made where there is some foundation for them and they are not to be made simply as part of the normal discourse of submissions over the admissibility of evidence or the conduct of the trial. To persist in making these submissions does not simply hurt the feelings of a thin-skinned opponent. Those types of submissions are disruptive to the orderly running of the trial...No prosecutor, no matter how thin-skinned, is obliged to hear the kind of allegations made by [defence counsel] in this case, until there was some prospect that these allegations would be proved and lead to a remedy.

As the "thin-skinned" prosecutor in the *Felderhof* case, I could not agree more with the Court of Appeal's observations. The problem is that notwithstanding what may be regarded as the overzealous conduct of counsel and the Court's failure to have intervened to stop this type of abuse, the Court of Appeal in *Felderhof* was satisfied, as was the application judge, that this conduct did not compromise the fairness of the proceedings, and dismissed the appeal.

In my respectful submission, unless and until the Court is prepared to recognize that the duty of counsel to respect the proper limits of zealous advocacy and the notion of a fair trial are inextricably interwoven, a compelling argument can be made that civility will remain a mere adornment to the proceedings.

Only be recognizing and enforcing the direct correlation between the right to a fair trial and the duty of counsel to conduct themselves within the proper limits of zealous advocacy, can we move beyond treating civility as something we "ought" to do, to something we "must" do.

A trial judge who looks at *Marchand* and *Felderhof* for guidance could conclude that the message is that so long as the conduct before them does not reach the extremes exhibited in those cases they will be on solid ground should they chose not to intervene.

Enforcing Civility through Cost Awards: Downloading Responsibility

In fairness, it should be noted that in both *Marchand* and *Felderhof* the Court did attempt to redress the harm occasioned by counsel's conduct through the use of the Court's discretion to award costs.

In *Marchand*, the trial judge awarded costs to the respondents, which order was appealed from. While counsel for the respondents in their factum sought to uphold the cost award, in oral argument the

respondent agreed not to pursue their costs (an award of over $2 million) and no costs were ordered by the Court of Appeal[24].

While it is not clear in the Court's judgement that the decision respecting costs had anything specifically to do with the concerns expressed by the Court concerning the conduct of the respondent's counsel at trial, one can speculate that in walking away from the $2 million awarded at trial, the respondents may have been seeking to atone for their misconduct.

However, I do not believe that addressing the impact of overzealous behaviour by means of cost awards is an adequate means of enforcing the limits of zealous advocacy.

Apart from a cost award being made personally against counsel, the net effect of utilizing the courts discretion respecting costs is that the sins of counsel are ultimately visited on the client who will bear the burden of the Court's refusal to order costs. This is not right. The client should not be held responsible for their counsel's failure to respect their professional obligations.

This is precisely what the Court of Appeal did in *Felderhof*. In an effort to redress the harm occasioned by incivility, the Court downloaded the burden to the client.

The Court of Appeal affirmed the decision of the application judge and declined to award costs to the respondent even though, in the result, they were successful. The reason stated by the application judge, and adopted by the Court of Appeal, was that "to award costs to the defence would carry the wrong message by rewarding him for the consequences of his unacceptable conduct". [25]

However, the Court of Appeal recognized that the person most directly impacted as a result of the cost decision will be the client and not the counsel who exceeded the proper limits of zealous advocacy. In recognition of this fact, the Court of Appeal felt compelled to make the following finding[26]:

> This application and appeal were brought because of the respondent's counsel's inappropriate behaviour during the trial. The respondent has never appeared at the trial but I can only assume that these tactics have been carried out with his approval.

[24] Supra, note 8, at para.180
[25] Supra, note 3, at para.100
[26] Supra, at para.100

I would argue that this is a dangerous assumption to make. In the absence of evidence to the contrary, what the Court should assume is that the client has retained counsel on the assumption that counsel possessed the necessary skills and training to zealously represent the client's interests within "proper" limits. On the basis of *Neil*, the client is entitled to assume they are retaining counsel who knows the "proper" limits of zealous advocacy.

If, as the Honourable G. Arthur Martin made clear, the proper role of counsel is not to act as the client's "alter ego", then we must not assume that they are.

Furthermore, if the trial judge is duty bound to intervene in the face of overzealous conduct of counsel yet chooses to remain passive, why should the client conclude that such tactics are inappropriate? The client should be entitled to assume that if counsel behave inappropriately, the trial judge will do something about it; if the trial judge doesn't, then how is the client to know that the tactics engaged in by counsel have exceeded the bounds of zealous advocacy.

Visiting counsel's sins on the client by the use of costs is, in my opinion, an ineffective way of addressing the issue as it fails to bring home to counsel the consequences of their misconduct.

Conclusion

I do not discount the importance of education, and forums such as this Colloquium, in instilling in counsel an understanding of the proper limits of zealous advocacy.

Nor do I diminish the important role to be performed by the Law Society in taking counsel to task for failing to respect the rule of professional conduct.

The problem as I see it is that neither enhanced education or more effective professional discipline can address the immediate consequence of overzealous advocacy; the immediate consequences of the 'low blow'.

If, as stated by Justice Trotter[27], "the courtroom is suppose to be a place where citizens take their disputes to be resolved in a calm, detached atmosphere of respect and dignity", conduct which undermines this objective must be addressed where and when it occurs: in the courtroom.

[27] Supra, note 21, at p.22

Yes, it is an additional burden on the judiciary but one that, in my view, is wholly in keeping with the overriding obligation of the Court to protect the right of all who appear before it to a fair trial.