

The Civil Law of Civility*

Introduction

Is civility a rule of law? In *R. v. Felderhof*,¹ the Ontario Court of Appeal stated that the court and counsel have a shared responsibility to maintain civility both inside and outside the courtroom. In *Landolfi v. Fargione*,² the same Court stated that a trial judge has a responsibility to maintain civility in the courtroom. In *R. v. Felderhof*, the Court of Appeal also stated that uncivil behaviour in the courtroom diminishes the public's respect for the court and for the administration of justice and thereby undermines the legitimacy of the results of the adjudication.³ In *The King v. Sussex Justices, ex parte McCarthy*,⁴ Heward, C.J. famously stated: “[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” Civility is an important aspect of the appearance of justice, and it would seem to follow that the civility of judges and lawyers ought to be both an aspect of the administration of justice but also a matter of law.

This article surveys the court’s jurisdiction to encourage civility and to respond to uncivil behaviour by judges and lawyers during the course of civil proceedings, and thus this article examines the law associated with the shared responsibility of court and counsel to maintain civility. It examines civility as a substantive aspect of the civil law, and it treats the idea of civility as a genuine legal topic. This article will begin by examining the civil law’s regulation of the civility of judges and then address the civil law’s regulation of the civility of lawyers.

Before getting the discussion underway, it should be noted that the civil law of civility to be surveyed in this article is related to but independent of the regulation of uncivil behaviour as a matter of the legal profession’s self-regulation of ethical conduct. Generally speaking, it is not the court’s role to supervise the professionalism of judges or practitioners or to enforce rules of ethical conduct, including rules about civility. The supervision of professional conduct is, rather, the role of the independent bodies that discipline judges or lawyers. That said, judicial councils, law societies, legal organizations, and legislators do contribute to the substantive law of civility, and this article must mention their contribution to the law of civility because courts will consider rules of civil procedure and may consider the regulator’s rules of professional conduct when deciding whether a lawyer’s behaviour disrupts the administration of justice and is worth of sanction. Moreover, a coterie of judges and masters have held that the court has a role in promoting civil behaviour and appropriate conduct in the administration of justice, and these judges and masters have urged lawyers to follow principles of civility

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¹ *R. v. Felderhof* (2004), 68 O.R. (3d) 481 (C.A.) at para. 81.

² (2006), 79 O.R. (3d) 767 (C.A.) at para. 101.

³ *R. v. Felderhof* (2004), 68 O.R. (3d) 481 (C.A.) at para. 84.

⁴ [1924] 1 K.B. 256.

established by professional organizations.⁵ Thus, the substantive law has borrowed or adapted principles of civility established by legislatures, by law societies, by professional organizations, and by the Canadian Judicial Council. In this way, the published codes of conduct are being giving judicial approval and are becoming a source of guidance if not law.

Using Ontario as an example, here, the Law Society of Upper Canada's *Rules of Professional Conduct* include rules and commentary that expressly address the topic of civility in the practice of law be it in a boardroom or a courtroom. These provisions are set out in Schedule A, below. The relevant provisions about civility from the Canadian Judicial Council's *Ethical Principles for Judges*⁶ are set out in Schedule B below. Several provisions of Ontario's Rules of Civil Procedure and of the Family Law Rules are relevant to the law of civility, and these are set out in Schedule C below. Ontario's Advocates' Society publishes a pamphlet entitled *Principles of Civility for Advocates*, and this pamphlet is available on the internet.⁷

Regulating the Civility of Judges

The law about a reasonable apprehension of bias and about unfair trials have been used to regulate uncivil behaviour by judges. This is not surprising because anger, intemperance, impatience, sarcasm, derision, and rudeness are evidence from which a reasonable person might reasonably apprehend bias towards a litigant or to his or her lawyer and from which it may be concluded that a trial conducted in an uncivil manner was unfair and even contrary to the *Canadian Charter of Rights and Freedoms*.

However, because it often requires the intervention of an appellate court, the regulation of the civility of judges is perhaps more indirect than it is direct. The regulation, however, is direct when a party asks a judge to recuse himself or herself on the grounds of a reasonable apprehension of bias arising from the judge's incivility or arising from the judge's failure to control the incivility of others. If the judge refuses to recuse and if the judge's uncivil conduct or failure to control the uncivil conduct of others makes the trial unfair or if it raises a reasonable apprehension of bias, then an appellate court may set aside the judge's decision and order a new trial or hearing.

⁵ *Kaplun v. Kaplun*, [2007] O.J. No. 3524 (S.C.J.); *Penney v. Penney*, [2006] O.J. No. 4802 (S.C.J.) at para. 30; *Close Up International Ltd. v. 1444943 Ontario Ltd.*, [2006] O.J. No. 4225 (Master); *Beneda v. Canada (Attorney General)*, [2006] O.J. No. 4105 (S.C.J.); *Kobre v. Sun Life Assurance Co. of Canada*, [2005] O.J. No. 4235 (Master); *Kudlak v. Sutherland*, [2005] O.J. No. 3395 (S.C.J.); *Baksh v. Sun Media (Toronto) Corp.* (2003) 63 O.R. (3d) 51 (Master); *ABC Metal Products Inc. v. Franzem*, [2003] O.J. No. 4077 (Master); *Etobicoke Noodles Inc. v. Rajah*, [2002] O.J. No. 5157 (Master); *Chapell v. Marshall Estate*, [2001] O.J. No. 3009 (S.C.J.); *Royal Extrusions Ltd. v. Continental Window and Glass Corp.*, [2001] O.J. No. 3243 (Master); *Flying Saucer v. Lick's Leasing*, [2001] O.J. No. 3388 (Master). See also J.R. Olchowy, "On the Loss of Civility and the Need for a Reinvigorated Professionalism: Objectionable Counsel Conduct and Its Impact on Trial Fairness" (2002), 26 *Adv. Q.* 322.

⁶ Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at pp. 44–45.

⁷ <http://www.advocates.ca/civility/principles.html>

In *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*,⁸ which was a medical malpractice case involving the birth of a brain-injured baby, it was argued that the trial judge's failure to end a rancorous display of incivility and hostility by defence counsel toward the plaintiff, and even more relentlessly against her counsel, raised a reasonable apprehension of bias and the judge's failure to control the defendants' lawyers was advanced as a ground of appeal. In *R. v. Felderhof*,⁹ which concerned alleged violations of the *Securities Act* arising out of the notorious Bre-X affair, it was argued that the trial judge had lost jurisdiction by his failure to control uncivil conduct. In both cases, the arguments were rejected, but the Court of Appeal accepted that a trial judge's failure to control uncivil behaviour in the courtroom could establish a reasonable apprehension of bias or establish that a trial was not fair. The Court indicated, however, that incivility, as such, did not call for a judicial response, unless it actually prevented a fair trial.¹⁰

A judge ought to recuse himself or herself or he or she may be disqualified from hearing a matter if his or her words or conduct raise a reasonable apprehension of bias.¹¹ Conceptually independent of the law associated with a reasonable apprehension of bias, a judge may lose jurisdiction if his or her failure to manage and control the proceedings results in an unfair trial or hearing. An unfair trial may be contrary to the *Charter of Rights and Freedoms*.

The test for a reasonable apprehension of bias was set out by de Grandpré, J. in his dissenting judgment in *Committee for Justice and Liberty v. National Energy Board*,¹² and the test was approved and adopted by the Supreme Court in *Valente v. The Queen*¹³ and in *R. v. R.D.S.*¹⁴ The test is whether an informed person, viewing the matter realistically and practically and having thought the matter through, would think that it is more likely than not that the decision maker consciously or unconsciously would not decide the matter fairly. The information of this hypothetical observer would include knowledge of the traditions of integrity and impartiality of the judiciary.¹⁵ The demonstration of either actual bias or the reasonable apprehension of bias requires an

⁸ (2001), 51 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 66.

⁹ (2004), 68 O.R. (3d) 481 (C.A.).

¹⁰ *R. v. Felderhof* (2004), 68 O.R. (3d) 481 (C.A.) at paras. 81, 90.

¹¹ The public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. Judicial impartiality requires that a judge approach the case with an open mind in the sense that he or she is open to persuasion. Bias is a predisposition to decide in a particular way that closes the judicial mind to being persuaded: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 59; *R. v. Steele* (1895), 26 O.R. 540 (H.C.J.); *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 106; *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.).

¹² [1978] 1 S.C.R. 369.

¹³ [1985] 2 S.C.R. 673. See also: *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259; *Authorson (Litigation Guardian of) v. Canada (Attorney General)*, [2002] O.J. No. 2050 (Div.Ct.), aff'g [2001] O.J. No. 4352 (S.C.J.); *Peart v. Peel Regional Police Services Board*, [2006] O.J. No. 4457 (C.A.); P.M. Perell, "The Disqualification of Judges and Judgments on the Grounds of Bias or the Reasonable Apprehension of Bias" (2004) 29 *Adv. Q.* 102.

¹⁴ *R. v. R.D.S.*, [1997] 3 S.C.R. 484.

¹⁵ *R. v. R.D.S.* [1997] 3 S.C.R. 484; *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.); *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.).

examination of the judge's state of mind either as a fact or as imagined by the reasonable and informed person.¹⁶ The test for a reasonable apprehension of bias has two elements of objectivity: (a) the measure is that of the reasonable and informed person; and (b) his or her apprehension of bias must be reasonable.¹⁷ It is to be noted that the test is not whether a party to the proceeding would reasonably apprehend bias but whether a hypothetical member of the public would apprehend impartiality.¹⁸

A judge swears an oath that he or she will be impartial,¹⁹ and there is a strong presumption that judges honour their oaths and do dispense justice without bias.²⁰ An allegation of bias or a reasonable apprehension of bias is a serious allegation that calls into question the personal integrity of the judge and the integrity of the entire administration of justice.²¹ The grounds for an apprehension of bias must be substantial,²² but each case must be evaluated in its own particular circumstances and in light of the whole proceeding.²³ The party alleging bias has the onus of proving it.

The standard for disqualification is high because it is not in the public interest to have judgments easily nullified with the attendant uncertainty about the finality of decisions and the attendant disruption in the administration of justice, which harms not only the parties to the impugned proceeding, who waste time and money, but also other litigants, who are delayed access to justice by the wasted use of scarce judicial resources. Disqualification, especially if it comes some distance into a hearing or on an appeal, yields an enormous waste of resources and ironically may itself be unfair or unjust because the delay associated with starting over may prevent substantive justice being done. A low standard for judicial disqualification would encourage tactical motions by litigants seeking another judge whenever they anticipate or suffer an unfavourable outcome.

Thus, there are formidable countervailing forces that need to be weighed when the law regulates the civility of judges by an order disqualifying a judge from hearing a matter on the grounds of a reasonable apprehension of bias or an unfair trial. The case

¹⁶ *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 72.

¹⁷ *R. v. R.D.S.*, [1997] 3 S.C.R. 484; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369; *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2001), 51 O.R. 97 (C.A.) at para. 131, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 66.

¹⁸ *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.); *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.); *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.*, [1992] B.C.J. No. 2828 (C.A.) at para. 18.

¹⁹ For example, under s. 80 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, every judge or officer of a court in Ontario takes the following oath: "I solemnly swear (affirm) that I will faithfully, impartially and to the best of my skill and knowledge execute the duties of ... So help me God. (Last sentence omitted in an affirmation.)"

²⁰ *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 117; *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 59; *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A.); *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.).

²¹ *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2001), 51 O.R. 97 (C.A.) at para. 131, leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 66.

²² *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 76; *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at p. 395.

²³ *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 77; *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at para. 136-141.

law reveals that given the high threshold for a finding a reasonable apprehension of bias and given the reality that litigation under an adversarial system is not at “tea party”, a judge’s impatience, annoyance, anger, sarcasm, derision, rudeness, and sharp remarks are usually insufficient to meet the test for establishing bias.²⁴

That said, courts do have the authority to regulate the civility of judges, and although the threshold for a finding of perceived bias is high, it depends entirely on a carefully considered analysis of the facts of the particular case.²⁵ For example, in *Shoppers Mortgage & Loan Corp. v. Health First Wellington Square Ltd.*,²⁶ the Court of Appeal ordered a new trial in a large part because of the caustic and derisive comments of the trial judge who told defence counsel, among other things, that he was wasting the court’s time with a desperate case that scarped the bottom of the barrel and that clutched at straws.²⁷

The appellate court may examine the oral and written words of the trial judge for signs he or she prejudged substantive issues or issues of credibility²⁸ or unduly interfered with the examination of witness and descended into the adversaries’ arena.²⁹ Viewing the judge’s acts individually or cumulatively, the appellate court may decide that there was a reasonable apprehension of bias and thus a new trial is necessary. If a judge’s incivility demonstrates animosity or antipathy toward a party or a party’s lawyer, this too may raise a reasonable apprehension of bias.³⁰ In *R. v. R.D.S.*,³¹ Cory, J. stated: “Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. If the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer, this will render the trial unfair.”

²⁴ *Confectionately Yours Inc. (Re)* (2002), 219 D.L.R. (4th) 72 (Ont. C.A.); *Middelkamp v. Fraser Valley Real Estate Board* (1993), 20 C.P.C. (3d) 27 (B.C.C.A.); *R. v. Gaudaur*, [2007] B.C.J. No. 647 (S.C.).

²⁵ *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1 (C.A.); *R. v. R.D.S.*, [1997] 3 S.C.R. 484. (1995), 23 O.R. (3d) 362 (C.A.).

²⁶ (1995), 23 O.R. (3d) 362 (C.A.).

²⁷ Of the defendant’s expert, the trial judge said that if his grandmother had wheels, she would be a bicycle.

²⁸ *Sorger v. Bank of Nova Scotia* (1998), 39 O.R. (3d) 1 (C.A.); *J.M.W. Recycling Inc. v. Attorney-General of Canada* (1982), 35 O.R. (2d) 355 (C.A.).

²⁹ *Majcenic v. Natale*, [1968] 1 O.R. 189 at 199 (C.A.); *Ross v. Hern*, [2004] O.J. No. 1186 (C.A.); *Lennox v. Arbor Memorial Services Inc.* (2001) 56 O.R. (3d) 795 (C.A.); *J.M.W. Recycling Inc. v. Attorney-General of Canada* (1982), 35 O.R. (2d) 355 at p. 362; *Farrar v. Farrar* (2003), 63 O.R. (3d) 141 (C.A.) at para. 25; *Yuill v. Yuill*, [1945] 1 All E.R. 183; *Jones v. National Coal Board*, [1957] 2 All E.R. 155; *Sloboda v. Sloboda*, [2007] S.J. No. 29 (Sask. C.A.).

³⁰ *Ayerst, McKenna & Harrison, Inc. v. Apotex Inc.* (1983), 41 O.R. (2d) 366 (C.A.); *Blanchette v. C.I.S. Ltd.* (1973), 36 D.L.R. (3d) 561 (S.C.C.); *R. v. Lin*, [1995] B.C.J. No. 982 (S.C.); *Antle v. Peddle, P.C.J. and Newfoundland (Attorney General)* (1993), 108 Nfld. & P.E.I.R. 284 (Nfld. S.C.T.D.); *R. v. Gushman*, [1994] O.J. No. 813 (Gen. Div.).

³¹ [1997] 3 S.C.R. 484 at para. 94.

Regulating the Civility of Lawyers

There are legal resources that both directly and indirectly can be brought to bear to regulate the civility of lawyers. As already noted above, in *R. v. Felderhof*,³² the Ontario Court of Appeal stated that counsel have a responsibility to the administration of justice, and as officers of the court, lawyers have a duty to act with integrity, a duty that requires civil conduct. In *Kobre v. Sun Life Assurance Co. of Canada*,³³ Master McLeod noted that as officers of the court, lawyers are liable to answer to the court for the manner in which they conduct the litigation including how they carry out procedures that occur outside the courtroom such as examinations for discovery and documentary production. Recently, in response to a chorus of complaints that professionalism has declined, judges have held that the court has a role in promoting civil behaviour and appropriate conduct in the administration of justice and that it is appropriate to borrow from the rules of professional conduct and the principles of civility proposed by legal organizations as a measure of appropriate conduct.³⁴

Directly, while acknowledging that, generally speaking, unprofessional conduct is a matter for the Law Society, if a lawyer's conduct inside or outside the courtroom is a contempt of court, an interference with the proper conduct of proceedings, or a cause of expense and delay, then the court has jurisdiction to intervene.³⁵ This jurisdiction, some of which is statutory and some of which is an inherent jurisdiction, has been used to reprimand, to refuse a right of attendance, to disqualify (remove from the record), or to punish lawyers with imprisonment, fines, or with costs awards to be paid by the lawyer personally or sometimes jointly with his or her client.³⁶ The public disapprobation of uncivil lawyers occurs from time to time in the reports of judgments,³⁷ and judges sometimes note in reasons for decision that a lawyer's conduct will be reported to the Law Society.

One apparent legal resource available to discourage incivility and to encourage civility is the court's power to punish for contempt of court. However, as was the situation for the law associated with a reasonable apprehension of bias, discussed above, there are countervailing forces at work that attenuate using this jurisdiction as a means to respond to incivility. Practically speaking, it turns out that the law of contempt is available only for egregious examples of lawyer incivility.

³² *R. v. Felderhof* (2004), 68 O.R. (3d) 481 (C.A.) at para. 85.

³³ [2005] O.J. No. 4235 (Master) at para. 18.

³⁴ See the authorities noted at footnote 6.

³⁵ *Kordic v. Bernachi*, [2007] O.J. No. 3212 (S.C.J.) at paras. 68-70; *Kobre v. Sun Life Assurance Co. of Canada*, [2005] O.J. No. 4235 (Master) at paras. 17-20.

³⁶ *Re Duncan*, [1958] S.C.R. 41; *R. v. Vaillancourt*, [1981] 1 S.C.R. 69.

³⁷ *R. v. Okafor*, [2006] O.J. No. 2714 (S.C.J.); *Howells v. Manufacturers Life Insurance Co.*, [2005] O.J. No. 4815 (S.C.J.); *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069 (S.C.J.) at paras. 19, 23-25, 47, 56-64; *Flying Saucer v. Lick's Leasing*, [2001] O.J. No. 3388 (Master) at paras. 20-21.

There are two kinds of contempt, civil contempt and criminal contempt.³⁸ Civil contempt involves private injury to a litigant arising from his or her opponent's disobedience of court orders or court process. The focus of the law of civil contempt is on the enforcement of court orders, and it is not much concerned about incivility and more concerned about obedience and respect. Practically speaking, to the extent that it is addressed at all, the problem of incivility rather falls inside the territory of criminal contempt, which has as its focus deterring and punishing conduct that interferes with the administration of justice, which may occur in the environs of the court, in which case the contemptuous behaviour is known as a contempt in the face of the court (*in facie curiae*) or it may occur outside the court and courtroom, in which case the contempt is known as a contempt not in the face of the court (*ex facie curiae*).

Criminal contempt is a common law offence that is preserved by the *Criminal Code*,³⁹ and its definition of contemptuous behaviour is open-ended, but its key elements are that the conduct challenges or interferes with the court's authority and its ability to administer justice. Contemptuous conduct, therefore, can include such misdeeds as: failing to appear in court when required to do so; refusing to be sworn as a witness; refusing to answer questions; interfering with witnesses; interfering with the jury; disturbing the court proceedings; insulting witnesses, litigants, the judge, the jury; picketing the courthouse; publishing statements that undermine or depreciate the authority of the court.⁴⁰ Criminal contempt contains an element of defiance, scorn, disdain, or deprecation of the court's authority and processes. The law associated with contempt of court is meant to protect the rule of law and the institutional integrity of the administration of justice not the personal esteem or dignity of a judge.⁴¹

The contempt power is to be used sparingly with great restraint and caution and only in those circumstances when it is required to protect the rule of law, and it is subject to rigorous procedural and substantive standards given its nature as a criminal offence, including proof beyond a reasonable doubt of a guilty mind (*mens rea*) and of acts calculated to obstruct or interfere with the lawful process of the court (*actus reus*).⁴² To be contumacious the conduct must be willful, deliberate, and of an egregious nature, and a court will only find contempt where the risk of prejudice to the administration of justice is serious or real or substantial.⁴³

³⁸ *British Columbia Government Employees' Union v. Attorney-General of British Columbia*, [1988] 2 S.C.R. 214; *Poje v. British Columbia*, [1953] 1 S.C.R. 516; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901.

³⁹ *R. v. Kopyto* (1987), 62 O.R. (2d) 449 (C.A.); *R. v. Cohn* (1984), 48 O.R. (2d) 65 (Ont. C.A.).

⁴⁰ *R. v. Kopyto* (1987), 62 O.R. (2d) 449 (C.A.).

⁴¹ *Re Duncan*, [1958] S.C.R. 41; *R. v. Gray*, [1900] 2 Q.B. 36; *Re Ouellet (No. 1)* (1976), 67 D.L.R. (3d) 73 at p. 93.

⁴² *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182 at para. 42-43; *R. v. Watkins* (2000), 51 O.R. (3d) 358 (C.A.); *R. v. Glasner* (1994), 19 O.R. (3d) 739 (C.A.); *R. v. Fox* (1976), 13 O.R. (2d) 246 (C.A.); *R. v. Elliott*, [2003] O.J. No. 4694 (C.A.) at paras. 142-44.

⁴³ *R. v. Glasner* (1994), 19 O.R. (3d) 739 (C.A.); *R. v. Kopyto* (1987), 62 O.R. (2d) 449 (C.A.) at pp. 511-12.; *Rogacki v. Belz* (2003), 67 O.R. (3d) 330 (C.A.); *Anthes v. Wilson Estate*, [2005] O.J. No. 1780 (C.A.).

An unjustified allegation of bias may constitute contempt.⁴⁴ Insulting and offensive comments about the judge's honesty and fairness may constitute contempt.⁴⁵ Thus, contempt of court can also include rudeness, intemperate, and uncivil behaviour, but the misconduct must rise to the level of a serious interference with the administration of justice. The Canadian Judicial Council, in a booklet prepared for judges, recommends that "insults and other indignities in court should be dealt with other than by contempt proceedings, unless the conduct is such that the ability of the court to administer justice is significantly impaired."⁴⁶ Thus, the court's contempt power is of limited assistance in combating incivility and is only a modest general deterrent to the everyday incivilities that mar the practice of civil litigation.

In an event, contempt is not punishable by costs,⁴⁷ but courts sometimes use their authority to award costs as a means to regulate the uncivil behavior of lawyers. Modern costs rules, among other things, are designed to discourage and sanction inappropriate behaviour in the conduct of the proceedings,⁴⁸ and thus costs awards do provide a means to regulate the uncivil behaviour. Lawyers are officers of the court and courts have an inherent jurisdiction to order lawyers to pay costs.⁴⁹ The court's inherent jurisdiction, however, may be narrow because the common law jurisprudence requires bad faith or egregious misconduct before a lawyer will be ordered to pay costs personally.⁵⁰ However, under rule 57.07(1) of the *Rules of Civil Procedure* or rule 24(9) of the *Family Law Rules* costs may be ordered against a lawyer where he or she has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default. Although there is case law that suggests that the court's statutory jurisdiction under rule 57.07 is as qualified as its inherent jurisdiction, the better view is that rule 57.07 or rule 24(9) are independent and not narrow jurisdictions and are available without a finding that the lawyer's conduct was in bad faith or reprehensible.⁵¹ Thus, the statutory jurisdiction and the court's inherent jurisdiction have been used to order lawyers to pay

⁴⁴ *Re Duncan*, [1958] S.C.R. 41.

⁴⁵ *R. v. Doz*, [1985] A.J. No. 1090 (Alta. C.A.), rev'd on other grounds [1987] 2 S.C.R. 463.

⁴⁶ Canadian Judicial Council, *Some Guidelines on the Use of Contempt Powers* (May 2001), at p. 4.

⁴⁷ *Walsh v. 1124660 Ontario Ltd.*, [2007] O.J. No. 639 (S.C.J.).

⁴⁸ Costs further five fundamental purposes in the administration of justice: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to encourage settlements; and (5) to discourage and sanction inappropriate behaviour in the conduct of the proceedings: *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2007), 82 O.R. (3d) 757 (C.A.); *Reynolds v. The City of Kingston Police Services Board* (2007), 86 O.R. (3d) 43 (C.A.); *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371; *Sommers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.); *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.).

⁴⁹ *Young v. Young*, [1993] 4 S.C.R. 3; *Fong v. Chan* (1997), 97 O.A.C. 317 (C.A.); *Rockwell Developments Ltd. v. Newtonbrook Plaza Ltd.*, [1972] 3 O.R. 199 (C.A.).

⁵⁰ *Young v. Young*, [1993] 4 S.C.R. 3; *Robertson v. Edmonton (City) Police Service*, [2005] A.J. No. 840 (Q.B.).

⁵¹ *Walsh v. 1124660 Ontario Ltd.*, [2007] O.J. No. 639 (S.C.J.); *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*, [1998] O.J. No. 527 (Gen. Div.); *Howells v. Manufacturers Life Insurance Co.*, [2005] O.J. No. 4815 (S.C.J.); *Beardy v. Canada (Attorney General)*, [2003] O.J. No. 3940 (S.C.J.); *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069 (S.C.J.); *Worsley v. Lichong* (1994), 17 O.R. (3d) 61 (Gen. Div.).

costs personally when there failure to uphold professional obligations of courtesy and civility to others interferes with the orderly process of the litigation.⁵²

The courts inherent jurisdiction or its expanded (lower threshold) statutory jurisdiction to award costs against a lawyer, however, share the feature that they are to be used cautiously and rarely.⁵³ The reason for caution is that an overreaching exercise of the court's power to order a lawyer to pay costs could interfere with the operation of the adversarial system and interfere with the lawyer's ability to carry out his or her duties to loyally and sometimes fearlessly advance the case for the client. There is also the problem that because of lawyer and client privilege and confidentiality, it sometimes may not be possible for the court to fairly attribute blame for the lawyer's conduct to the lawyer.

Under either the inherent jurisdiction or the jurisdiction provided by the *Rules of Civil Procedure* or the *Family Law Rules*, where a lawyer acts in bad faith during the course of proceeding, he or she may be ordered to pay costs personally.⁵⁴ Bad faith, which may include instances of uncivil behaviour, includes: scheduling a motion at a time known to be inconvenient when a reasonable alternate date has been suggested; setting a motion date to extract concessions; misrepresenting to the court that a motion was to be adjourned on condition it be peremptory; sending misleading messages to opposing counsel and taking advantage of them to gain advantage; and proceeding in the absence of counsel knowing that counsel had substantive objections to a motion.⁵⁵ Failure to honour an undertaking not to note a party in default is an act of bad faith that will justify an order that counsel pay costs personally.⁵⁶

In *Penney v. Penney*,⁵⁷ Pardu, J. held that a court may order costs against a lawyer personally where the lawyer has breached his or her professional obligations to opposing counsel or to the court. In this case, Justice Pardu found that the lawyer had acted in bad faith by refusing to set aside an improperly obtained order, by making groundless allegations of dishonesty against opposing counsel, and by proceeding with a motion while knowing that opposing counsel intended to argue the matter but was not present because the matter was not on the court list.

The court may award costs, including costs on a substantial basis, against a party where his or her lawyer wants for good manners and professional decency and does not in a meaningful way observe the *Rules of Civil Procedure*.⁵⁸ In *Etobicoke Noodles Inc. v. Rajah*,⁵⁹ Master Haberman held that in extreme cases, a counsel's failure to be civil was grounds for an order that he or she personally pay costs. Master Haberman relied on and

⁵² *Beardy v. Canada (Attorney General)*, [2003] O.J. No. 3940 (S.C.J.) at paras. 69-70; *Schreiber v. Mulroney*, [2007] O.J. No. 3191 (S.C.J.); *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069 (S.C.J.).

⁵³ *Walsh v. 1124660 Ontario Ltd.*, [2007] O.J. No. 639 (S.C.J.); *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069 (S.C.J.) *Schwisberg v. Perry Krieger & Associates* (1997), 33 O.R. (3rd) 256 (C.A.).

⁵⁴ *Howells v. Manufacturers Life Insurance Co.*, [2005] O.J. No. 4815 (S.C.J.).

⁵⁵ *Howells v. Manufacturers Life Insurance Co.*, [2005] O.J. No. 4815 (S.C.J.).

⁵⁶ *Schreiber v. Mulroney*, [2007] O.J. No. 3191 (S.C.J.).

⁵⁷ [2006] O.J. No. 4802 (S.C.J.).

⁵⁸ *Carroll v. Stonhard Ltd.* (2001), 53 O.R. (3d) 175 (S.C.J.)

⁵⁹ [2002] O.J. No. 5157 (Master).

employed the principles of civility set out in the *Advocates' Society's* pamphlet *Principles of Civility for Advocates*. In *Etobicoke Noodles Inc.*, counsel had without notice and in the face of a pending motion to strike his client's statement of claim noted several defendants in default. Of particular interest is that Master Haberman rejected the argument that unfair and harsh practices can be justified by the client's instructions. She adopted the principle of civility that clients cannot override a lawyer's obligations to act in manner that encourages cooperation and civility.

In *Baksh v. Sun Media (Toronto) Corp.*,⁶⁰ Master Dash held that a self-represented lawyer could be liable for costs on a substantial indemnity basis for failure to comply with the civility principles of the Law Society's *Rules of Professional Conduct* and the Advocates' Society's *Principles of Civility*. The lawyer had made unsubstantiated and offensive comments about opposing counsel, and Master Dash concluded that the court must show its disapproval of such conduct. The Master's comments reveal that the court's jurisdiction was not limited to lawyers who were also parties. He stated that lawyers who appear before Ontario courts as counsel or as litigants are expected to comply with the rules of professional conduct and to adhere to the *Principles of Civility*, or risk sanctions by the court.

In addition to rules 57.01 of the *Rules of Civil Procedure* or 24(9) of the *Family Law Rules*, in some circumstances, rule 34.14 of the *Rules of Civil Procedure* may be used to discourage incivility and to encourage civility at out-of-court examinations. Rule 34.14 (1) provides that an examination may be adjourned for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where, (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections; (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined; (c) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or (d) there has been a neglect or improper refusal to produce a relevant document on the examination.

Rules 34.14 along with rule 35.15 provides remedies for the improper conduct of an examination.⁶¹ Rule 34.14 empowers the court to make an order requiring a person participating in an examination, which includes parties, deponents, and lawyers, personally to pay costs for a motion for directions, any costs thrown away, and the costs of any continuation of the examination. The rule also empowers the court to make such other orders as is just. This rule has been used to punish counsel for uncivil and inappropriate conduct during an examination for discovery or a cross-examination.⁶² However, the standard for misconduct is higher under rule 34.14 than under rule 57.01 as the rule about the conduct of examinations requires an actual finding of improper conduct, while rule 57.01 is available where a lawyer for a party has caused costs to be

⁶⁰ (2003) 63 O.R. (3d) 51 (Master).

⁶¹ *Kudlak v. Sutherland*, [2005] O.J. No. 3395 (S.C.J.).

⁶² *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069 (S.C.J.); *Kingsberg Developments Ltd. v. MacLean* (1985), 3 C.P.C. (2d) 241 (Master).

incurred without reasonable cause or to be wasted by undue delay, negligence or other default.⁶³

Within their limits, rules 34.14 and 57.01 and family law rule 24(9) can be used directly to control lawyer incivility, but there are other legal resources where the control is indirect in the sense that the court's attention is not so much directed at incivility but rather at redressing certain harmful consequences of improper behaviour in civil proceedings and those consequences may arise from a variety of causes not limited to a lawyer's uncivil behaviour. For example, as discussed above, the court's contempt power has a modest deterrent effect on lawyer's uncivil behaviour. For another example, the law, also discussed above, about the recusal or disqualification of judges on the grounds of a reasonable apprehension of bias when a judge fails to control the uncivil conduct of the lawyers controls the conduct of lawyers indirectly. *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham*,⁶⁴ and *R. v. Felderhof*⁶⁵ demonstrate this point. The comments of the Court of Appeal suggest that the conduct of the defendants' lawyers came perilously close to providing grounds to set aside the trial judgment or the proceedings themselves. The prospect that a hard fought victory will be overturned on appeal because the lawyer fought unfairly acts as a deterrent and indirectly controls uncivil behavior.

In a similar fashion, the law about inflammatory jury addresses sometimes provides another indirect way to curb the incivility of lawyers. Counsel are required to advance their client's cause fearlessly and with vigour, so long as this is done in accordance with the rules of court and professional conduct and in conformity with counsel's obligations as an advocate and officer of the court. Counsel are allowed considerable latitude in what they say and how they may say it when addressing a jury; however, there are limits.⁶⁶ In circumstances of an inflammatory jury address, the trial judge must take remedial steps which may include a firm correcting charge to the jury, striking the jury, or declaring a mistrial.⁶⁷ If the trial judge fails to take appropriate steps, then the appellate court may order a new trial on the grounds that the inflammatory jury address compromised the fairness of the trial. Incivility may infuse an inflammatory jury address, for example, where counsel's comments impugn the integrity of the opponent's lawyer by suggesting that he or she is lying or misrepresenting the evidence.⁶⁸ In *Landolfi v. Fargione*,⁶⁹ Cronk, J.A. stated: "[T]here is no room in our adversarial system of justice for unwarranted *ad hominem* attacks at trial on opposing counsel. This is not simply a

⁶³ *Walsh v. 1124660 Ontario Ltd.*, [2002] O.J. No. 4069 (S.C.J.), where Sutherland, J. disagreed with the conclusion of the Master in *Kingsberg Developments Ltd. v. MacLean* (1985), 3 C.P.C. (2d) 241 (Ont. Master) that the invocation of the rule required a finding that the discovery had been rendered futile. Sutherland, J. referred to and adopted *Kay v. Posluns* (1990), 71 O.R. (2d) 238 (H.C.J.) as authority for guidelines for the proper conduct of a discovery.

⁶⁴ (2001), 51 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused [2001] S.C.C.A. No. 66.

⁶⁵ (2004), 68 O.R. (3d) 481 (C.A.).

⁶⁶ *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.) at paras. 76-78; *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.) at paras. 15-16.

⁶⁷ *Marrelli v. Deathe*, [2005] O.J. No. 125 (C.A.).

⁶⁸ *Landolfi v. Fargione* (2006), 79 O.R. (3d) 767 (C.A.); *Ross v. Lamport*, [1955] O.R. 542 (C.A.) at pp. 562-63, rev'd on other grounds, [1956] S.C.R. 366.

⁶⁹ (2006), 79 O.R. (3d) 767 (C.A.) at para. 88.

matter of courtesy. Such attacks are not only uncivil and unprofessional, left unchecked they also endanger trial fairness and stain the administration of justice.”

Conclusion

Although the normal antagonism of disputants, the idiosyncrasies of human behaviour, the circumstances of scarce human and other resources, and the adversarial nature of an adversary system are fertile ground for incivility, the discussion above reveals that, at least, in theory, the civil law both directly and indirectly brings to bear an array of rules and doctrines to encourage civility and to control incivility by judges and lawyers. The law associated with disqualification of judges, unfair trials, grounds for appeal, contempt, right of audience, disqualification of counsel, costs, inflammatory jury addresses, and the inherent jurisdiction of the court to control its own process all make a contribution directly or indirectly to the encouragement of civility and the sanctioning of incivility.

The discussion also reveals, however, that in implementation and application, the law of civility confronts countervailing forces. For example, the firmness and decisiveness that is required from a judge for a fair trial may transmute into incivility to make the trial unfair and be grounds for an appeal, and conversely, as demonstrated by *R. v. Felderhof*,⁷⁰ a judge’s failure to be firm and decisive to control the uncivil conduct of lawyers may also make the trial unfair and should there be an appeal of the trial verdict, the judge’s lenience may be a reversible error. There are some very fine lines to be drawn. The discussion reveals that much of the substantive law about civility involves discretion and delicately balanced and difficult to apply legal tests.

Justice Cronk’s remarks in *Landolfi v. Fargione*,⁷¹ highlight the fundamental values threatened by incivility, and she notes that the threats to the administration of justice cannot be left unchecked. However, the discussion in this paper reveals that for many good reasons, the civil law is very cautious in employing its substantive legal tools against judges and lawyers to curb incivility and to promote civility and courtesy. An analysis of all the legal tests for exercising the court’s jurisdiction reveals that they all have high to very high tolerances for incivility. As it turns out, while civility is indeed a substantive rule of the civil law both substantively and also procedurally and while there is a growing trend for judges and masters to employ the principles of civility fashioned by regulators and professional organizations, it must largely fall on the regulators, the professional organizations, education (the law schools and continuing education providers), and the traditions and day-to-day practices of the bench and the bar to curb incivility.

⁷⁰ *R. v. Felderhof* (2004), 68 O.R. (3d) 481 (C.A.).

⁷¹ (2006), 79 O.R. (3d) 767 (C.A.) at para. 88.

Schedule A

Law Society of Upper Canada, *Rules of Professional Conduct**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.

Commentary

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which 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 with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where 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.

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

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.

Commentary

Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, 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 legal profession.

Commentary

If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and the reputation with the profession will be destroyed regardless of how competent the lawyer may be.

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

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.

Commentary

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 function properly.

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.

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.

(2) A lawyer shall 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.

(3) A lawyer shall avoid sharp practice and shall 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.

Communications

(5) A lawyer shall 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.

Schedule B

Canadian Judicial Council's *Ethical Principles for Judges*,⁷²*Diligence*

Statement: Judges should be diligent in the performance of their judicial duties.

Commentary:

1 Socrates counselled judges to hear courteously, answer wisely, consider soberly and decide impartially. These judicial virtues are all aspects of judicial diligence. It is appropriate to add to Socrates' list the virtue of acting expeditiously, but diligence is not primarily concerned with expedition. Diligence, in the broad sense, is concerned with carrying out judicial duties with skill, care and attention, as well as with reasonable promptness.

7. Diligence in the performance of adjudicative duties includes striving for impartial and even-handed application of the law, thoroughness, decisiveness, promptness and the prevention of abuse of the process and improper treatment of witnesses. While these are all qualities and skills a judge needs, the variety of cases and the particular conduct of counsel and parties requires a judge conducting a hearing to emphasize one or more sometimes at the expense of some of the others, in order to achieve the proper balance. Striking this balance may be particularly challenging when one party is represented by a lawyer and another is not. While doing whatever is possible to prevent disadvantage to the unrepresented party, the judge must be careful to preserve his or her impartiality.

8 The obligation to be patient and treat all before the court with courtesy does not relieve the judge of the equally important duty to be decisive and prompt in the disposition of judicial business. The ultimate test of whether the judge has successfully combined these ingredients into the conduct of the matters before the court is whether the matter has not only been dealt with fairly but in a fashion that is seen to be fair. These issues are addressed in the "Impartiality" chapter, section B.

Equality

Statement: Judges should conduct themselves and proceedings before them so as to assure equality according to law.

Principles:

1 Judges should carry out their duties with appropriate consideration for all persons (for example, parties, witnesses, court personnel and judicial colleagues) without discrimination.

⁷² Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998) at pp. 44–45.

2 Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.

4. Judges, in the course of proceedings before them, should disassociate themselves and disapprove of clearly irrelevant comments or conduct by court staff, counsel or any other person subject to the judge's direction which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law.

Commentary:

4 As is discussed in more detail in the "Impartiality" chapter, judges should strive to ensure that their conduct is such that any reasonable, fair minded and informed member of the public would justifiably have confidence in the impartiality of the judge. Judges should avoid comments, expressions, gestures or behaviour which reasonably may be interpreted as showing insensitivity to or disrespect for anyone. Examples include irrelevant comments based on racial, cultural, sexual or other stereotypes and other conduct implying that persons before the court will not be afforded equal consideration and respect.

Impartiality

Statement: Judges must be and should appear to be impartial with respect to their decisions and decision making.

Principles:

A. General

1. Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.
2. Judges should as much as reasonably possible conduct their personal and business affairs so as to minimize the occasions on which it will be necessary to be disqualified from hearing cases.
3. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair minded and informed person.

B. Judicial Demeanor

1. While acting decisively, maintaining firm control of the process and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.

Commentary

A.3 Impartiality is not only concerned with perception, but more fundamentally with the actual absence of bias and prejudgment. This dual aspect of impartiality is captured in

the often repeated words that justice must not only be done, but manifestly be seen to have been done. As de Grandpre, J. put it in *Committee for Justice and Liberty v. National Energy Board*, the test is whether “an informed person, viewing the matter realistically and practically – and having thought the matter through –” would apprehend a lack of impartiality in the decision maker. Whether there is a reasonable apprehension of bias is to be assessed from the point of view of a reasonable, fair minded and informed person.

A.5 A reasonable perception that a judge lacks impartiality is damaging to the judge, the judiciary as a whole and the good administration of justice. Judges should, therefore, avoid deliberate use of words or conduct, in and out of court, that could reasonably give rise to an absence of impartiality. Everything from his or her associations or business interests to remarks which the judge may consider to be “harmless banter” may diminish the judge’s perceived impartiality.

B. Judicial Demeanor

B.1 Litigants and others scrutinize judges very closely for any indication of unfairness. Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudice and intemperate and impatient behaviour may destroy the appearance of impartiality. On the other hand, judges are obliged to ensure that proceedings are conducted in an orderly and efficient manner and that the court’s process is not abused. An appropriate measure of firmness is necessary to achieve this end. A fine balance is to be drawn by judges who are expected both to conduct the process effectively and avoid creating in the mind of a reasonable, fair minded and informed person any impression of a lack of impartiality. These issues are more fully discussed in chapters 4 and 5, “Diligence” and “Equality.” It bears repeating, however, that any action which, in the mind of a reasonable, fair minded and informed person who has considered the matter, would give rise to reasoned suspicion of a lack of impartiality must be avoided. When such impressions are created, they affect not only the litigants before the court but public confidence in the judiciary generally.

Schedule C

Rules of Civil Procedure (Ontario)

IMPROPER CONDUCT OF EXAMINATION

Adjournment to Seek Directions

34.14(1) An examination may be adjourned by the person being examined or by a party present or represented at the examination, for the purpose of moving for directions with respect to the continuation of the examination or for an order terminating the examination or limiting its scope, where,

- (a) the right to examine is being abused by an excess of improper questions or interfered with by an excess of improper interruptions or objections;
- (b) the examination is being conducted in bad faith, or in an unreasonable manner so as to annoy, embarrass or oppress the person being examined;
- (c) many of the answers to the questions are evasive, unresponsive or unduly lengthy; or
- (d) there has been a neglect or improper refusal to produce a relevant document on the examination.

Sanctions for Improper Conduct or Adjournment

- (2) Where the court finds that,
 - (a) a person's improper conduct necessitated a motion under subrule (1); or
 - (b) a person improperly adjourned an examination under subrule (1),

the court may order the person to pay personally and forthwith the costs of the motion, any costs thrown away and the costs of any continuation of the examination and the court may fix the costs and make such other order as is just.

LIABILITY OF LAWYER FOR COSTS

57.01 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

- (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
 - (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
 - (c) requiring the lawyer personally to pay the costs of any party.
- (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court.
- (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

Family Law Rules

COSTS CAUSED BY FAULT OF LAWYER OR AGENT

Rule 24(9) - If a party's lawyer or agent has run up costs without reasonable cause or has wasted costs, the court may, on motion or on its own initiative, after giving the lawyer or agent an opportunity to be heard,

- (a) order that the lawyer or agent shall not charge the client fees or disbursements that the client has already paid toward costs;
- (b) order the lawyer or agent to repay the client any costs that the client has been ordered to pay another party;
- (c) order the lawyer or agent personally to pay the costs of any party; and
- (d) order that a copy of an order under this subrule be given to the client.