Nova Scotia Barristers’ Society

TASK FORCE ON PROFESSIONAL CIVILITY

2002 Report
The mandate of this Task Force was defined as follows:

As part of reputation management or otherwise, consider whether there has been a deterioration in civility among members of the profession, and if so, the reasons for it, and the means for improving it.

The Task Force has concluded there has been a deterioration in civility among the profession. The Legal Ethics Handbook, professional tradition, and the public interest call for fair, civil and courteous dealings between counsel and with clients. Failure to observe these principles results in a more difficult, less satisfying career and a diminished public image.

Inquiries from the membership, the Barristers’ Society, other barristers’ societies and the Bench confirm that incivility is becoming part of the culture of the profession. Reversing this cultural shift represents a daunting task.

The reasons for the trend towards incivility are many but appear to be rooted in the business model of the modern law practice. The trend also appears to be a reflection of the increase in incivility in society generally. The lack of collegiality and fraternization and increased competitiveness are all contributing factors. Traditional mentoring has given way to fast-track training. Client expectations, and the resultant loss of professional objectivity, is another contributing factor. The practice of law has become increasingly stressful and more lawyers are finding the practice less satisfying, therefore, the incidence of incivility is on the rise. Many lawyers feel incivility must be met with incivility. The availability of immediate communication, by e-mail, facsimile and telephone, has had the effect of reducing the opportunity for reflection before responding to correspondence.
The Task Force has concluded there is insufficient emphasis on civility in law school curriculum, the articling program, the bar admission course, and continuing professional education programs.

The Task Force has identified many avenues toward remedying the problem of incivility, as part of a long term project focused on education and example. The starting point for addressing this issue, however, has to be with the individual lawyers treating others as they would expect to be treated.

The Task Force determined that immediate attention is required to develop specific civility components for the law school curriculum, the bar admission course, the articling program, and continuing professional education. It is apparent, however, that such programs are more likely to have an impact on the behavior of future members of the bar than on current members.

The Task Force has identified a need to maintain a heightened awareness of civility by way of the publication of a civility brochure, use of Society publications and the web page, and regular seminars provided to members by qualified individuals.

The Task Force has concluded there is compelling evidence that civility among members of the bar contributes to an enhanced public image of lawyers. Incivility debases the profession as a whole. The public cannot be expected to show respect for lawyers when so many lawyers fail to show respect among themselves.
INTRODUCTION - MANDATE:

The issue of professional civility has been the subject of anecdotal discussion for some time. Concern regarding this issue has grown substantially over the past few years. Law societies across Canada and bar associations throughout the United States have responded to address the problem.

The realization has emerged that civility is not just a question of manners, but is a significant problem that is having a negative effect on the profession. A lack of civility among counsel and toward clients increases the pressures of practice and impacts on professional reputation. Civility is distinguishable from legal ethics, however, there is often considerable overlap.

On October 13, 2000, the Nova Scotia Barristers’ Society struck a Task Force to inquire into the decline professional civility. The general mandate was stated as follows:

“As part of reputation management, or otherwise, consider whether there has been a deterioration in civility among members of the profession and, if so, the reasons for it and means for improving it.”

The initial objective of the Task Force was to solicit input from the membership of the Society and to review all available information, which included:

$ Discussions with Nova Scotia Barristers’ Society staff
$ Submissions from the judiciary
$ Contact with all Canadian law societies
$ Appearances before the Executive Committee and Bar Counsel encouraging participation and input
$ Profiling this initiative in the Law News and on the Nova Scotia Barristers’ Society Web Site
$ Review of published materials on professional civility
Review of the Nova Scotia Barristers’ Society Legal Ethics Handbook
Review of case law and discipline reports involving civility

The input received from the above was critical to the preparation of this Report. It became apparent that professional civility is a significant concern in Nova Scotia, Canada, and among legal professionals generally.

PROFESSIONAL CIVILITY DEFINED:

Professional Civility is a hallmark of the legal profession. John J. Copeland Jr. in “Legally Speaking - Focus on Professionalism” (vol 21, No. 3, Spring 98 - ABA Section of State and Local Government) describes this concept in the following language:

“Civility is more than surface politeness; it is an approach that seeks to diminish rancor, to reconcile, to be open to non-litigious resolution. In short, it is an approach that modifies the antagonisms and aggressiveness of an adversarial society and seeks a more civilized condition.”

Civility is akin to notions of courtesy, politeness, good manners and respect. Webster’s defines “civility” as (1) courtesy, politeness, consideration (2) a polite act or utterance. “Polite” is defined as (1) polished, cultured, refined, correct and (2) having good manners, courteous.

Again in Webster’s, under the section dealing with synonyms for “civil”, the following appears:

“Civil implies merely a refraining from rudeness, polite suggests a more positive observance of etiquette in social behavior, courteous suggests a still more positive and sincere consideration of others that springs from an inherent thoughtfulness”

Barry Vogel, Q.C., practice advisor for the Law Society of Alberta, adds that it is a mistake to assume that the decline in civility is taking place only in litigation. He states that while “one
might argue that the adversary system is more prone to this kind of posturing, the fact is that it is found in all aspects of practice, including the common house deal”.

Michael Eizenga, in a 2000 article entitled “Citizenship in the Legal Profession - Civility as an Instrumental Value in Self-Governance” advances the proposition that “the beginning place for any consideration of professional behavior has to be a recognition of, as well as a rededication to, our fundamental professional service mandate”. He states that civility is instrumental in ensuring the maintenance of our professional institution and furthering our profession’s goals. He stresses that civility is a value that is embedded in the roots of our rule of law.

Mr. Eizenga further states as follows at page 10 of the aforementioned paper:

“By way of contrasting civility to ethics ... I have emphasized how civility is instrumental to our institutional capacities by counter-balancing the individualist drive with self-restraint and public spirit. In short, our capacity for civility corresponds precisely without capacity for dialogue, interaction and cooperation.”

Professional Civility exists as part of, yet independent of, ethics and professionalism. Alan Harris, an American writer, advanced this distinction in the following language:

“Civility is different - it’s how you treat others. A civil and courteous lawyer may, unbeknownst to you, be unethical. And the converse is also true; an ethical lawyer may be very rude, contentious and lacking in civility. Professionalism is a larger category. It includes civility, ethics, being well prepared and doing pro-bono work”

Mr. Harris advances the Virginia Bar Associations’ creed to make his point.

“Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationship with their fellow lawyers and their own well-being.”
“Civility is not inconsistent with zealous advocacy. You can be civil while you’re aggressive, angry, upset and intimidating; you’re just not allowed to be rude.”

The Honourable Chief Justice R. Roy McMurty, Chief Justice of Ontario, states in the brochure “Principles of Civility for Advocates” (The Advocates Society, Toronto, Ontario, 2001) that “the success of our greatest advocates has been characterized by civility”. Civility values diversity, disagreement and the possibility of disagreement. Civility allows criticism of others and sometimes requires it, but the criticism should always be civil.

United States Supreme Court Justice Anthony Kennedy observed as follows in his 1997 address to the Annual Meeting of the American Bar Association:

“Civility is the mark of an accomplished and superb professional, but it is even more than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual. We are civil to each other because we respect one another’s human aspirations and equal standing in a democratic society. We must restore civility to every part of our legal system and public discourse. Civility defines our common cause in advancing the rule of law”.

The Ontario Advocates Society Conference of this past year was an effort to advance the profile of civility across the bar. This group concluded, as a fundamental position, that civility enables the litigator to create some distance between their personal values and the advocates professional role in the adversarial system. Professor Pilkington stated at that time:

“Civility continues to be an essential counterweight within the adversary system. If it cannot be protected, if it cannot be inculcated, then perhaps we need to rethink the adversary process itself.”
DETERIORATION IN CIVILITY

The Task Force has concluded that there has been a deterioration in civility in the legal profession. Further, this deterioration knows no geographical or demographic boundaries and concerns lawyers in all areas of practice. It is the Task Force’s perception that civility is at its lowest among the matrimonial and civil bars.

The Law Times in a November, 2000 editorial entitled “Civility at all Times” offered the following:

“More and more lawyers are name calling, finger pointing, shouting at each other, being rude to one another, employing questionable means to advance their careers and doing absolutely anything to secure the interests of their clients.”

Barry Vogel, Q.C., practice advisor for The Law Society of Alberta, commented in the Society’s January, 1999 newsletter titled “Ethically Speaking”:

“This sorry state of affairs is brought to my attention daily in the calls that come to me as practice advisor. Lawyers describe to me regularly conduct that demonstrates rudeness, inflated rhetoric, hostility and refusal to discuss or consider any position other than that being put forward. Frequently, the language used is antagonistic and unjustifiably aggressive.”

Mr. Vogel concluded that incivility is becoming part of the culture of the profession and cautions that cultural changes are difficult to reverse.

The Law Society of Alberta held a civility initiative meeting on November 19, 1999. The Society’s efforts disclosed that over the previous six (6) years there was an increase in the number of complaints made related to incivility among lawyers. The Society’s complaints officers reported that about one-third (1/3) of the complaints originate from lawyers complaining about other lawyers.
The American experience with incivility appears to be more extreme than as encountered in Canada. Alan Harris, writing in the winter 2001 newsletter of the American Bar Association Center for Professional Responsibility, advanced the following conclusion:

“Many believe that relations between lawyers have so deteriorated that our profession nears a crisis - one that not only implicates how we deal with each other but threatens our usefulness to society, the ability of our clients to bear the cost of our work, and the essential values that mark us as professionals.”

The Ontario experience also confirms a serious erosion in civility among members. The Advocates Society recently held a conference to address these concerns and a great deal of the initiative came from the office of the Honourable Chief Justice R. Roy McMurty, Chief Justice of Ontario. That experience has resulted in ongoing education and the publication of a brochure entitled “Principles of Civility for Advocates”. The Advocates Society is presently drafting a civility training workshop as a response to the ongoing problem of incivility among counsel.

The Law Society of Saskatchewan reported that civility is being treated as a peripheral issue in its ongoing study on competence and is an issue that underlies many of the matters before the Society’s ethics committee.

The Law Society of Prince Edward Island reported that civility has become “an increasing subject of concern to our members”.

The Law Society of Manitoba reported that “The issue of Professional Civility is one that seems to be a growing problem for our profession, the clients of our profession and others who have to deal with us, such as the judiciary”.

The Law Society of the Northwest Territories recognizes some erosion in the “courtesy and good faith” required by its Code of Conduct.
The Law Society of British Columbia reports that “professional civility, or the lack of it, is a frequent topic of conversation and consternation, and has been the subject of published remarks by the Law Society Treasurer”.

Nova Scotia also recognizes an ongoing deterioration in civility among counsel. The judiciary has responded by deeming the mandate of the Task Force as a worthwhile endeavor. The Honourable Chief Justice Joseph P. Kennedy has described this as “a problem that has surfaced over the last ten years or so”. The Honourable Associate Chief Justice J. Michael MacDonald reports that at a recent Judges’ meeting this initiative was discussed and deemed worthy of the Court’s support.

Victoria Rees, Director for Professional Responsibility with the Nova Scotia Barristers’ Society, confirms an increase in civility related complaints over the past year. She noted three disputes between lawyers involving complaints of poor communication, inappropriate/unprofessional language, and basic inability to relate in an amicable manner. Ms. Rees also noted eight additional matters that were sent to the Discipline Committee. These cases involved poor attitude, threats to counsel, conflict of interest, poor communications, and sharp practice. More than half of these complaints resulted in some form of sanction.

The issue of civility formed part of the agenda at a Canadian Bar Society Conference in Saskatoon and was part of the program at the August, 2001 annual meeting of the Canadian Bar Association. Nova Scotia is clearly not the only body addressing the issue of professional civility.

**REASONS FOR DECLINE IN CIVILITY:**

The lack of civility in the legal profession is a product of modern practice. The profession has evolved away from its traditions and moved towards a business model. The challenge for the future is to re-introduce civility into the modern practice of law.
The Law Society of Alberta’s civility inquiry advanced the following as some of the reasons for the decline in civility:

- Incivility in society in general
- Larger numbers of lawyers resulting in a lack of collegiality and an increase in competitiveness
- Traditional mentoring has given way to “fast track” training and consequently young lawyers are on their own earlier
- Client expectations
- Identifying with clients at a personal level
- Stress/pressure
- Attitude that incivility must be met with incivility

Paul McLaughlin, Practice Management Advisor for the Law Society of Alberta, argues the problem of incivility can be solved by increasing the policeman role of the Law Society. Mr. McLaughlin feels the problem can only be solved by changing the culture of the profession. He sets forth the following as factors contributing to incivility in the profession:

- Stress
- Time Management
- Personnel Management
- Financial Management
- Marketing
- Technology
- Goals to be achieved

Mr. McLaughlin emphasizes stress as the most significant factor contributing to incivility and advances the theory that “anything you can do to reduce the stress in your practice will help you improve civility”.

The inability of counsel to be objective appears to be the second most significant factor leading to incivility. Barry Vogel, Q.C., in an article entitled “Ethically Speaking” offers the following observation:

“At the risk of oversimplifying, I believe that what is happening is that lawyers are becoming too quick to identify, at the personal level, with the issues raised by their own clients. And if they are
identifying in this way, it is not much of a leap to characterize the lawyer opposite the same way, viz he or she is personally identified with the clients position. That seems to be justification for lawyers treating one another in the same way clients treat one another.”

The Task Force has sought input from both the judiciary and the members of the Bar. The following represents some of the factors identified as contributing to the decline in civility:

- The stress associated with the demands of present day practice
- The financial realities of modern day practice (margins, volume, billable hours)
- Senior practitioners talking down to junior lawyers
- The ill considered use of letters, memos, e-mails and telephone exchanges between counsel
- The immediacy of modern technology (voicemail and e-mail)
- The lack of mentoring programs available to young lawyers
- Tolerance of uncivil behavior by the judiciary
- The extremely adversarial nature of matrimonial practice and the inability of some counsel to maintain objectivity
- Deterioration of professional etiquette and tradition at the bar
- Insufficient emphasis on civility in law school curriculum, articling programs, bar admission courses, and continuing professional development programs

**LEGAL ETHICS HANDBOOK:**

The foundation for civility in the legal profession is rooted in the Legal Ethics and Professional Conduct Handbook. While all 23 rules in some way involve civility, Rules 3, 13, 14, 18, 21 and 23 in particular are the most relevant to the issue at hand.

**Rule 3:** Quality of Service - A lawyer has a duty to serve a client in a conscientious, diligent, efficient and civil manner so as to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation.

**Rule 13:** Duties to other lawyers - a lawyer has a duty to treat and deal with other lawyers courteously and in good faith.
**Rule 14:** Duties to the court - when acting as an advocate, the lawyer has a duty to treat the court with candor, courtesy and respect.

**Rule 18:** Duties to the profession generally - a lawyer has a duty to uphold the integrity of the profession and to promote the reputation of the profession for fairness, justice and honesty.

**Rule 21:** Justice and the Administration of Justice - the lawyer has a duty to encourage public respect for Justice and to uphold and try to improve the administration of justice.

**Rule 23:** Avoiding questionable conduct - the lawyer has a duty to carry out all of the duties in this Handbook in the spirit as well as the letter.

The Task Force has reviewed the Rules, the associated commentaries, the discipline digests, and case law. The principles garnered from this research are set out at Schedule “A” to this Report.

**CIVILITY AND REPUTATION MANAGEMENT:**

The mandate of the Task Force is to study civility “as part of reputation management or otherwise”. There can be no question that civility produces its own internal rewards. Additionally, there can be no question that civility among the profession contributes to an enhanced public image of lawyers. It is the impression of the Task Force that there appears to be acknowledgment among the profession that the deterioration in professional civility has significantly contributed to the present image of lawyers.

David Gambill in “The Law Times”, November 8, 2000 articulates the foundation for the connection between civility and reputation:

“By and large, people in our society have agreed to place their faith in resolving conflicts through the civil intellectual procedures of law. In exchange they gain the benefit of the freedom from fear, they don’t have to worry about resolving conflicts through
intimidation, co-ersion or physical force.”

“In order for this social contract to work, its imperative for people to maintain respect for the law. But this is difficult to do when lawyers themselves flout codes of conduct constructed to maintain civility in the profession.”

The effect of incivility is to debase the profession as a whole. If lawyers cannot respect each other, or the rules of the legal system, it cannot be expected that the public will view lawyers in a positive light. Barry Vogel, Q.C., Practice Advisor for the Law Society of Alberta, concurs with this point of view:

“There is yet another negative effect. We all complain about lawyer bashing on the part of the public. We are all unhappy when we see the evidence, which is everywhere, that a large part of the public has no respect for lawyers. Why should the public show respect for lawyers when so many lawyers don’t show respect for lawyers”.

John Honsberger, in a recent article entitled “Civility within the Profession”, argues that acceptable morality, character and civility is expected from members of the profession and that the supervision of these areas is one of the important duties of a professional organization. Our failure to so supervise results in a breakdown in these traditional areas of behavior.

Mr. Honsberger suggests that if incivility is left unaddressed, the independence of the profession could suffer:

“Decreasing civility is both a measure of the state of the profession and our civilization. It may well be the principle factor for the comment increasingly heard these days that “practice is no longer fun”. The lack of civility within the profession and the resulting decrease in respect for the profession by the general public may be too the beginning of the end of the self-government of the profession when it may appear that the practice of law is no longer a profession at least in the traditional sense.”
Professionalism is a cornerstone of respect. Warren E. Burger (‘The ABA Has Fallen Down on the Job’, The Wall Street Journal 10 August 1994) has said:

“The law historically has been viewed as a learned profession rather than a trade. As such a lawyer’s “calling” goes beyond his or her immediate financial interest. Lawyers have viewed themselves as statesmen, and have served as problem-solvers, harmonizers, and peacemakers - the healers of conflict, not its promoters or gunslingers. The legal profession, in short, abided by standards that were above the minimum commands of the law. All the professions current problems, the eroding public respect for lawyers, the lack of professional dignity and civility on the part of many lawyers, and lawyers insensitivity to the litigation explosion - are clear indications that the professionalism of the bar is in sharp decline.”

There appears to be general acceptance of the understanding that professionalism ranks second only to expertise when clients and the general public evaluate lawyers. Professionalism is not unlike obscenity in that it means different things to different people and different things over time, however, civility is an important indicator.

In recent years the media has been ever present to document the decline in civility in the legal profession. The media continually presents the public with examples of overzealous lawyers, thus encouraging the perception of the general population that those lawyers are the norm.

**COSTS OF INCIVILITY:**

Incivility impacts primarily on the quality of the working environment and relationships, and on professional reputation. There are additional costs associated with incivility which involve self governance and insurance.

Malcolm Heinz, former President of the Ontario Lawyers Professional Indemnity Co. and now Chief Executive Officer of the Law Society of Upper Canada, states that uncivil behavior is
costing the legal profession as a whole. Litigation claims are increasing regarding cases involving actions between lawyers. In Ontario, litigation claims against lawyers have increased from $15 million to $25.7 million over the past four years.

The Law Times, in a November 2000 editorial, advanced the realization that there are economic consequences to incivility:

“There is a good economic argument to be made for civility. Being nasty costs too much. LPIC says it sees millions of dollars in insurance claims based on rude or outrageous behavior and that means higher premiums.”

Ronald Slaght Q.C., head of Ontario’s civility initiative, writes in the Advocates Brief, August 2000 as follows:

“You also will have seen the recent release from LPIC to the effect that litigation matters now constitute the largest class of claims made against lawyers, and not from an increase in the traditional minefields for litigators, such as missed limitation periods, but rather from emerging categories of claims such as libel and slander allegations against lawyers, claims that counsel should pay the costs of proceedings personally...”

Jerry Adamowicz with LPIC, argues that a more aggressive uncivil approach to practice is “a significant factor” in claims being made against lawyers, especially litigation lawyers. In Mr. Adamowicz’s experience, the conduct of lawyers who have increasingly become more aggressive, uncivil, emotional and self motivated is often the root cause of these claims. Mr. Adamowicz offers the following statistics:

“The greatest increase has been seen in the area of litigation practice. For the period from 1989 to 1998, real estate accounted for 44.9% of LPIC’s claims while litigation practice accounted for 35%. In 1999 the trend reversed with litigation accounting for 43% of all claims reported while real estate accounted for only 32%.”
The Alberta Law Society sees many costs related to a lack of professional civility. Over the past six years, the Society’s practice advisors office has noted an increase in the number of calls related to incivility between lawyers. The Society’s complaints officers report that one-third of the calls received involve lawyers complaining about other lawyers.

These increases, however, must be put in proper perspective. Lawyers do not tend to complain about lack of civility unless it is particularly egregious. Less serious offences are most often voiced as complaints to other colleagues.

The Nova Scotia experience with incivility is not as perceptible as that of other larger Canadian jurisdictions. Nonetheless, complaints to the Nova Scotia Barristers’ Society are on the rise. The level of complaints is set out elsewhere in this Task Force’s Report. There have been at least four cases over the past fifteen years where incivility has led, at least in part, to reported litigation. The Task Force has found that rarely are civility criticisms included in the decisions of the Court. The Task Force conducted an extensive review of discipline decisions. It is apparent that civility based complaints are increasing in number annually, as is the cost associated with addressing these complaints.

**CIVILITY AND ADVOCACY:**

The Honourable R. Roy McMurty, Chief Justice of Ontario, has shown great interest in addressing the lack of civility in the profession. Critical to his initiative is the acceptance that “the success of our greatest advocates has been characterized by civility”, and further, that “the level of civility at the bar relates directly to the level of professionalism of the legal profession”.

There is no inconsistency between civility and effective zealous advocacy. Advocacy which is both civil and professional, however, is by far the most effective. The Ontario Advocates Society, in the preamble to the brochure “Principles of Civility for Advocates”, describes the
balance in the following manner:

“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 their clients case, fairly and honourably. Accordingly, counsels role is openly and necessarily partisan and nothing which follows is intended to undermine those principles. But counsel can disagree, even vigorously, without being disagreeable. Whether among counsel or before the courts, antagonistic or acrimonious behavior is not conducive to effective advocacy. Rather civility is the hallmark of our best counsel”

Civility among counsel also enhances some of the core values associated with traditional advocacy. Michael Eizenga, in an article entitled “Citizenship in the Legal Profession: Civility as an Instrument in Self-Governance”, states as follows:

“While I most certainly support our profession in asking and struggling with ethical questions, the power of civility lies in its immediacy and relevancy to the everyday context of the practice of law. If a lawyer conducts themselves in a thoughtful, open and generally considerate manner, you can bet that they are well on their way to satisfying some high order ethical ideals”.

Tranio’s advice in The Taming of the Shrew, that “we should do as adversaries do in law, strive mightily but eat and drink as friends”, provides a fitting illustration of what legal advocates have lost as a result of incivility, in terms of reputation and public perception.

The Nova Scotia Barristers Society has long been respected for the quality and skill of its advocates. Counsel are often expected to be both civil and “hard nosed”. It is the impression of the Task Force that the balance necessary for this ideal and guiding principle is somewhat unequal given the increase in incivility.
OTHER INITIATIVES:

The decline in civility within the legal profession appear to be the most significant in the United States, where the quantity and the quality of incivility far exceeds the Canadian experience. In many American jurisdictions the level of incivility has become a serious discipline issue, as the impression appears to be that the response of the profession is required to be as severe as the behavior complained of. It is not unheard in the American experience for name calling and physical violence, for example, to be part of the discovery process.

A Canadian initiative to address incivility was the Ontario Advocates Society conference on civility in the legal profession. The full day conference involved members of the bench and the bar and a panel of experts. Most panelists felt the phenomenon of uncivil behavior is widespread and beyond the control of any single person, legal association or group. A principle of civility handbook emerged and has been disseminated to all Ontario counsel.

Also, the Law Society of Upper Canada has formed the Chief Justice of Ontario Advisory Committee, the objective of which is to “encourage professionalism” and to act as a clearing house for complaints involving incivility.

The Law Society of Alberta has also established a civility initiative. A plenary session was held in January of 2001 in conjunction with the Canadian Bar Association mid-winter meeting. The theme of the program was the importance and the advantage of maintaining professional respect, and that professional courtesy is not only an important tradition, but is in the clients’ best interests.

The Nova Scotia Barristers’ Society is the third provincial law society to launch a civility program.
The Canadian Bar Association recognizes the need for professional civility and regularly advances materials in its publications that address the issue. In addition, the CBA has included a civility component in its ongoing programs.

There appears to be little doubt that all stakeholders have an interest in professional civility, clients and members of the profession alike.

**OVERCOMING INCIVILITY:**

The Task Forces has found that the solution to professional incivility among lawyers will be a long term project. At present, the majority of the profession are civil and courteous, however, the aim of any civility initiative should be to involve all parties involved and not just the offenders. Justice Cummings, in his presentation to the Ontario Advocates Society Program, stated that “to tolerate incivility in a few is to encourage it in many”. Professor Buckingham, at the same Ontario program, offered the following comments in terms of the speed of implementation:

“Civility is not something you can simply go out and get. You can’t sort of buy it. You can’t commodify it so that it is immediately available. It is a longer term project”

There is no “silver bullet” solution. Remedies must be structural and implemented by way of education and example.

Brenda Stothert-Kennedy, in a recent Lawyers’ Weekly article, set forth a starting position for addressing the issue of incivility:

“But what can be done? Bumper stickers? Computer magnets? Speakers on civility? Awards for the ultra-civil? The lunch time civility police (take a bag to lunch program)? We brain stormed all day.
We concluded that it all came down to each one of us taking personal responsibility for biting our collective tongues, taking those ten deep breaths and treating others as we would like to be treated.”

Research appears to indicate that individual responsibility approach is most likely to improve the behaviour of the occasional offender and that the more egregious offenders will only be motivated by self-interest. The latter must be made to realize that civility can increase professional success, financially and personally, and can be key in avoiding disciplinary proceedings.

Family law practitioners in Nova Scotia have recognized a significant deterioration in civility in their area of practice and have attempted to address the issue through the Collaborative Family Law initiative. The initiative is a model which may be applicable in other areas of practice as well.

The practice of family law, by nature, has always been emotional and rife with conflicts. The practice has becomes even more taxing, for clients and legal professionals, where the conduct of lawyers deteriorates to the point of incivility. The Collaborative Family Law initiative is a process in which lawyers and clients can evaluate the facts and assess options, and which empowers clients to make their own decisions in a civil fashion at an emotionally charged time.

Collaborative Family Law is a way of practicing law whereby the lawyers for both sides to a dispute agree to assist in resolving conflict using cooperative strategies rather than adversarial techniques and litigation. The process involves two lawyers and two clients working together towards the sole goal of reaching an efficient, fair and comprehensive settlement. If the process fails to end in an acceptable agreement and the matter proceeds to court, both collaborative lawyers are disqualified from further representing the clients. The process involves binding commitments to proceed in good faith and to refrain from threats of litigation during the collaborative process. Collaborative lawyers are models for their clients in that they embody a commitment to honesty, dignified behavior and mutual respect.
A more intrusive mechanism to address incivility involves a discipline type model. This concept has been used in the United States where incivility has encroached upon the discipline process. Linda Rothstein, of Gowlings Strathy Henderson, suggested to the Advocates Society of Ontario symposium that consideration should be given to a “civility tribunal”. That tribunal would steer complaints of uncivil behaviour away from the law society’s discipline process. Ms. Rothstein suggested establishing a commission of retired judges who would have the power to compel appearances before the tribunal. The aim would be to address with the lawyer complained of his or her actions. Ms. Rothstein stated that there would be “no consequences to that lawyer, no discipline, no record anywhere, no sanction, no deleterious effect to his client, nothing - just a meeting”.

There appears to be minimal support for such a program in Canada. It is generally felt that level of incivility here does not warrant such an approach. Education and example appear to be the preferred methods for addressing the issue in Canada.

The Law Society of Alberta’s plenary session on civility put forth the following “solutions” after extensive discussions in January, 2001:

- Professional leadership e.g., courts, law societies, the Canadian Bar Association
- Heightening awareness through speakers, articles, disciplinary action where appropriate, and responding publicly to unacceptable behavior
- Speakers and articles emphasizing the unacceptability of incivility and the “bottom line” self-interest in civility
- More comprehensive mentoring of articled students and bar admission courses
- More comprehensive treatment in law schools and bar admission courses

Law schools are a good starting point with regard to reversing the trend towards incivility. An article entitled “One Response to the Decline in Civility in the Legal Profession”, in the Rutgers Law Review (Summer 1999), stated as follows:

“The authors of this article, members of a legal writing faculty, submit that they can contribute to the effort to reverse the trend of the decline in civility among members of the bar. In teaching legal
research and writing to first year law students, they believe it is possible to instill in students a sense of civility, fair-dealing, good judgment and competence through lectures and assignments.”

The American authorities reviewed by the Task Force confirm that “the most frequently selected recommendation for solving the problem is law school education”. The materials reviewed have revealed that many law students consider that legal ethics and civility are oxymorons. It appears that law students feel in order to fulfill the duty of zealous representation they must be as close to the edge of acceptable behavior as possible.

In an address to the Advocates Society program in Ontario, Professor Buckingham indicated that very little is offered by law schools with respect to mandatory courses in ethics and professionalism. Professor Buckingham advocates greater emphasis on a role for law schools in Canada regarding the issue of civility. He states:

“So to conclude, how do we transform a legal community into civitas with civility? Law schools have an important role to play...the moral education requirement fits nicely into the law school curriculum. We do education so why don’t we do moral education?”

At the same program in Ontario, Professor Ian Holloway of the University of Western Ontario adds:

“My experience is that ...law schools have become really quite hostile, in many respects, to moral instruction, at least the sort of moral instruction that most of the people in this room would embrace.”

“So some of the moral traditions that the common law system has traditionally embraced include things like deference to age, respect for tradition, the concept of grace under fire, and it seems to me that each one of these things would be rejected as a concept by many of the people who you and I work with in law schools today.”
Dawn Russell, the former Dean of Dalhousie Law School, commented that “it seems to me that elements on professional civility might well be taught in either or both of these courses” (Legal Profession and Professional Responsibility and Dalhousie Legal Aid Service).

The Task Force has explored including civility in our the Bar Admission Course and the articling program in Nova Scotia. Jackie Mullenger, Director of Admissions and Professional Development for the Nova Scotia Barristers’ Society, advised that the issue of civility arises throughout the different skills components of the Bar Admission Course, but that there is no structured civility component in the curriculum for the course. Ms. Mullenger has expressed an openness to including a civility component as part of the Bar Admission Course. Kevin MacDonald of the Qualifications and Bar Admissions Course Committee of the Nova Scotia Barristers’ Society, expressed a similar willingness to consider the introduction of a civility component into the Bar Admissions Course and the articling program in Nova Scotia.

The Task Force is of the impression that there is significant support for the premise that proper professional conduct can and should be taught and that an educational approach to civility, through the law schools, bar admission courses and other legal education programs is feasible.

There also appears to be some indication that the decline in civility in the legal profession may be due in part to tolerance by the judiciary of incivility among counsel in the courtroom. The Task Force has noted some support for sanctions from the judiciary, including costs, as a response to incivility in the courts.

**CONCLUSION:**

This Task Force submits this Report to Council as well as the following Action Items:
**ACTION ITEMS:**

1. That Council authorize Society staff to prepare and publish a brochure promoting the principles of civility, similar in format to the Ontario Advocates Society publication, and to authorize the distribution of such a brochure to the membership.

2. That Council authorize the Task Force and Society staff to enter into discussions with Maritime law schools with regard to establishing a civility component into their curriculum.

3. That Council authorize the Qualifications and Bar Admissions Course Committee (QBACC) to develop and implement a civility component in the Bar Admission Course offered by the Nova Scotia Barristers’ Society.

4. 

5. That Council authorize QBACC to develop and implement a civility requirement that will be part of the checklist for the Nova Scotia Barristers’ Society articling program.

6. That Council authorize Society staff to develop a civility component for ongoing continuing legal education programs.

7. That Council authorize a symposium in which the findings and recommendations of this Task Force be reviewed and reinforced and authorize presentations to the membership on professional civility.

8. That Council authorize the Society and its committees to open up a line of communication with the judiciary for the discussion of civility in the broader legal community.
9. That Council authorize Task Force members and others to speak to the local bar communities on the subject of professional civility and to provide support as necessary.

10. That Council authorize Society staff to prepare a civility binder, that will include this Report and supporting materials, for use as a resource by members of the Society.

11. That each year the President of the Nova Scotia Barristers’ Society devote one article in the Society Record to professional civility.
SCHEDULE “A”

RULE #3 - QUALITY OF SERVICE:

COMMENTARY:

1. The requirement of these elements of the Rule means that the lawyer has a duty to make every effort to provide courteous, thorough and prompt service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client.

“Delay, and particularly protracted delay, discredits the profession and is a disservice to the public. Delay by any other name is still delay, and protected delay is conduct unbecoming a barrister.” Re J.S.C., Formal Hearing Panel Decision, N.S.B.S.-D26, March 3, 1988, at 4.

2. It will be observed that this Rule does not prescribe a standard of perfection.

3. A mistake, although it might be actionable for damages in negligence, does not necessarily constitute a failure to maintain the standard set by this Rule; conversely, conduct, while not actionable, may constitute a violation of the Rule. Evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure regardless of tort liability. Where both negligence and failure to serve a client in a conscientious, diligent, efficient and civil manner are established, while damages may be awarded for the former, the latter can result in the additional sanction of disciplinary action.
4. The lawyer who fails to serve a client in a conscientious, diligent and efficient manner does the client a disservice, brings discredit to the profession, and may bring the legal system and the administration of justice into disrepute. As well as damaging the lawyer's own reputation and practice, the failure of a lawyer to serve a client in a conscientious, diligent, efficient and civil manner may also damage the lawyer's associates and dependents.

5. Occasionally, a lawyer must be forceful with a client. Forcefulness, without rudeness, is not a violation of the Rule.

NOVA SCOTIA BARRISTERS’ SOCIETY DISCIPLINE DECISIONS

FAILURE TO COMMUNICATE:

Re F, Reprimand by Consent, N.S.B.S.-D93, December 14, 1999 [failure to explain or keep client reasonably informed];

Re C, Reprimand by Consent, N.S.B.S.-D92, December 14, 1999 [failure to explain or keep client reasonably informed];

Re M, Settlement Agreement, N.S.B.S.-D77, September 24, 1996 [poor communication, keeping clients informed, and doing work effectively and in a timely fashion];
Re C, Formal Hearing Panel Decision, N.S.B.S.-D76, May 29, 1996 [poor communication with client and failure to inform about file progress];

Re J (No. 2), Settlement Agreement, N.S.B.S.-D73, January 29, 1996 [inappropriate work on files, excessive fees, failure to communicate progress to clients];
Re M, Reprimand by Consent, N.S.B.S.-D66, May 29, 1995 [failure to inform clients and to be frank & candid in advising clients, failure to advise clients to seek independent legal advice, failure to complete necessary steps in real property transaction];

Re W (No. 1), Settlement Agreement, N.S.B.S.-D64, February 17, 1995 [failure to communicate with client, failure to complete work, failure to comply with Civil Procedure Rules];

Re S (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D55, August 20, 1993 [failure to register documents in a timely manner, failure to communicate with client and provide updates on status of files];

Re D (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D53, May 13, 1993 [misleading clients, failure to inform clients about file progress, failure to complete work in timely or competent manner, and breach of retainer].

Re J.R.M. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D48, November 15, 1991 [poor communication with client];

Re D.B. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D46, October 29, 1991 [failure to provide necessary documentation, failure to communicate with client, failure to complete work in timely manner];

Re R.A.M. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D44, June 17, 1991 [failure to communicate with client and to explain delay, misleading clients];

Re H.J.D. (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D40, July 31, 1990 [failure to carry out duties in timely manner, failure to keep clients informed, misleading clients about file progress];
Re G.R.F. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D36, February 28, 1990 [failure to perform assigned work, failure to communicate with client];

Formal Hearing Panel Decision, N.S.B.S.-D32, July 18, 1989 [failure to complete work for which he was paid, failure to keep clients informed, and failure to record documentation on property transactions];

Re P.M. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D28, May 19, 1988 [failure to serve clients in a diligent and conscientious manner, failure to keep clients reasonably informed, misrepresenting and misleading clients],

Re J.S.C., Formal Hearing Panel Decision, N.S.B.S.-D26, March 3, 1988 [failure to provide reasonable service, and failure to keep client informed].

No. 151, Caution, Discipline Digest, Issue No. 26, May 2000 [Delay, inactivity, and failure to keep the client informed].

No. 140, Counselling, Discipline Digest, Issue No. 25, February 2000 [Delay, inactivity, and failure to keep client advised].

No. 135, Caution, Discipline Digest, Issue No. 24, October 1999 [Delay and failure to keep client informed, in particular regarding a settlement offer].

No. 134, Counselling, Discipline Digest, Issue No. 24, October 1999 [Failing to communicate information to client].

No. 126, Counselling and Caution, Discipline Digest, Issue No. 22, February 1999 [Poor communication].
No. 125, Caution, *Discipline Digest*, Issue No. 22, February 1999 [Failure to respond to communications from client].

No. 124, Caution, *Discipline Digest*, Issue No. 22, February 1999 [Poor communication].

No. 120, Counselling, *Discipline Digest*, Issue No. 22, February 1999 [Poor communication].

No. 116, Counselling and Caution *Discipline Digest*, Issue No. 22, February 1999 [Poor communication and delay in providing client with documents].

No. 115, Counselling, *Discipline Digest*, Issue No. 22, February 1999 [Delay, inactivity, and poor communication while an associate of the member worked on the file].

No. 91, Counselling, *Discipline Digest*, Issue No. 18, February 1998 [Failing to keep client well informed and failing to return client's telephone calls].

No. 52, Counselling, *Discipline Digest*, Issue No. 11, May 1995 [Member counselled for failure to communicate with client about progress being made on a file. Member should have had a procedure in place to deal with clients' concerns].

No. 33, Caution, *Discipline Digest*, Issue No. 9, August 1994 [Member cautioned for failure to discuss offers to settle with client or to inform the client of the outcome of related proceedings].

No. 21, Caution, *Discipline Digest*, Issue No. 7, February 1994 [Member cautioned for failure to inform his client that he would be unavailable on the date of closing and that details were to be handled by his property secretary].
FAILURE TO PERFORM WORK IN A TIMELY FASHION:

Re M, Settlement Agreement, N.S.B.S.-D87, June 1, 1998 [failed to record documents in relation to real property transactions in a timely manner];

Re M, Settlement Agreement, N.S.B.S.-D77, September 24, 1996 [poor communication, keeping clients informed, and doing work effectively and in a timely fashion];

Re M, Reprimand by Consent, N.S.B.S.-D66, May 29, 1995 [failure to inform clients and to be frank & candid in advising clients, failure to advise clients to seek independent legal advice, failure to complete necessary steps in real property transaction];

Re W (No. 1), Settlement Agreement, N.S.B.S.-D64, February 17, 1995 [failure to communicate with client, failure to complete work, failure to comply with Civil Procedure Rules];

Re S (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D55, August 20, 1993 [failure to register documents in a timely manner, failure to communicate with client and provide updates on status of files];

Re D (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D53, May 13, 1993 [misleading clients, failure to inform clients about file progress, failure to complete work in timely or competent manner, and breach of retainer].

Re D.B. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D46, October 29, 1991 [failure to provide necessary documentation, failure to communicate with client, failure to complete work in timely manner];

Re H.J.D. (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D40, July 31, 1990 [failure to carry out duties in timely manner, failure to keep clients informed, misleading clients about file progress];
Re G.R.F. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D36, February 28, 1990 [failure to perform assigned work, failure to communicate with client];

Formal Hearing Panel Decision, N.S.B.S.-D32, July 18, 1989 [failure to complete work for which he was paid, failure to keep clients informed, and failure to record documentation on property transactions];

Re J.S.C., Formal Hearing Panel Decision, N.S.B.S.-D26, March 3, 1988 [failure to provide reasonable service, and failure to keep client informed].

No. 151, Caution, Discipline Digest, Issue No. 26, May 2000 [Delay, inactivity, and failure to keep the client informed].

No. 140, Counselling, Discipline Digest, Issue No. 25, February 2000 [Delay, inactivity, and failure to keep client advised].

No. 135, Caution, Discipline Digest, Issue No. 24, October 1999 [Delay and failure to keep client informed, in particular regarding a settlement offer].
No. 130, Caution, Discipline Digest, Issue No. 23, May 1999 [Delay, lack of response, breach of undertakings, and missing discovery dates].

No. 116, Counselling and Caution Discipline Digest, Issue No. 22, February 1999 [Poor communication and delay in providing client with documents].

No. 115, Counselling, Discipline Digest, Issue No. 22, February 1999 [Delay, inactivity, and poor communication while an associate of the member worked on the file].

No. 114, Counselling, Discipline Digest, Issue No. 22, February 1999 [Delay in obtaining execution and garnishee orders].
No. 113, Counselling, *Discipline Digest*, Issue No. 22, February 1999 [Delaying the finalization of a taxation of party and party costs before a Taxing Master].

No. 112, Caution, *Discipline Digest*, Issue No. 22, February 1999 [Delay in forwarding final documentation to client].

No. 98, Caution, *Discipline Digest*, Issue No. 19, May 1998 [Delay in addressing client's case].

No. 88, Caution, *Discipline Digest*, Issue No. 18, February 1998 [Delay and inactivity even though an Originating Notice (Action) and Statement of Claim had been filed and Discoveries had been held].

No. 87, Counselling, *Discipline Digest*, Issue No. 18, February 1998 [Delay in commencing an action].

**INAPPROPRIATE DEMEANOUR:**

No. 154, Counselling, *Discipline Digest*, Issue No. 26, May 2000 [Use of inappropriate language to the complainant in a telephone call].

No. 83, Counselling, *Discipline Digest*, Issue No. 17, August 1997 [Making rude and derogatory remarks in a letter to a client].

No. 82, Counselling, *Discipline Digest*, Issue No. 17, August 1997 [Making profane remarks to client].

No. 76, Counselling, *Discipline Digest*, Issue No. 16, May 1997 [Member counselled for inappropriate demeanour with a client and for making allegedly derogatory remarks about the client and about the Barristers' Society].
IMPROPER CONDUCT:

Re M Settlement Agreement, N.S.B.S.-D81, September 23, 1997 [misleading client];

Re J (No. 2), Settlement Agreement, N.S.B.S.-D73, January 29, 1996 [inappropriate work on files, excessive fees, failure to communicate progress to clients];

Re M Settlement Agreement, N.S.B.S.-D71, November 21, 1995 [breach of fiduciary duty, failure to advise client to seek independent legal advice in situation of conflict of interest];

Re W (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D69, August 24, 1995 [failure to maintain records, failure to communicate honestly with clients, defrauding clients, breach of fiduciary duty];

Re M, Reprimand by Consent, N.S.B.S.-D68, July 18, 1995 [overbilling Legal Aid for poor quality service];

Re M, Reprimand by Consent, N.S.B.S.-D66, May 29, 1995 [failure to inform clients and to be frank & candid in advising clients, failure to advise clients to seek independent legal advice, failure to complete necessary steps in real property transaction];

Re D (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D53, May 13, 1993 [misleading clients, failure to inform clients about file progress, failure to complete work in timely or competent manner, and breach of retainer].

Re R.A.M. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D44, June 17, 1991 [failure to communicate with client and to explain delay, misleading clients];

Re H.J.D. (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D40, July 31, 1990 [failure to carry out duties in timely manner, failure to keep clients informed, misleading clients about file
progress];

*Re D.L.D.*, Formal Hearing Panel Decision, N.S.B.S.-D38, May 9, 1990 [misleading clients about the status of a file];

*Re M.C.*, Formal Hearing Panel Decision, N.S.B.S.-D37, March 9, 1990 [misleading client];

*Re L.G.W.*, Formal Hearing Panel Decision, N.S.B.S.-D35, December 21, 1989 [misleading clients about Court dates];

*Re P.M. (No. 2)*, Formal Hearing Panel Decision, N.S.B.S.-D28, May 19, 1988 [failure to serve clients in a diligent and conscientious manner, failure to keep clients reasonably informed, misrepresenting and misleading clients],

**RULE #13 - DUTIES TO OTHER LAWYERS:**

**COMMENTARY:**

1. “...[B]esides the duty which an attorney owes to the court and his client, he is bound as regards the opposite party and his professional brethren, to conduct his business with fairness and propriety.” *Dobie v. McFarlane* (1832), 2 U.C.Q.B. (O.S.) 285 at 323, per Macaulay J.

2. ...it is the duty of counsel to try the merits of the cause and not to try each other.” NB D-4

A member of the Nova Scotia Barristers’ Society was reprimanded in 1987 for his use of foul language to another lawyer inside and outside the court. In its decision the Discipline Subcommittee stated: “The proposition that there is a difference between making such utterances in public or private is similarly flawed. The harm is perhaps
much more widespread when clients and other members of the public become aware of such personal antagonisms. However, discourtesies exchanged in private conversations between solicitors can be equally harmful to effective administration of justice when personalities, rather than legal issues, become determinative of the approach adopted by counsel. It is a fundamental prerequisite to our system of law that the legal adversaries go out of their way to be courteous to each other.” *Re N.T.B.*, Formal Hearing Panel Decision, N.S.B.S.-D24, December 22, 1987, at 6.


“...[T]o build up a client’s case on the slips of an opponent is not the duty of a professional man’...Solicitors do not do their duty to their clients by insisting upon the strict letter of their rights. That is the sort of thing which, if permitted, brings the administration of justice into odium.” *Re Arthur and Town of Meaford* (1915), 34 O.L.R. 231 at 233, per Middleton J. (Ont. H.C.). See also *Meadwell Enterprises Ltd. v. Clay & Co.* (1983), 44 B.C.L.R. 188 (S.C.).

“...[W]e do not think that [the defendant’s attorney’s] conduct was marked with candor in not drawing the plaintiff’s attorney’s notice to such objections in the procedure as he had or intended to insist upon until the day before the opening of the court at which the trial was to be had...” *Cushman et al. v. Reid* (1869), 20 U.C.C.P. 147 at 153, per Gwynne, J.

4. “The principle was laid down long ago...that once it appears a person has an attorney there can be no effective dealing except through him...a lawyer should never in any way...attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except through such lawyer.” “*Nelson v. Murphy et al.* (1957), 65 Man. R. 252 at 267, 9 D.L.R. (2d) 195 at 213; 22 W.W.R. 137 at 142, per Tritschler J.A. (Man. C.A.).
“...[The lawyer should] not hold any communication of the kind that passed here, except with the Solicitor of the opposite party, and even had the defendant come to the office of then plaintiff’s Solicitor, as the latter alleges, of his own accord, he should have refused to negotiate with him personally.” Bank of Montreal v. Wilson (1867), 2 Chy. Chrs. 117 at 119, per Van Koughnet C. See also Re T.R.C., Formal Hearing Panel Decision, N.S.B.S.-D4, November 7, 1980; Everingham v. Ontario (1992), 88 D.L.R. (4th) 755, 8 O.R. (3d) 121 (Div. Ct.).

5. “Undertakings should be written and the terms should be unambiguous. Counsel then giving an undertaking accepts personal responsibility unless expressly excepted.” NB D-5

“It has more than once been determined by the Court that if attorneys choose to practice upon loose understandings...they cannot expect aid from the Court, if difficulties arise in carrying them out...” Ferguson v. Swedish-Canadian Lumber Co. (1912), 41 N.B.R. 217 at 220; 2 D.L.R. 557 at 580, per Barry J. (C.A.).

NOVA SCOTIA BARRISTERS’ SOCIETY DISCIPLINE DECISIONS

ABUSIVE AND DISCOURTEOUS REMARKS:

RA, Formal Hearing Panel Decision, N.S.B.S.-D84, January 7, 1998 [Made disparaging and abusive remarks about other lawyers and failed to inform clients and other persons that conversations were being recorded];

RM, (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D63, January 31, 1995 [ conduct unbecoming a barrister by making obscene comments about another lawyer in public];
Re N.T.B., Formal Hearing Panel Decision, N.S.B.S.-D24, December 22, 1987 [use of obscene and offensive language to another lawyer in court; allowing personal feelings of ill-will to influence court behaviour].

No. 141, Counselling, Discipline Digest, Issue No. 25, February 2000 [Using discourteous tone in correspondence with another member].

No. 138, Counselling, Discipline Digest, Issue No. 24, October 1999 [Unprofessional tone of correspondence to an Insurance adjuster regarding a claim of the member’s client].

No. 59, Counselling, Discipline Digest, Issue No. 14, May 1996 [Member counselled for failure to treat opposing counsel courteously and for making false allegations].

No. 48, Counselling, Discipline Digest, Issue No. 11, May 1995 [Member counselled for using abusive and inappropriate language to another lawyer in a telephone conversation following an accident in which both were involved].

No. 29, Counselling, Discipline Digest, Issue No. 9, August 1994 [Articled clerk counselled for making disparaging comments regarding other counsel].

**UNDERTAKINGS AND COMPLIANCE:**

GW, Reprimand by Consent, N.S.B.S.-D86, May 28, 1998 [Failure to fulfill undertakings];

Re D.B. (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D46, October 29, 1991 [failure to fulfill undertakings given to the Barristers’ Society];

Re L.G.W., Formal Hearing Panel Decision, N.S.B.S.-D35, December 21, 1989 [failure to
perform an undertaking given to another lawyer];

*Re C.E.B.* (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D30, October 25, 1988 [failure to live up to a written undertaking, and misleading opposing counsel].

No. 117, Counselling, Discipline Digest, Issue No. 22, February 1999 [Failing to honour trust conditions imposed by another lawyer].

No. 37, Counselling, Discipline Digest, Issue No. 10, February 1995 [Member counselled for failure to abide by a trust condition or to indicate his inability to comply with the conditions to opposing counsel before the deadline].

**FAILURE TO COMMUNICATE:**

*Re D.B.* (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D43, November 28, 1990 [failure to communicate with other lawyers];

No. 136, Counselling, Discipline Digest, Issue No. 24, October 1999 [Failure to respond to an opposing solicitor’s correspondence].

No. 77, Caution, Discipline Digest, Issue No. 16, May 1997 [Member cautioned for failure to inform imposing party and opposing counsel that a subpoena had not been issued, contrary to information previously provided in writing by the member].

No. 67, Counselling, *Discipline Digest*, Issue No. 15, December 1996 [Member counselled for failure to respond to opposing counsel’s communications, even though he believed he was only retained for the purpose of acting at trial and not for any other related matters].
No. 50, Counselling, Discipline Digest, Issue No. 11, May 1995 [Member counselled for failure to respond to communications from opposing counsel or to indicate that he would not respond until having the opportunity to discuss matters with his client].

No. 9, Counselling Discipline Digest, Issue No. 3, June 1992 [Member counselled for giving insufficient notice to opposing counsel about adjournment of a court hearing].

**INAPPROPRIATE CONTACT:**

*Re W.W.C., Formal Hearing Panel Decision, N.S.B.S.-D42, November 23, 1990* [attending home of opposing party without knowledge or consent of opposing party’s counsel, participation in discussion between own client and opposing party without prior notice to opposing party’s counsel];

No. 6, Counselling, Discipline Digest, Issue No. 2, March 1992 [Member contacted clients of another lawyer to obtain information while knowing that they were represented by other counsel].

**SHARP PRACTICE:**

No. 122, Caution, Discipline Digest, Issue No. 22, February 1999 [Improper behaviour at a File Review in a compensation process administered by the Department of Justice].

No. 105, Counselling, Discipline Digest, Issue No. 21, October 1998 [Improper behaviour at a File Review in a compensation process administered by the Department of Justice].

No. 32, Caution, Discipline Digest, Issue No. 9, August 1994 [Member cautioned for taping a telephone conversation with another member without first advising of her intention to do so].
JUDICIAL AUTHORITY:

Temple v. Riley (2001) N.S.J. No. 36. The Nova Scotia Court of Appeal in a judgment dated February 14, 2001 dealt with an allegation of an alleged breach of ethical and professional duties of counsel who had entered a default judgment. The court was clear in its condemnation of counsel’s handling of the matter.

In Mayerhofer v. Busch (1986) N.S.J. No. 233 Kelly, J. made the following observations dealing with the setting aside of a default judgment:

“It would have been appropriate for counsel for the plaintiff, before proceeding to default judgment under circumstances such as this, to give notice to counsel for the defendants that they were making such application or that they would make such application if a defence were not filed within a reasonable specified period of time. The proper conduct of a legal proceeding relies to a great extent on highly ethical and courteous communication between counsel.

It would have been appropriate for Mr. Findell to have responded more promptly to the correspondence and enquiries submitted to him by counsel for the plaintiff, but his failure to do so is not sufficient reason to refuse this application.”

In Tkach v. Tkach (1984) N.S.J. No. 275, Nunn, J. in dealing with a matrimonial action stated the following:

“One other matter relating to this affidavit bears comment. At the trial, this affidavit was missing from the file and I asked counsel for the wife if it had indeed been filed. At this time, the husband’s counsel wanted to cross-examine upon it. One of the wife’s counsel told the Court that he was not sure if it was filed. Yet when a copy was produced, there was attached to it a copy of a letter from this same counsel which indicated it was being sent directly to the Judge hearing the interim application to ensure it
came to his attention rather than file it with the Prothonotary. This apparently, was an attempt to gain advantage if the affidavit was, indeed, missing by preventing the husband’s counsel from using it for her cross-examination. Again, this is not conduct the Court expects and demands.

If the foregoing is reflective of the practice of family law, then it is time that all counsel be made aware that a higher standard is expected by the Courts. Sharp practice, insulting innuendo in affidavits directed to opposing counsel and improper attempts to gain advantage have no place in family law nor in any other area of the law. I presume that a word to the wise ought to be sufficient in this regard.”

In Thomas v. Keddy Motor Inns Ltd. (1992) N.S.J. No. 516, Kelly, J. dealt with issues involving the conduct of counsel towards one another and makes specific reference to Chapter 13 of the Handbook of Legal Ethics and Professional Conduct and stated that this standard is consistent with the expectation of the Court.

In Society of Lloyd’s v. Van Snick (2000) N.S.J. No. 213, the Nova Scotia Court of Appeal dealt with certain findings of the Trial Judge that there had been material non-disclosure by counsel. The Appeal Court refused to overturn or interfere with the comments of the Trial Judge relating to the conduct of counsel on the issue of non-disclosure.

NOTE RE: CASELAW:

Nova Scotia courts generally do not pass comment on the conduct of counsel in their decisions unless it is raised as an issue or the particular Judge feels that the conduct is of such a nature that it merits comment.
RULE #14 - DUTIES TO THE COURT

COMMENTARY:

1. Legal contempt of court and breach of ethical or professional duty are not identical. A consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit disciplinary action.

2. "Lawyers' duties to their clients require them to vary their manner as circumstances require, and at times lawyers must ask questions in a way that would rightly be regarded as discourteous on social occasions. They should abandon courtesy, however, only when and to the extent necessary to discharge their duty properly. It is improper to belittle a witness who has done nothing to deserve contempt." G. MacKenzie, Lawyers & Ethics: Professional Responsibility and Discipline (Toronto: Carswell, 1993), 4.14 at 4-38.


RULE #18 DUTIES TO THE PROFESSION GENERALLY

COMMENTARY:

Public confidence in the profession requires that lawyers respect and zealously guard those values and principles and modes of conduct and behaviour that promote the ideals set forth in this Handbook. Conduct by a lawyer which does not promote the ideals of fairness, justice and honesty will adversely affect the image and morale of the profession and the public perception of the legal system.

RULE #21 JUSTICE AND THE ADMINISTRATION OF JUSTICE

COMMENTARY:

1. "In view of the vital part played by lawyers in the administration of Justice, they are under an obligation to strive to maintain respect for that administration...." Lund, at 27.

2. The oath / affirmation taken by lawyers in Nova Scotia upon admission to the Bar which states:
   I ... swear / affirm that as a Barrister and Solicitor, I shall, to the best of my knowledge and ability, conduct all matters and proceedings faithfully, honestly and with integrity. I shall support the Rule of Law and uphold and seek to improve the administration of justice. I shall abide by the ethical standards and

3. "Lawyers, because of what they are as opposed to who they are ... are required to assume responsibilities of citizenship well beyond [the basic requirements of good citizenship] ... This ... is necessary because we are the profession to which society has entrusted the administration of law and the dispensing of justice." R. MacKimmie, "The Presidential Address" (1963), 6 Can. B.J. 347 at 348. For lucid and divergent views as to the limits to which lawyers may properly go in defying the law, see editorial "Civil Disobedience and the Lawyer" (1967), 1:3 Gazette 5 and response thereto in (1968), 2:3 Gazette 44.

**NOVA SCOTIA BARRISTERS’ SOCIETY DISCIPLINE DECISIONS**


No. 122, Caution,  *Discipline Digest*, Issue No. 22, February 1999 [Improper behaviour at a File Review in a compensation process administered by the Department of Justice].

No. 105, Caution,  *Discipline Digest*, Issue No. 21, October 1998 [Improper behaviour at a File Review in a compensation process administered by the Department of Justice].

No. 92, Counselling,  *Discipline Digest*, Issue No. 18, February 1998 [Making inappropriate comments in the Courtroom].
No. 16, Counselling, *Discipline Digest*, Issue No. 7, February 1994 [Member counselled for creating title to a parcel of land to which the recipients had no colour of right].

**RULE #23 AVOIDING QUESTIONABLE CONDUCT**

**COMMENTARY:**

1. Public confidence in the profession and the system and administration of justice may be eroded by irresponsible conduct of the individual lawyer and by conduct which appears to be irresponsible.

2. Our legal system is designed to try issues in an impartial manner and decide them upon the merits. Statements or suggestions that the lawyer could or would try to circumvent the system should be avoided because they might bring the lawyer, the legal profession and the administration of justice into disrepute.

3. A lawyer's duty to conduct himself or herself with integrity and entirely without the spirit and letter of the *Handbook* extends to all with whom the lawyer works, including partners, associates, students-at-law and staff.

**NOVA SCOTIA BARRISTERS’ SOCIETY DISCIPLINE DECISIONS**

**INAPPROPRIATE REMARKS AND BEHAVIOR:**

*Re C*, Formal Hearing Panel Decision, N.S.B.S.-D76, May 29, 1996 [disparaging comments about the Barristers' Society, failure to grasp why disciplinary measures instituted];
Re M (No. 1), Formal Hearing Panel Decision, N.S.B.S.-D63, January 31, 1995 [abusive language and lack of courtesy to a fellow lawyer, and misleading the Barristers' Society];

Re M (No. 2), Formal Hearing Panel Decision, N.S.B.S.-D72, December 13, 1995 [failure to reimburse fees after withdrawal; lack of courtesy displayed to client and to Barristers' Society];

Re W, Settlement Agreement, N.S.B.S.-D61, April 26, 1994 [harassment of a public officer and making misleading statements while intoxicated, lack of candour in responding to the Barristers' Society];

Re D.J.M., Formal Hearing Panel Decision, N.S.B.S.-D39, September 28, 1990 [rude and vulgar comments in public and to client, conduct unbecoming a barrister];

No. 123, Counselling, Discipline Digest, Issue No. 22, February 1999 [Inappropriate language in a conversation concerning an opposing counsel's client].

No. 121, Counselling, Discipline Digest, Issue No. 22, February 1999 [Behaviour considered to be inappropriate and unbecoming a barrister].

No. 93, Counselling, Discipline Digest, Issue No. 18, February 1998 [Aggressive manner of dealing with a title searcher and insurance adjuster].

No. 86, Counselling, Discipline Digest, Issue No. 17, August 1997 [Making inappropriate comments to a client about another professional and accusing the client of being involved in a conspiracy with the professional in an attempt to discredit the member professionally].

No. 28, Caution, Discipline Digest, Issue No. 9, August 1994 [Member cautioned for yelling at and threatening a creditor in a telephone conversation].
No. 25, Caution, *Discipline Digest*, Issue No. 7, February 1994 [Member used inappropriate language and behaviour at a public hearing].

**FAILURE TO COMMUNICATE:**

*Re H*, Formal Hearing Panel Decision, N.S.B.S.-D22, November 14, 1990 [failure to respond to the Barristers' Society and to act in a professional manner with respect to the taking of a statutory declaration];

*Re M.C.*, Formal Hearing Panel Decision, N.S.B.S.-D37, March 9, 1990 [misleading Barristers' Society by presenting fabricated evidence];