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Keywords
Legal ethics; Legal etiquette; Attorney and client; Canada

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Commentary

Does Civility Matter?

ALICE WOOLLEY *

Recent discussion of legal ethics in Canada has focused on the importance of "civility" as a fundamental value and goal of ethical conduct. This comment questions that focus. After defining the content of "civility" and reviewing its treatment in these initiatives by both the law societies and the courts, the author suggests that the emphasis on civility is misplaced. Focusing on civility has the undesirable tendency to impede lawyer reporting of misconduct by other lawyers and potentially undermines the effective representation of client interests. It also shifts emphasis away from the ethical values that should be the focus of our attention, namely loyalty to clients and ensuring the proper functioning of the justice system.

Dernièrement, des débats sur l'éthique juridique au Canada se sont intéressés à l'importance de la « civilité » en tant que valeur fondamentale et but fondamental d'une conduite éthique. Cet article remet cet intérêt en question. Après avoir défini le contenu de la « civilité » et avoir analysé la façon dont il est traité dans ces initiatives, et par les ordres des avocats, et par les tribunaux, l'auteur suggère que l'accent sur la civilité est mal placé. Le fait de se concentrer sur la civilité tend, de manière indésirable, à gêner le signalement, par les autres avocats, d'une conduite incongrue, et pourrait ébranler la représentation efficace de l'intérêt du client. Cela détourne aussi l'attention loin des valeurs éthiques qui devraient être au centre de notre attention, en particulier le fait d'être loyal envers les clients et de veiller à ce que le système judiciaire fonctionne convenablement.

* Assistant Professor, Faculty of Law, University of Calgary. Thanks to Richard Devlin and Adam Dodek for their helpful comments on an earlier draft and to Jocelyn Stacey for research assistance. Also thanks to Justice C.D. O'Brien for his discussions on the merits of civility, and for being an examplar of civility in legal practice.

I. INTRODUCTION

THE LEGAL PROFESSION cares about civility. Over the past thirty years in North America, and particularly over the past ten years in Canada, legal regulators and professional associations have undertaken initiatives to foster and encourage lawyer civility—and to discourage and even penalize lawyer incivility.[1]

This commentary challenges the civility movement. It argues that to the extent that civility means the enforcement of good manners amongst lawyers, it is not a proper subject for professional regulation. To the extent that civility encompasses other ethical values—respect and loyalty to clients, respectfulness to the general public, and ensuring the proper functioning of the legal system—the use of "civility" as an all-encompassing ethical value obscures the real ethical principles at play. Imposing a broadly defined obligation of "civility" does not meet the goal of principles of legal ethics and professional regulation: to guide counsel as to what is required of an ethical lawyer.

This commentary develops this argument in three parts. First, it identifies how civility has been defined by the Canadian legal profession. It considers civility initiatives undertaken by organizations such as the Canadian Bar Association (CBA), as well as law society disciplinary decisions in which lawyers have been sanctioned for incivility. Second, it critiques attempts to regulate the manners of lawyers, focusing in particular on the risk that such attempts will undermine self-regulation and the pursuit of client interests. Third, it critiques the inclusion of other fundamental ethical values within the concept of "civility," arguing that rules directed at ensuring that lawyers appropriately balance and pursue honesty, loyalty, respectfulness, and justice should be identified as such. An omnibus requirement of "civility" does not give sufficient guidance to lawyers about what the duty to be ethical requires.

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1. The initiatives undertaken in Canada are indicated in Section II, below, and include the Advocates' Society's *Principles of Civility for Advocates*, *infra* note 4. The Law Society of Alberta and the Nova Scotia Barristers' Society have also made efforts to improve civility. The former Chief Justice of Ontario R. Roy McMurtry has spoken on the issue of civility in legal practice. See "Advocacy and Professionalism" (Remarks presented to the Advocacy Policy Forum, 17 February 2004), online: The Advocates' Society <http://www.advocates.ca/pro%20bono/pdf/Advocacy.pdf>. For a discussion of civility concerns in the United States, see Bronson Bills, "To Be or Not to Be: Civility and the Young Lawyer" (2005) 5 Conn. Pub. Int. L.J. 31; Brenda Smith, "Civility Codes: The Newest Weapons in the 'Civil' War Over Proper Attorney Conduct Regulations Miss Their Mark" (1998) 24 U. Dayton L. Rev. 151; and Monroe Freedman, "Civility Runs Amok" (14 August 1995) *Legal Times* 470.

II. WHAT DOES CIVILITY MEAN?

As employed by the legal profession, "civility" clearly encompasses two separate areas of concern. It refers primarily to the requirement that other people, and in particular other lawyers, be treated with courtesy, manners, and politeness. Thus, the Law Society of Alberta's Office of the Practice Advisor has defined incivility as "sharp conduct or shoddy treatment of other lawyers, opposing parties and even independent witnesses."[2] The Nova Scotia Barristers' Society 2002 Task Force on Civility defined civility as "akin to notions of courtesy, politeness, good manners and respect."[3]

Similarly, the Canadian Bar Association and Advocates' Society *Principles of Civility for Advocates*[4] include numerous rules directed primarily at courtesy towards others. The rules direct lawyers to "always be courteous and civil to Counsel engaged on the other side of the lawsuit,"[5] to treat witnesses with "appropriate respect," to avoid "discourteous comments,"[6] and to "avoid ill-considered or uninformed criticism of the competence, conduct, advice, appearance or charges of other Counsel."[7]

In every provincial law society decision reported on Quicklaw in which the term "civility" is used,[8] the allegation of incivility arose from the lawyer's use of

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2. Nancy Carruthers & Ross McLeod, "Civility Revisited" *The Advisory* 3 (November 2005) 7, online: <http://www.lawsocietyalberta.com/files/benchersadvisory/V3I5.pdf>. See also Paul McLaughlin, "Civility and Practice Management: Flying Solo" *Benchers' Advisory* 68 (January 2001) 12, online: <http://www.lawsocietyalberta.com/LSA_Archives/files/benchersadvisory/i68_jan01_arcadvisory_ixSFfr_1.0.pdf>; Barry Vogel, "The Civility Initiative: Time for Action" *Benchers' Advisory* 63 (February 2000) 13, online: <http://www.lawsocietyalberta.com/LSA_Archives/files/benchersadvisory/i63_feb00_arcadvisory_ixSFfr_1.0.pdf>.

3. Nova Scotia Barristers' Society, *Task Force on Professional Civility, 2002 Report* (available from the Nova Scotia Barristers' Society) at 2.

4. The Canadian Bar Association, *Principles of Civility for Advocates*, reprinted as an appendix to the *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006) [CBA, *Principles*]. See also The Advocates' Society, *Principles of Civility for Advocates* (which are identical), online: <http://www.advocates.ca/civility/principles.html>.

5. CBA, *Principles*, *ibid.*, r. 1.

6. *Ibid.*, r. 23.

7. *Ibid.*, r. 26.

8. Based on a search of "civility" in Quicklaw's Law Society Discipline Decisions, online: <http://www.lexisnexis.ca>.

strong, profane and/or flatly rude language towards another person. In all cases the concern about civility, and the justification for the sanction imposed on the lawyer, appears to have arisen from the lawyer's lack of courtesy or politeness.[9] In a 2002 decision, the Law Society of Alberta discussed civility as a form of politeness, noting that "[l]aunching or exchanging insults is not professional behaviour."[10] Similarly, the Law Society of Upper Canada has defined civility in terms of communications between counsel and others, emphasizing that while not all "strongly-worded or ill-received communications" are problematic, "[o]verwrought opinion, misplaced hyperbole, or a desire to intimidate, sully or defame have no place in communications from lawyers."[11] Given the fine line between candour and slander, a lawyer should "err on the side of courtesy."[12]

This first meaning of civility therefore addresses the manner in which counsels communicate with each other, specifically the politeness and courtesy, or lack thereof, in lawyer communication. The second meaning of civility is more substantial, referring generally to the conduct essential to ensure the proper functioning of the judicial process, with a specific focus on advocacy. The CBA *Principles* deal significantly with the obligation of a lawyer to ensure the expeditious and effective delivery of justice. This obligation includes duties to comply with undertakings,[13] to ensure that draft orders "accurately and

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9. However, as will be discussed below, in a number of cases the impoliteness caused concern not only because the lawyer was rude (although in fact the lawyer was disciplined in most of the cases solely for being rude, not because of other concerns); in some cases the rudeness indicated a lack of proper loyalty to the client and/or efforts to ensure the proper functioning of the legal system (although, again, these underlying concerns do not appear to have been the basis for the discipline). The cases in which lawyers have been subject to regulatory review for incivility are: *Law Society of Alberta v. Christensen*, 2007 LSA 3; *Law Society of British Columbia v. Goldberg*, 2007 LSBC 40 [*Goldberg*]; *Law Society of Upper Canada v. Wagman*, 2007 ONLSHP 39 [*Wagman*]; *Law Society of Upper Canada v. Kay*, 2006 ONLSHP 31 [*Kay No. 112*]; *Law Society of Alberta v. Arends*, [2006] L.S.D.D. No. 50 (QL) [*Arends*]; *Law Society of Alberta v. McCourt*, [2005] L.S.D.D. No. 91 (QL); *Law Society of Upper Canada v. Carter*, 2005 ONLSHP 24 [*Carter*]; *Law Society of Alberta v. Pozniak*, [2002] L.S.D.D. No. 55 (QL) [*Pozniak*]; *Nova Scotia Barristers' Society v. Richey*, 2002 NSBS 8; *Nova Scotia Barristers' Society v. Ayre*, [1998] L.S.D.D. No. 8 (QL); and *Nova Scotia Barristers' Society v. Murrant*, 1995 NSBS 10 [*Murrant*].

10. *Pozniak*, *ibid.* at para. 17.

11. *Kay No. 112*, *supra* note 9 at para. 19.

12. *Ibid.*

13. CBA, *Principles*, *supra* note 4, rr. 8-10. The *Principles* in this respect are often substantially

completely reflect[] the Court's ruling,"[14] to refrain from engaging in discovery merely to impose a financial burden on the other side,[15] and to refrain from submitting perjured evidence to the court.[16] This second class of civility obligations thus requires more than polite behaviour from a lawyer. It requires a lawyer to assist in the effective and expeditious functioning of the legal system.

The following sections assess the validity of these two categories of civility as ethical obligations.

III. IS COURTESY A MORAL GOOD?

The argument against civility as a moral good is hardly self-evident. After all, politeness, decency, and kindness to others seem like basic moral obligations with which everyone is familiar and to which everyone should adhere. One commentator has gone so far as to suggest that civility guidelines for lawyers are akin to what one might learn in kindergarten about being "nice to each other" and "kind to the teacher."[17]

The problem, however, is that the ethical obligations of a lawyer are not the same as those of a kindergarten student. It is the unenviable job of a lawyer to argue for the guilty to be acquitted, to ask unpleasant personal questions of

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duplicative of obligations imposed on lawyers by provincial law society codes of conduct. For example, the Law Society of Upper Canada's *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2007) [LSUC, *Rules*] provides in r. 4.01(7) that a lawyer must "strictly and scrupulously carry out an undertaking given to the tribunal or to another licensee in the course of litigation"; r. 6.03(10) requires that a lawyer "shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given."

14. CBA, *Principles*, *supra* note 4, r. 16. This would perhaps fall within LSUC, *Rules*, *ibid.*, where r. 4.01(2)(f) prohibits knowingly misstating the contents of a document (although this may be directed at misrepresentations to the tribunal); r. 6.01(1) requires that a lawyer act so as to maintain the integrity of the legal profession; and r. 6.03(3) requires that lawyers avoid "sharp practice."

15. CBA, *Principles*, *ibid.*, r. 25. See in general LSUC, *Rules*, *ibid.*, r. 4.01(4) and in particular r. 4.01(4)(c) (which prohibit the lawyer making "frivolous requests for the production of documents" or "frivolous demands for information at the examination for discovery").

16. CBA, Principles, *ibid.*, r. 56. See also LSUC, *Rules*, *ibid.*, where r. 4.01(2)(b) prohibits a lawyer from "knowingly" assisting a client to "do anything that the lawyer considers to be dishonest or dishonourable"; r. 4.01(2)(e) prohibits a lawyer from "knowingly" attempting to "deceive a tribunal or influence the course of justice by offering false evidence."

17. Susan N. Turner, "Raising the Bar: Maximizing Civility in Alberta Courtrooms" (2003) 41 Alta. L. Rev. 547 at 557.

people who would rather not answer them, and to attempt to win even where victory imposes costs on others. Lawyers do not and should not "share and be nice" where to do so impinges either on their loyalty their client or their fidelity to the legal system.[18]

This does not mean that lawyers must be uncivil, but it does mean that disciplining lawyers for incivility—and even attempting to foster a culture of civility—may have negative ethical consequences.

Most significantly, an undue emphasis on civility has the potential to undermine the ability of law societies to fulfill their obligation to regulate lawyers' ethics. As members of a self-regulating profession, lawyers must hold each other to account. They must be actively engaged with each other's ethics and professionalism, and must be critical where necessary. Emphasizing civility has the significant potential to dampen the effect of this function, and to foster professional protectionism. If a strongly-worded criticism will subject a lawyer to discipline for incivility she will, naturally, be less likely to make that criticism even if it is well-founded. Knowing the difficulty of proving the truth of allegations of professional misconduct,[19] she will simply refrain from making them.

In several of the disciplinary decisions lawyers were sanctioned for making allegations about the competence or ethics of other lawyers.[20] In each case it appears that the remarks were largely unfounded, as no supporting evidence was introduced to the disciplining law society. However, assume for the moment that the allegations had a foundation in truth. Presumably information about the ethics and competence of other counsel—however rudely and impolitely expressed—is something that *should* be brought before the appropriate authorities.[21] Had the allegations been substantiated with some

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18. The idea of lawyers as having ethical obligations of "fidelity to the legal system" is Bradley W. Wendel's. See generally Bradley W. Wendel, "Professionalism as Interpretation" (2005) 99 Nw. U.L. Rev. 1167.

19. Harry W. Arthurs has observed that even law societies struggle with this problem, and tend as a result to discipline lawyers for offences easily proven, rather than those which are more ambiguous. See Harry W. Arthurs, "Why Canadian Law Schools Don't Teach Legal Ethics" in Kim Economides, ed., *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998) at 105.

20. See *Goldberg, supra* note 9; *Carter, Kay No. 112, supra* note 9; and *Murrant, supra* note 9 (although in *Murrant* the remarks appear to have flown from the deterioration of a "personal relationship" between Murrant and the lawyer in question).

21. See LSUC, *Rules, supra* note 13, where r. 6.01(3) requires that lawyers report misconduct by

evidence we could have seen examples of this in *Goldberg*,[22] in which the lawyer being investigated for misconduct had criticized another counsel to the Court, and in *Carter*,[23] in which the lawyer had criticized another counsel to the legal aid society. Bringing forward concerns of this type is, I would argue, prima facie good and desirable. If the allegations were unfounded and untrue that is not good.[24] But comments that are grounded in fact should be made; that they are made rudely does not warrant disciplining the lawyers who make them. Any other outcome creates the impression, as Goldberg argued in his submissions, that "the Law Society is dominated by considerations of professional courtesy and collegiality ... [that] ultimately inhibit their truth seeking function."[25] If ensuring the appropriate airing of ethical concerns with lawyers' conduct requires occasional tolerance of incivility, rudeness, and overheated remarks, then so be it. The law of defamation still exists to give protection to lawyers who are unfairly subject to criticism by their colleagues. The addition of law society discipline fosters protectionism unnecessarily and suppresses legitimate criticism.[26]

In addition, lawyers should not have to be civil where it undermines their ability to advocate for their client. Or, to put it differently, lawyers should not be disciplined for incivility where it occurs in the context of protecting a client's legal interests. In the case of *Pozniak*, a lawyer was representing himself in a real estate transaction. The opposing counsel attempted to have his client impose a condition on the real estate contract with respect to Pozniak's ability to assume a mortgage. The client declined to do so. At closing, opposing counsel nonetheless attempted to impose this condition as a trust condition. Pozniak pointed out that doing so was improper, and the lawyer backed down. However, the difficulties over the trust condition caused the closing to be delayed, at which point the lawyer attempted to require Pozniak to pay daily

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other lawyers, albeit only where the nature of that misconduct is serious. The commentary goes on to say that lawyers are permitted to report "any instance involving a breach of these rules." It seems odd that in a self-regulating profession it is necessary to indicate that lawyers are permitted to report other lawyers who have breached the ethical rules of the profession.

22. *Supra* note 9.

23. *Ibid.*

24. Although also not necessarily something that is desirably inhibited through professional discipline.

25. *Goldberg*, *supra* note 9 at para. 26.

26. The one exception to this position may be where comments made by counsel are protected by privilege because they are made in the courtroom. It may be that law society discipline is a reasonable addition to defamation laws in that instance.

interest on the funds outstanding. Pozniak was understandably angry and wrote to the lawyer (with whom he had gone to law school) saying "I regret to say this [name], but you are clueless. I would hope that the other solicitors in your firm are not similarly clueless."[27] The Law Society of Alberta found this conduct worthy of sanction and reprimanded Pozniak.

While this criticism was certainly not polite, it was fair. If Pozniak had been representing a client other than himself, a strong resistance to the approach of opposing counsel would have been warranted. It is more important that the client's legal rights be protected from the unfair incursions of counsel than that the lawyer attempting to do so be chided for incivility because of the manner in which he expressed himself. Otherwise the lawyer may become more, and perhaps excessively, concerned with the selection of his words rather than with the rights of his clients.

It may be for this reason that on two recent occasions the Ontario Court of Appeal, while deploring the lack of civility of counsel in litigation, declined to find any relationship between counsel's incivility and the fairness of the trial process. In both *R. v. Felderhof*[28] and *Marchand v. Public General Hospital Society of Chatham*,[29] the court declined counsel's request for relief due to a trial judge's failure to control the incivility of opposing counsel.

In addition to the uncertain relationship between civility and resolute advocacy, and between civility and rigorous enforcement of lawyer ethics, civility is also problematic because it tends to lie in the eye of the beholder. One commentator has noted that in "the legal context, "civility" does not have a precise meaning. Rather, it is a judicial construct signifying an attitude of respect."[30] That may be an accurate statement, but it does not provide much guidance to a lawyer as to what constitutes incivility. This means that a lawyer who wishes to avoid discipline for incivility may self-censor in part because she does not know how her words will be perceived, and whether what she perceives as fair comment will be perceived by the law society as sanctionable misconduct. She may choose not to speak even though her

27. *Pozniak*, *supra* note 9 at para. 10.

28. (2003) 68 O.R. (3d) 481 (C.A.).

29. (2000) 51 O.R. (3d) 97 (C.A.).

30. Christopher J. Piazzola, "Ethical Versus Procedural Approaches to Civility: Why Ethics 2000 Should Have Adopted a Civility Rule" (2003) 74 U. Colo. L. Rev. 1197 at 1202-03.

comments would be important for calling another lawyer to account for improper behaviour, or in order to pursue the legal rights of her client.

This tendency is particularly problematic given that the historic collegiality with which civility is often associated[31] is also connected to discrimination and intolerance for diversity. A diverse bar in which lawyers may simply have different senses of what constitutes "polite" behaviour may require greater tolerance of forms of expression than are countenanced by the civility movement. Otherwise civility would become shorthand for elitism.[32]

This is not to say that all of the "civility" cases were wrongly decided; rather, it is to say that to the extent that those cases were correctly decided, it was because the rude behaviour of the lawyers in question implicated *other* ethical values. The lawyers behaved unethically, but not because they were rude per se. The validity of this broader definition of "civility" in the cases and civility initiatives—in which "incivility" incorporates a broad array of behaviours extending beyond simply bad manners or a lack of courtesy—is discussed in the following section.

Before turning to that discussion, however, an objection to these arguments must be addressed. The CBA *Principles* are not binding, but merely provide "an educational tool for the encouragement and maintenance of civility in our justice system."[33] Thus, the ethical dangers identified here may be overstated and may overlook the virtue of encouraging lawyers to be polite to each other. The difficulty with this objection is that however voluntary the CBA *Principles* may be, there are numerous cases reported from law societies across the country in which lawyers have been disciplined in significant part because of the incivility of their communication. Therefore, there *is* disciplinary force to the civility movement. In addition, uncomfortable and rude speech that contributes to proper lawyer regulation, and proper client representation, is in itself a good thing, even if it occasionally results in incivility. As a consequence, to the extent that the encouragement of civility discourages that speech, it is not desirable.

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31. Although not necessarily accurately. See Kathleen P. Browe, "A Critique of the Civility Movement: Why Rambo Will Not Go Away" (1994) 77 Marq. L. Rev. 751 at 774 (where she writes, "[i]t is important for proponents to realize that incivility and commercialism are not new facets of the profession").

32. *Ibid.* at 777-78.

33. CBA, *Principles*, *supra* note 4 at 4.

IV. FUNDAMENTAL ETHICAL VALUES AND CIVILITY

A more profound objection to the preceding argument against civility arises from the incorporation of more fundamental ethical values in civility initiatives. These include the incorporation of obligations related to efficient litigation process, proper conduct in *ex parte* applications, and the general avoidance of sharp practice and improperly aggressive litigation strategies ("Rambo" litigation). The values underlying these requirements ensure that the ethics of the profession are upheld, including a lawyer's proper loyalty to his or her clients. Indeed, many if not all of the requirements of the civility initiatives are restatements or specifications of existing rules of professional conduct.[34] They are, in other words, already an important part of lawyers' ethical obligations.

The inclusion of these fundamental ethical requirements within civility initiatives is problematic nonetheless. First, as noted, the rules of professional conduct in every province in Canada contain similar ethical obligations to those imposed by these more substantive aspects of the civility guidelines.[35] It is not obvious that the response to the law societies' lack of rigorous enforcement of their existing rules[36] should be the enactment of more rules, especially where the new rules specifically state that they will not be enforced.[37]

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34. Freedman, *supra* note 1, and Smith, *supra* note 1. See LSUC, *Rules*, *supra* note 13, where r. 4.01(2) has a number of provisions related to the expedition of the litigation process, including a prohibition on instituting malicious proceedings (r. 4.01(2)(a)), assisting the client in acting dishonestly or dishonourably (r. 4.01(2)(b)), harassing a witness (r. 4.01(2)(k)), or needlessly inconveniencing a witness (r. 4.01(2)(m)). In addition, r. 4.01(1) places a general obligation on lawyers to treat a deciding tribunal with "candour, fairness, courtesy, and respect." The commentary to r. 4.01(1) adds that a 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." With respect to sharp practice, r. 6.03(3) expressly prohibits "sharp practice." Other LSUC rules that prohibit many of the tactics associated with "Rambo" litigation include r. 4.01(4), which deals with discovery obligations, and r. 4.01(6), which requires a lawyer to 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."

35. See rules listed *ibid.* See also LSUC, *Rules*, *supra* notes 13-16.

36. See in general Arthurs, *supra* note 19.

37. The CBA, *Principles*, *supra* note 4, are said to be aspirational rather than binding, as are those of the Advocates' Society. The preamble to the Appendix of the CBA's *Code of Professional Conduct*, in which the *Principles* are set out, says the following: "These principles are not intended as a code of professional conduct subject to enforcement by discipline or other

Second, and more substantively, the emphasis on civility tends to obscure the true nature of the ethical misconduct of lawyers subject to discipline for incivility. This is most evident in the civility cases where the discipline of the lawyer was warranted not because the lawyer was rude, but rather because of the nature of his rudeness—to whom he was rude, the way in which he was rude, and the context in which the rudeness occurred. The nature of the rudeness in those cases shows how the lawyer violated both his fundamental ethical obligations of loyalty to the client and his duty to ensure the proper functioning of the legal system. Those violations arguably warranted professional discipline that the rudeness, in itself, did not. By disciplining the lawyer not for these violations, but for rudeness, the disciplining law society obscures the real ethical issues at play.

In *Wagman*[38] for example, the lawyer was disciplined for, *inter alia*, writing a letter to a mediator with whom he was having a billing dispute in which he said "get ready because I can be ten times a bigger asshole than you. You want to fight, go ahead," and for calling a Senior Casualty Claims representative of the defendant insurer a "fucking cunt."[39] The rudeness of these comments is indisputable. What is more significant, however, is the nature of the rudeness. In the first instance the rudeness was directed towards an individual with whom he was having a fee dispute, and could well have been viewed as a threat, or an attempt to employ non-legal, extra-judicial means to obtain a legal benefit. In the second instance the rudeness was to a participant in the litigation and, again, could have inhibited that individual's willingness to participate openly and fully in the litigation process. In other words, in both instances the rudeness was such that it arguably impacted the functioning of the justice system and had the potential to disrupt an individual's free and willing participation in that system.[40]

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sanction but as an educational tool for the encouragement and maintenance of civility in our justice system." Of course, neither the CBA nor the Advocates' Society has any regulatory authority over lawyers in any event. I am indebted to Adam Dodek for the general point about the irrationality of responding to non-enforcement of existing rules with the enactment of non-binding additional rules.

38. *Supra* note 9.

39. *Ibid.* at paras. 14 and 15.

40. A similar situation arose in *Arends*, *supra* note 9, in which the lawyer ended up in a "heated" altercation with the client on the other side, saying to that client "why don't you blow me"

In both *Law Society of Upper Canada v. Kay No. 39*[41] and *Law Society of Alberta v. Willis*[42], lawyers were disciplined for rudeness towards their own clients. In *Kay No. 39*, the lawyer, embroiled in a fee dispute with his client, accused her of fraud and threatened to report her to the police. He wrote her a letter in which he emphasized her recent immigration to Canada, stating, "I would like to think that any Commonwealth country, including India, takes the same dim view of your criminal activity."[43] In *Willis* the lawyer swore at his client and ignored her instructions after he "became frustrated with what he considered to be bizarre instructions to settle a file for less than an offer the client had previously rejected."[44] In both these cases the issue is not that the lawyers were rude and uncivil, although of course they were; it is that their incivility was contrary to the interests of their clients. Instead of facilitating their clients' autonomy in accessing the legal system, they undermined it: in *Kay No. 39* by giving the client groundless fears of criminal prosecution, and in *Willis* by interfering with her judgment as to her best course of action. That is unethical and would be unethical even had it been done politely. A polite but false indication that conduct may constitute a crime, or a polite refusal to allow a client to exercise her own judgment after

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and "fuck you." The client appears to have been provoking the lawyer, but the same unethical interference with the pursuit of justice is raised by the lawyer's conduct. For the ethical rules related to the conduct in these cases, see generally LSUC, *Rules*, *supra* note 13, rr. 2, 4, which set out the obligations of the lawyer relative to his/her dealings with clients and the administration of justice. More specifically, see r. 6.03(5), which prohibits a lawyer from sending correspondence which is abusive or offensive; r. 5.03, which prohibits "verbal or physical conduct of a sexual nature" where such conduct might "reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient"; and r. 5.04, which imposes a "special responsibility" on lawyers to "respect the requirements of human rights laws in force in Ontario."

41. [2006] L.S.D.D. No. 39 [*Kay No. 39*].

42. [1995] L.S.D.D. No. 308 [*Willis*].

43. *Kay No. 39*, *supra* note 41 at para. 54.

44. Willis, *supra* note 42 at para. 7. For the ethical rules related to the conduct in this case, see generally LSUC, *Rules*, *supra* note 13, r. 2.02(4), which prohibits a lawyer from threatening to bring a criminal or quasi-criminal prosecution to secure a civil benefit for a client; presumably the rule would also apply so as to prevent the lawyer from doing so in order to obtain a civil benefit for himself. See also r. 5.04, requiring the lawyer to respect the requirements of human rights laws; r. 4.01(1), commentary, which prohibits the lawyer from waiving or abandoning the client's legal rights "without the client's informed consent."

receiving advice as to whether to accept a settlement, are as improper as rude and impolite versions of the same conduct.

Disciplining these lawyers for violation of their fundamental ethical obligations to clients and to the functioning of the justice system would be justifiable and is what should be at issue in the cases. To talk about the misconduct as incivility or rudeness obscures the real ethical problem with the lawyers' conduct. This is significant not just because of fairness to these lawyers, but also because it means that other lawyers reading the decisions are not properly informed as to the nature of their ethical obligations.

Being an ethical lawyer is challenging—not always, and not in every circumstance—but in general a lawyer is required to strike the difficult but proper balance between competing ethical obligations so as to make the best possible ethical decision she can. A lawyer must be loyal to her client, but she must also ensure that the justice system functions effectively. She must be honest but must also keep confidences. She must be resolute in her advocacy but also ensure that she does not interfere with the fair functioning of the justice system. She must be competent but also ensure access to justice for the disadvantaged.[45] Deciding what to do when those obligations conflict with each other is difficult, and lawyers need all the guidance they can get: from colleagues and the courts but also from law societies and bar associations. To focus on civility, which not only fails to address these tensions but often flat out denies that they exist, provides no useful guidance for the lawyer seeking to resolve them.[46]

The desire to improve the ethics and conduct of the legal profession is laudable. Focusing on civility does not accomplish this goal. Even defining civility as encompassing real questions of ethical importance diminishes, rather than enhances, the amount of guidance that counsel receive. Lawyers need to understand and embrace the multi-faceted roles they serve in the legal system, and learn how to resolve the difficult dilemmas those roles can present. Bar associations and law societies should focus on providing lawyers with the guidance that the civility movement cannot.

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45. As discussed by Bryant G. Garth, competence is expensive, and requiring lawyers to achieve high standards of competence can result in their services being priced out of the market. See Bryant G. Garth, "Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective" (1983) Wis. L. Rev. 639.

46. Browe, *supra* note 31 at 769.

V. CONCLUSION

In a recent column on the *Sports Illustrated* website, senior football correspondent Peter King had this to say about former Atlanta Falcons coach Bobby Petrino, who quit his job near the end of a disastrous season in order to coach college football:

> Goat of the Week
>
> ... Idiot. Weasel. One day after having permission to speak to Arkansas denied him by the man who hired him for $4.8 million a year last winter, Petrino went ahead and talked to Arkansas anyway. Then he rode out of Atlanta for Fayetteville under the cover of darkness.
>
> ...
>
> ... If the other coaches in the SEC [Southeastern Conference] use Petrino's carpetbagging skullduggery against him, good for them. I hope it works. That wouldn't be negative recruiting. It would be truthful recruiting.[47]

No one would call this description of Petrino's conduct civil. But it is a fair comment, and it raises issues of importance to the world of football that warrant discussion.

Lawyers should be free to make similar comments about each other, about the courts, and about the functioning of the justice system. Hard-hitting and unvarnished critiques are essential to working towards the justice system we should have, and to ensuring that lawyers play the role they need to play within that system. Pursuing the impossible dream of a positive public image, or seeking to soften the discomfort of hearing unpalatable and uncivil truths, is not required. What is required is strong and cogent debate about how lawyers can be ethical—how they can balance the competing values inherent in the difficult but fundamental role they play in a democratic society. The civility movement should be abandoned in favour of this more difficult but ultimately more fruitful and important task.

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47. "Monday Morning Quarterback," *Sports Illustrated* (17 December 2007), online: <http://sportsillustrated.cnn.com/2007/writers/peter_king/12/16/week15/4.html>.