

Uncivil advocacy

An intensifying spotlight on incivility in advocacy cannot be ignored



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Early in 2015 a Canadian court referred to an "increasing concern over the last number of years that the conduct of lawyers is becoming less and less civil — both inside and outside the courtroom".¹ The court pondered the drivers for this 'increase in incivility' in the context of advocacy, including vis-à-vis the opposing lawyer, client or witnesses, and also the Bench. One driver, it surmised, could be demands by clients who, completely unfamiliar with what actually constitutes effective advocacy, believe that an aggressive lawyer is an effective lawyer. Competition for legal work may prompt aggressive advocacy in the belief that clients desire an 'attack dog'. The court identified a second, related driver, namely the image of lawyers in television shows, and in other media, where actors portray lawyers in a fashion unrestrained by any need to represent reality and without concern for the reputation of the legal system.

Yet, as the court went on to note, "[g]ood advocacy often does not make good television".² In a given case, the line dividing what is legitimate zealous advocacy — including that punctuated by a degree of aggression — as opposed to unprofessional conduct may be fine. What traverses into the realm of misconduct may, in practice, prove very much contextual. 'Uncivil' words spoken by one lawyer in one case may not cross the line into misconduct whereas similar words in a different case may.³

This, of course, does not obviate the need for courts and disciplinary tribunals to at least attempt to conceptualise the distinction in an ostensibly binary fashion. For instance, the New South Wales Court of Appeal, on the way to making a finding of professional misconduct arising chiefly out of a barrister's approach to advocacy, opined that "courage and aggression are acceptable and sometimes necessary weapons in the barrister's armoury; calculated insult and insolence are not".⁴ Extrapolated under the encompassing banner of undermining the proper administration of justice, the following

behaviours have more recently been identified as crossing the line:⁵

Such conduct will include, but is not limited to, repeated personal attacks on one's opponents or on the judge or adjudicator, without a good faith basis or without an objectively reasonable basis; improper efforts to forestall the ultimate completion of the matter at issue; actions designed to wrongly impede counsel from the presentation of their case; and efforts to needlessly drag the judge or adjudicator 'into the fray' and thus imperil their required impartiality, either in fact or in appearance. Of special concern is any such conduct that could ultimately result in a decision that would amount to a miscarriage of justice.

There are good reasons why incivility in advocacy, whatever its form, is unbecoming of a lawyer. An overly aggressive advocacy style can identify the advocate too closely with the lay client, prejudicing the much-vaunted independence of counsel as critical actors in the administration of justice. There is the corresponding prospect that this perception may translate to reality, wherein counsel loses at least some semblance of true independence in representing the client. The latter rarely benefits clients. An 'uncivil' advocacy style, in any case, may reek of little short of bullying the other actors in the trial. At a time when bullying, in the profession and elsewhere, is very much in the limelight, an approach that carries connotations of bullying seems difficult to condone.

Moreover, advocates who resort to incivility to pursue their clients' causes feed the widespread belief that lawyers are little more than 'hired guns', who for a (handsome) fee will say and do anything that can be perceived to advantage the payer. While there may well be some (or even many) clients who wish an advocate to pursue this course on their behalf, a profession populated by unbridled 'hired guns' threatens

to undermine the foundations of the adversary process. And it cannot be denied that, in a legal system premised upon open public access to (most) court proceedings, public perception of uncivil ('brawling') lawyers does little to foster public respect for the profession. If "a profession's most valuable asset is its collective reputation and the confidence which that inspires",⁶ as an English judge has said, incivility has an unfortunate progeny.

There are compelling grounds, accordingly, for disciplinary tribunals and courts to view incivility by advocates as a disciplinary issue. There is, perhaps unsurprisingly, an increasing tide of statements at a judicial level reinforcing the need for civility.⁷ Advocates have, to this end, been warned. Should the warning not be heeded, aside from disciplinary consequences, regulatory bodies may respond by formulating something in the nature of a 'principles of civility' statement. Yet the fact that this was found necessary in the Canadian province of Ontario, drilling down to some minutiae of professional interaction (including the shaking of hands between counsel after a trial),⁸ is perhaps no real cause for celebration.

NOTES

1. *Groia v Law Society of Upper Canada* [2015] ONSC 686 at [23] per Nordheimer J, delivering the reasons of the court.
2. *ibid.*, at [24].
3. *ibid.*, at [68].
4. *Prothonotary of the Supreme Court of New South Wales v Costello* [1984] 3 NSWLR 201 at 203 per Glass and Samuels JJA.
5. *Groia v Law Society of Upper Canada*, above note 1, at [76].
6. *Bolton v Law Society* [1994] 1 WLR 512 at 519 per Sir Thomas Bingham MR.
7. See, for example, *Ken Tugrul v Tarrants Financial Consultants Pty Ltd* [2014] NSWSC 437 at [70] per Kunc J; *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 4)* [2014] WASC 282 at [59] per Edelman J.
8. *Advocates' Society, Principles of Civility for Advocates*, April 2009, cl 63.