

DEFINING THE BOUNDARIES OF
ZEALOUS ADVOCACY

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AUTHORS' NOTE

The views expressed in this paper are those of Mr. Groia alone. They do not reflect views of the Law Society of Upper Canada, or other Benchers thereof and are expressed in his personal capacity only. Indeed it is safe to assume that the LSUC would strenuously disagree with much of what is said herein. And that is what free speech is all about.

“I have often seen people be uncivil by too much civility, and tiresome in their courtesy”.

Michel de Montaigne

I. INTRODUCTION

So can someone please explain the Law Society of Upper Canada’s (LSUC) pre-occupation with civility? At a time where there are widespread public concerns about access to justice, unemployed lawyers, failing law firms, wrongful convictions and the inadequate regulation of dishonest lawyers, the profession’s preoccupation with civility seems to be badly out of touch with the interests of lawyers and the needs of the public. In my view, zealous advocacy and fearless representation of our clients is at the core of our duties as lawyers. The determined pursuit of civility and the zealous prosecution of incivility threaten the profession’s privilege to self-govern. If there is to be a tension, why isn’t zealous advocacy the ally of professional responsibility and civility its adversary?

So to answer the question posed, I believe that there are no limits to zealous advocacy in a courtroom. But the emphasis must be on the word “advocacy”. Good trial lawyers follow the lead of the trial judge. What one judge may allow, another may reject. Our job is to use these differences to the advantage of our clients. We go out of step with the court at our client’s peril. So it is simply unfathomable to me that an ex post facto civility assessment by a regulator who is not even in the courtroom (or in my case didn’t even bother to read the trial transcripts before charging me, because \$6,000 was too much to spend to order them) can help maintain public confidence in the legal profession. To the contrary, I believe civility prosecutions have a chilling effect on zealous advocacy and to that extent are contrary to the public interest.

I also want to first clear up a few of the misconceptions about my supposed opposition to the civility movement.¹ First, I readily acknowledge that there has been and always will be some need for the regulation

¹When I refer to the civility movement, I refer to the numerous studies, papers, articles and cases, many of which contain exhortatory comments about the importance of civility in the legal community. Prosecutions for alleged incivility are a by-product of the civility movement. The movement as I describe it seems to have begun at the end

of lawyers when their conduct outside of a courtroom involves violent, sexist, racist, vulgar or otherwise offensive and disgraceful actions, speech or communications. However the civility movement has gone far beyond these reasonable and widely-accepted goals. Regulators now claim the right to meddle in the conduct of trials, to thereby place limits on the independence of courts, and to interfere with the freedom of expression of lawyers in oral argument, all in the hope of promoting some ill-defined notions of professionalism amongst lawyers.

In many ways this is the most important part of this little paper. Is the pursuit of civility amongst lawyers inherently bad? No, of course not. Is incivility inherently evil? No, equally this is untrue. What is so troubling, however, is where the frontline of the civility/incivility battle is now being fought. In the *Groia*² case, the Law Society expressed no real concern that an OSC prosecutor could suggest that he was being “shafted big time” by the *Felderhof*³ defence team and the court, or that another prosecutor could say that the defence was making “bald faced lie[s]”, and that the trial judge was lacking in “basic human sensitivity”.⁴ If these comments are all within the boundary of ‘civil’ discourse, and if it is not professional misconduct for the OSC’s prosecutor to call me in open Court essentially a terrorist “bomb thrower,” two months after 9/11, then maybe there is still some hope for zealous advocacy.⁵

The legal issues in my case go far beyond the civility debate. They are also outside the scope of this paper or programme. We are focused here on the issues that have greater importance for the profession as a whole. All we will attempt to show is that the civility movement not only adversely affects zealous

of the last century and continues to be a significant part of the regulatory programme for the Law Society of Upper Canada and other law societies in 2015.

² *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94, rev’d in part 2013 ONLSAP 41 [*Groia, HP*].

³ *R. v. Felderhof*, 2007 ONCJ 345, 224 CCC (3d) 97 [*Felderhof*].

⁴ Jeff Gray & Paul Waldie, “A new fight for Bre-X lawyer – and this time it’s personal”, *The Globe and Mail* (2 August 2011) online: The Globe and Mail < <http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/a-new-fight-for-bre-x-lawyer---and-this-time-its-personal/article589748>.

⁵ *Ibid.*

advocacy and thereby hurts the legal profession, but also that the undue promotion of civility actually hurts rather than helps the pursuit of excellence.

II. THE PROBLEM WITH INCIVILITY PROSECUTIONS

A. DEFINING INCIVILITY

The first problem to consider when discussing the prosecution of lawyers for incivility, is that the boundary between civility and zealous advocacy is hard to see, harder to contextualise, and in a courtroom at least, should only be policed by the trial judge.

There is no uniform definition of civility or incivility in the provincial or territorial codes of professional conduct, though the duty to be civil is stated⁶. The Canadian Bar Association's *Code of Professional Conduct* also does not supply a definition. The LSUC By-Laws mention civility only twice—once in By-Law 4 in the Required Oaths,⁷ and again in By-Law 3, which says that the Treasurer must preserve civility at Convocation⁸—but the By-Law never says what civility encompasses. The word civility is also absent from the *Law Society Act*.⁹ *The Principles of Civility for Advocates* published by The Advocates' Society also lacks a clear definition. Furthermore, the LSUC does not release interpretive statements on the meaning of these rules as is done by the equivalent bodies in the United States.¹⁰ For regulators, it can fairly be said that civility is in the eye of the beholder.

Definitions can be found in the cases, but judicial and panel decisions are inconsistent, creating even more uncertainty when it comes to knowing where the line between civil and zealous advocacy is to be

⁶ The duty to be civil is mentioned in all of the codes of professional conduct for every province and territory but New Brunswick. Civility may be translated as politesse or courtois. It is “courtois” which is used in the Québec *Code de déontologie des avocats*.

⁷ At s.21(1) is the oath for lawyers, and at s.21(2) is the oath for those providing legal services.

⁸ s.88

⁹ R.S.O. 1990, c. L.8

¹⁰ Alice Woolley, “The Problem of Disagreement in Legal Ethics Theory”, pp. 18-19.

drawn. In *Doré v. Barreau du Québec*, the Supreme Court said that incivility is characterised by “potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy”.¹¹ The LSUC Hearing Panel in *Groia*, a decision released three months after *Doré*, said that “extreme rudeness” was not a requirement for a finding of incivility.¹² So one must ask are behaviours that amount to less than extreme rudeness, but are more than mere rudeness, potentially misconduct? Add on top of this that what some people may consider rude is acceptable or even normal behaviour to others—such as the use of profane language, an issue that comes up repeatedly in discipline decisions.¹³

The consequences of not having a clearly defined definition is noted by Alice Woolley:

“In short, the lack of an articulated standard of behaviour and the negative consequences for her practice may lead the reasonable lawyer to modify the intensity of her advocacy to avoid a judicial complaint of incivility, even if that complaint could not result in disciplinary proceedings”.¹⁴

III. IS INCIVILITY ON THE RISE?

Starting around 2000, the LSUC seems to have concluded that the main threat to the public’s confidence in the functioning of the justice system was rudeness, discourtesy, and disrespect; in a word: incivility. No evidence, however, was cited in support of this conclusion. The answer seems to us to be that no, incivility is not on the rise but nevertheless, throughout the decade, various initiatives were undertaken to stamp out the scourge of incivility.¹⁵ Also around the same time, the LSUC and the Chief Justice of Ontario joined

¹¹ *Doré v. Barreau du Québec*, [2012] 1 SCR 395 para. 61 citing Michael Code’s article “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007), 11 *Can. Crim L.R.* 97 at p.101.

¹² *Groia, HP*, para. 62.

¹³ *Law Society of Upper Canada v. Ernest Guiste*, 2011 ONLSHP 24; *Law Society of Upper Canada v. Andrew Bishop Tulk; Johnson (Re)*, 2014 LSBC 8 (see discussion below); *Law Society of Alberta v. Burchak*, 2008 LSA 7 (was found to be discourteous for swearing); *Law Society of Upper Canada v. Shale Steven Wagman*, 2007 ONLSAP 6 (the Panel said of the Member’s choice of curse words: “The kind of language used by Mr. Wagman brings the profession into disrepute.”)

¹⁴ Alice Woolley, “Uncivil by too much civility”?: Critiquing Five More Years of Civility Regulation in Canada”, (Spring 2013), 36 *Dalhousie L.J.* 239, p. 5.

¹⁵ Adam Dodek gives a good overview in his article titled “An Education and Apprenticeship in Civility: Correspondent’s Report from Canada”, *Legal Ethics*, vol.14, part 2, at p.1.

forces to create the Chief Justice of Ontario's Advisory Committee on Professionalism, which was responsible for *Defining Professionalism*,¹⁶ a document that sets out the elements of professionalism. That same committee has been responsible for 13 colloquia since October 2003 on aspects of professionalism, an essay prize in legal ethics, and a fellowship in legal ethics and professionalism. By 2007 the LSUC put in motion a proposal to change to the Lawyers' Oath of Office to include the word civility, a word that is absent from all of the Oaths of Office of the other provincial and territorial law societies,¹⁷ and in 2009 the LSUC created the Civility Complaints Protocols to provide a process by which judges may refer inappropriate conduct to the Law Society.¹⁸

We note only parenthetically that regulators have not put nearly as much time, energy or resources into the support of zealous advocacy, the support of the wrongfully convicted or the prosecution of lawyers whose main shortcomings were those that come from not being adequately devoted to their duties of fidelity and loyalty to their clients. On another note, how many times have we dealt with firms that seem to believe that only their opponents can ever have a conflict of interest?

Outside of the LSUC, other professional organisations spent the decade feeding the profession's seeming fixation on civility. The Advocates' Society held a symposium on civility in 2000 and on professionalism in 2009, resulting in their publications: "Principles of Civility for Advocates" and "Principles of Professionalism for Advocates."¹⁹ The publications are now printed together and are appended to the Ontario Bar Association's *Code of Professional Conduct*.²⁰ The Advocates' Society, in 2008, launched the Institute for Civility & Professionalism to provide training and mentorship, and created

¹⁶ "Elements of Professionalism" (October 2001, revised December 201 and June 2002)

<http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>

¹⁷ http://www.lsuc.on.ca/media/convnov08_pdc.pdf, see also By Law-4 s.21(1).

¹⁸ http://www.lsuc.on.ca/media/sept2409_civilityprotocol_en.pdf

¹⁹ <http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf>

²⁰ <http://www.cba.org/CBA/activities/pdf/codeofconduct.pdf>

the Catzman Award for Professionalism & Civility.²¹ Ironically, its first recipient, Stanley Fisher, testified in *Groia* on behalf of the defence.

One would expect, from the fervour with which the profession took up the cause of civility, that a lack of professionalism was rampant across the province. Justice Nordheimer says that it is; he suggests that clients mistakenly want a brash Vinnie Gambini-type lawyer representing them and that competition has caused lawyers to jump into that role.²² We believe that's just not the case. Since 2000 there have been only 15 convictions by the LSUC for professional misconduct for demonstrating a lack of civility.²³ Of those convictions, only five were for incivility alone.²⁴

IV. INCIVILITY PROSECUTIONS OUTSIDE OF ONTARIO

Law Society discipline hearing panels outside of Ontario don't seem to share the LSUC's preoccupation with incivility. In the last ten years, there have been only four²⁵ reported²⁶ convictions for incivility in English-language decisions outside Ontario,²⁷ compared to 15 in Ontario.

Generally, there seems to be two reasons for the difference in the treatment of incivility. The first is that behaviour that would be called uncivil in Ontario, as a separate subcategory within the overarching charge of professional misconduct, is not labeled as such. Take for example *Johnson (Re)*.²⁸ Martin Johnson

²¹ The award was created in 2008 by the Catzman Family with the Advocates' Society and the Chief Justice of Ontario's Advisory Committee on Professionalism. It was first awarded in 2009.

²² *Joseph Groia v. The Law Society of Upper Canada*, 2015 ONSC 686, para. 24. [*Groia, Sup. Ct.*]

²³ Or lack of "politesse", which is the French word for civility used in the Oath, see s.21(1) of the Règlement Administratif N°4. For decisions see Appendix A. We considered the period from 3 January 2000 to 29 September 2015, for which all of the decision of the Tribunal are reported on CanLII.

²⁴ Those cases are: *Law Society of Upper Canada v. Ann Bruce*, 2013 ONLSHP 6; *Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2012 ONLSHP 94 [*Groia, HP*]; *Guiste*; *Law Society of Upper Canada v. Kevin Russell Marshall*, 2010 ONLSHP 81; and *Tulk*. *Groia* is the only case dealing solely with in-court behaviour.

²⁵ *The Law Society of Manitoba v Mayer*, 2015 MBLS 4; *Cherkewich (Re)*, 2014 SKLSS 3; *Law Society of New Brunswick v. [V.V.]*, 2009 NBLSB 2; and *Lanning (Re)*, 2008 LSBC 31

²⁶ Continuous coverage from 2005: BC, NS, NL; AB: continuous coverage from 2008; MB, NT: continuous coverage from 2009; SK, NB: continuous coverage from 2010; No reported decisions: PEI, YT, NU.

²⁷ We did not consider the tribunal decisions of the Barreau du Québec.

²⁸ *Johnson (Re)*

was charged with professional misconduct by the Law Society of British Columbia for cursing at a witness in the courthouse outside the courtroom after being provoked. The BC *Professional Conduct Handbook* was cited, with emphasis that it is the lawyer’s duty to be candid and courteous, refrain from offensive personalities, and to adhere to the virtue of dignity.²⁹ Incivility was mentioned only once to say that the Respondent had an obligation to “act with civility and integrity” as is expected of lawyers.³⁰ In a similar discipline case, Ontario lawyer Ernest Guiste was found guilty of incivility specifically, for using what the LSUC Hearing Panel found was sexually explicit, rude and profane language.

The second is that the law societies of the other provinces and territories seem to focus on the alleged bad behaviour itself, rather than the alleged civility or incivility of the lawyer; the approach outside Ontario is to get to the heart of the issue and determine if the conduct warrants discipline. An example of this approach is found in the decision of *Forsyth-Nicholson* before the Law Society of Alberta, which recognised “that useful short form descriptions like “civility” and “courtesy” ought not to detract from an analysis of the deeper ethical issues which may be engaged.”³¹ All but one of the law societies include in their code of professional conduct a rule that a lawyer must be civil,³² so there is a basis to discipline uncivil behaviour.

V. CIVILITY VERSUS ZEALOUS ADVOCACY

Much of the academic discussion about this issue puts civility and zealous advocacy on a spectrum. The question that is usually asked when discussing the two supposedly competing values is: “can zealous advocacy and usefully civility co-exist?”³³ The LSUC believes that they can – but offers no convincing

²⁹ *Ibid*, para. 11.

³⁰ *Ibid*, para. 9.

³¹ *Law Society of Alberta v. Forsyth-Nicholson*, 2013 ABLS 24 at para. 45.

³² New Brunswick is the only province that doesn’t mention civility. Instead it uses the word “courtesy” or “collegiality” when discussing interactions with fellow members of the Bar, see New Brunswick *Code of Professional Conduct*. Québec uses the word “courtois” at ss. 4 and 12 of the *Code de déontologie des avocats*.

³³ Don Bayne, “Problems with the Prevailing Approach to the Tension Between Zealous Advocacy and Incivility”, (2013) *Criminal Reports*, 4 CR-ART 301, p.1 citing B. McLachlin C.J.C., “Civility, The Hardest Path”, *American*

reasons for this conclusion. More importantly, the answer doesn't get us anywhere. Even if it were possible to always honour both values equally, there are still times when a lawyer may be charged for professional misconduct because he made a rude comment in the heat of the battle, even where he "immediately regretted his remark and recognized it was a mistake",³⁴ or acted with incivility toward opposing counsel, due in part to a diagnosis of Major Depressive Disorder and alcohol dependence, and whose conduct was unlikely to be repeated.³⁵ In cases such as these, all of the negative consequences that arise because of the prosecution of lawyers for incivility that are discussed in Section VI will still be faced by the profession. And where it's not possible to equally respect both civility and zealous advocacy, and one side needs to win out, it seems absurd that anyone might seriously suggest that an allegiance to civility should take precedence over an allegiance to one's client. In Groia, the Hearing Panel actually said that lawyers had an "overriding duty" to ensure that trials were "efficient" and conducted in an atmosphere of "calm". These opposing values lead us to the same place: prosecuting civility negatively impacts the profession.

If the prosecution of incivility is to be dramatically curtailed, we also have to ask if there is any part of the requirement to be civil that should be preserved. Indeed there is. Comments that are violent, highly-offensive, sexist, racist, or expletive-filled³⁶ are presently thought of as 'uncivil' by the LSUC. Language of this nature goes far beyond rudeness. Their use speaks to the integrity of the person using it and they have no place in any kind of professional environment. It would be far more appropriate to charge behaviour of this kind under the s. 2.1 duty to act with integrity, labelling it with a word that shows not just that the profession disapproves of that kind of language, but finds it reprehensible.³⁷ Honesty, integrity and good faith should ground the actions of all lawyers.

College of Trial Lawyers, The Bulletin No. 67 (Fall 2011) 16; Peter Cronyn, "Civility and Zealous Advocacy: Irreconcilable Differences? (Key-note address delivered at "Putting Theory into Practice: Exercising Professionalism and Civility" Advocates' Society Program, 11 December 2012)

³⁴ *Johnson (Re)*, para. 10.

³⁵ *Law Society of Upper Canada v. Jodi Lynne Feldman*, 2014 ONLSHP 6

³⁶ Joseph Groia, et al, "Shades of Mediocrity: The Perils of Civility", p.4 (presented at the CBA legal conference in the session "Civility in the Legal Profession: Zealous Advocacy v. Professional Duty" on 17 August 2014).

³⁷ *Code of Professional Conduct* (Law Society of Upper Canada)

VI. HOW THE CIVILITY MOVEMENT HURTS THE PROFESSION

Though we do believe that incivility is not the widespread problem we are told it is, there are lawyers still convicted for it (one of your authors included). Those convictions have a profound effect on the profession and on the personal lives of those charged. For those in the profession, the vigorous prosecution of incivility has a chilling effect on zealous advocacy. Defence lawyers are singled out as villains and those who don't fit the historical mould of a lawyer are excluded. And the public perception of lawyers, the profession, and the Law Societies are damaged irreparably. The reason that is most frequently cited for maintaining civility is that without it we risk jeopardising “the integrity of the court process and of the players involved in it.”³⁸ We propose the opposite: that this focus on maintaining civility and prosecutions of it jeopardise the administration of justice and brings the profession into disrepute.

In our view, the focus on incivility negatively impacts the legal profession in the following ways:

1. Impacts the public perception of the legal system by the misallocation of resources

The legal profession in Ontario is in crisis. Those who need a lawyer often can't afford one, while navigating the justice system is a near-impossible task for an untrained layperson. The public believes that lawyers who steal from their clients are not punished as harshly as they should be. And lawyers who fail to zealously represent their clients often fail detection or prosecution. These are the issues that Ontarians see as being wrong with the justice system and these are the issues that bring the administration of justice into disrepute. It is not the zealous defence of a client that causes people to question whether the administration of justice is what it should be or whether the legal profession is well regulated by the LSUC. Indeed, the hard work of most criminal defence lawyers remains one of the finest traditions of the Bar.

In particular, one negative consequence of the civility movement is that it has impacted the public perception of how resources are allocated by the LSUC. We believe that civility resources ought to have

³⁸ *Groia, Sup. Ct.*, para. 75.

been spent on more pressing concerns, like access to justice, access to the profession; and support for small and sole practitioners in rural areas. Instead of addressing these concerns, the Law Society diverts too many scarce resources into prosecuting civility cases, eroding public confidence in the goals of the profession, and its willingness to truly regulate in the public interest.

2. Impacts the public perception of legal professionals

Fear of prosecution for incivility changes the priority of lawyers from where it should be—on providing the best defence one possibly can to one’s client, to more self-interested causes—staying out of the LSUC enforcement process. The civility movement creates an inherent conflict of interest between the interests of the client and the interests of the advocate.³⁹ Mr Groia’s challenge of the LSUC decision in January 2015 was extensively covered in the *Toronto Star*, Canada’s most widely-circulated newspaper. Articles advocating for his position appeared in the *Star*⁴⁰, the *National Post*,⁴¹ and *The Globe and Mail*,⁴² among others. The impact of these articles on the public should have caused regulators to be concerned that their priorities are in conflict with the priorities of the public. Hopefully in the future it will.

Recently the Supreme Court of Canada reaffirmed the lawyer’s duty of commitment to the client’s cause.⁴³ The effect of this decision on civility cases remains to be seen.

3. Impacts the ability of the Court to regulate the courtroom

While the civility debate may not have directly impacted the ability of the court to control the courtroom, the decisions in the *Groia*⁴⁴ case have opened the door to the Law Society to meddle in how

³⁹ See also Groia, “Shades of Mediocrity”, p.18.

⁴⁰ Frank Addario, “Role of defence counsel poorly understood”, *The Toronto Star*, 16 February 2015.

⁴¹ Christie Blatchford, “Lawyer stands accused of offending the delicate sensibilities of his own profession” *National Post*, 8 January 2015; Conrad Black, “A judicial coup d’etat”, *National Post*, 31 January 2015; and Conrad Black, “Surviving the litigious jungle”, *National Post*, 17 February, 2015.

⁴² Jeff Gray, “Bre-X lawyer Joe Groia to challenge Law Society’s ‘incivility’ ruling”, *The Globe & Mail*, 7 January 2015.

⁴³ *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7

⁴⁴ *Groia, Sup. Ct.; Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2013 ONLSAP 41 (Law Society Appeal Panel); *Groia, HP*.

judges manage courtrooms long after a trial is over. Mr Groia was charged in November 2009 for incivility for his conduct during the trial of John Felderhof, more than two years after the case was decided and 9 years after the alleged offence.⁴⁵ During the course of the *Felderhof* trial, and indeed afterwards, Justice Peter Hryn did not make any complaint of misconduct by the defence. He did, however, harshly criticise the prosecution on several occasions.

An after-the-fact panel of regulators, none of whom were criminal defence lawyers, is not the better assessor of civility in the courtroom than the trial judge who was present during the trial, who had first-hand knowledge of the dynamics in the courtroom, and of the nuance, tone, or inflection with which the alleged uncivil words are spoken, and who already had the job during the course of the proceedings to “put out the threatened start of an incivility fire.”⁴⁶

4. Impacts marginalised individuals in particular

It is in the context of criminal proceedings that civility and zealous advocacy butt up against one another most often, or at least with the most at stake. Those accused of crimes are necessarily marginalised individuals, and must defend themselves against the government- with all its resources- for their freedom. Frank Addario puts it best: “The courtroom is not a trousseau tea, where genteel bewigged lawyers agree to disagree. For the defendant it is a fight for his life; one in which the odds are stacked against him by a better-resourced opponent wearing the white hat.”⁴⁷ It is these marginalised individuals-- the criminally accused-- that are most in need of a vigorous defence, unencumbered by worries of a civility prosecution for insufficient gentility.

⁴⁵ Interestingly, if the timing was different, and charges were laid at the time of the alleged infraction, Mr Groia might never have been charged with incivility. The first incivility case wasn’t decided until 2005 (*Law Society of Upper Canada v. George Nelson Carter*, 2005 ONLSHP 24). The second case decided by the Hearing Panel wasn’t decided until 2009 (*Law Society of Upper Canada v. Julia Carmen Ranieri*, 2009 ONLSHP 39)!

⁴⁶ Bayne, p. 4.

⁴⁷ Addario.

Racialised lawyers are also adversely impacted by a preoccupation with civility. Constance Backhouse has found that “[t]he very concept of “professionalism” has been inextricably linked historically to masculinity, whiteness, class privilege, and Protestantism”⁴⁸, and that these historical links are still pervasive today. Indeed, Alice Woolley points out that 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 a shorthand for elitism.”⁴⁹

5. Impacts defence lawyers in particular

In Ontario between 2010 and 2012, 88 percent of complaints for incivility in a criminal trial were made against defence counsel and only 12 percent were made against Crown counsel.⁵⁰ Further, since the implementation of the Civility Complaints Protocol in September 2009, up until 31 December 2014, 35% of all complaints (44 complaints of 124) have been made against lawyers practicing criminal or quasi-criminal law.⁵¹

6. Miscategorises truly reprehensible behaviours as merely ‘uncivil’

As mentioned above, in Ontario, of the 15 cases since 2000 in which a lawyer was found guilty of professional misconduct by a Law Society Hearing Panel, five are cases where incivility alone was the basis for the finding of professional misconduct. The remaining ten cases involve behaviour other than just incivility, including attempting to deceive the court;⁵² improper dealings with trust accounts and retainers;⁵³

⁴⁸ Constance Backhouse, “Gender and Race in the Construction of “Legal Professionalism”: Historical Perspectives”, p. 2

⁴⁹ Woolley, “Does Civility Matter?”, p. 183. See also discussion in Adam Dodek, “An Education and Apprenticeship in Civility: Correspondent’s Report from Canada”, *Legal Ethics*, Vol. 14, Part 2.

⁵⁰ Bayne, p. 4.

⁵¹ <https://www.lsuc.on.ca/uploadedFiles/DirectorsReport-JudicialComplaints.pdf> *Report: Update on Judicial Complaints*, 16 January 2015 prepared by Zeynep Onen

⁵² *Feldman*, *supra* note 30.

⁵³ *Law Society of Upper Canada v. Sebastiano Cammisuli*, 2012 ONLSHP 51

failing to maintain proper books;⁵⁴ providing legal advice while under suspension;⁵⁵ acting in a conflict of interest;⁵⁶ and commissioning an affidavit with false information.⁵⁷ All of these are serious offences, and when the word incivility is used to describe the behaviours, it takes away from the seriousness of the offence. Professor Woolley argues that another issue is that when civility is sometimes used as a catch-all word for unethical behaviour, the reasoning as to why particular conduct is unethical may not be fleshed out as well as it should.⁵⁸

7. Promotes mediocrity

The preoccupation with civility necessarily promotes mediocrity "by discouraging full, frank, and if necessary, harsh criticism"⁵⁹ of the profession. This is discussed at length in the Groia CBA paper "Shades of Mediocrity".

8. Impacts the ability of the profession to self-regulate

The aggressive prosecution of uncivil actions has a chilling effect on the profession in at least two distinct ways: advocates may be so concerned about becoming the next Joe Groia that they will not fearlessly defend their clients as they should; and those in the profession may be less likely to bring applications for abuse of process or prosecutorial misconduct for fear of being charged with misconduct themselves.⁶⁰ This dangerous precedent, as Alice Woolley warns, threatens the ability (or willingness) of the profession to self-regulate.⁶¹

⁵⁴ *Cammisuli, Ranieri*

⁵⁵ *Cammisuli*

⁵⁶ *Ranieri*

⁵⁷ *Law Society of Upper Canada v. Colin Cameron Leon Lyle*, 2011 ONLSHP 34

⁵⁸ Woolley, "Does Civility Matter?", p.7.

⁵⁹ Groia, "Shades of Mediocrity", p. 3.

⁶⁰ Groia, "Shades of Mediocrity", pp. 3, 14-17.

⁶¹ Woolley, "Does Civility Matter?", p. 180.

VII. CONCLUSION

The crisis in the legal profession is not because lawyers are viewed as too passionate, too unruly, or too zealous. There have been too many wrongful convictions and too many instances of abuse of authority by government actors for the public to be comforted that the legal profession is all that it should be. We fear that the civility movement has forced lawyers to rank civility above their fundamental duties of loyalty and zealous advocacy. No wonder there has been a loss of confidence in the legal profession. When members of the public see little response to wrongful convictions, access to justice concerns and unemployed lawyers, they must be troubled. When they see the significant resources that are being devoted to stamping out incivility instead, they must be dismayed.

We hope that in the near future we will start to see less emphasis on the pursuit of civility and more interest in the pursuit of zealous advocacy. If that happens there will be some hope that lawyers will start to regain the public trust that has been so tragically lost.

APPENDIX A

Cases heard by the Hearing Panel of the Law Society of Upper Canada in which incivility was charged:

Law Society of Upper Canada v Botiuk, 2015 ONLSTH 55—2015-02-25
Law Society of Upper Canada v. Jodi Lynne Feldman, 2014 ONLSHP 6—2014-01-21
Law Society of Upper Canada v. Brian Allan Ludmer, 2012 ONLSHP 191—2012-11-22
Law Society of Upper Canada v. Ann Bruce, 2013 ONLSHP 6— 2013-01-15
Law Society of Upper Canada v. Kimberly Lynne Townley-Smith, 2012 ONLSHP 52— 2012-03-29
Law Society of Upper Canada v. Joseph Peter Paul Groia, 2012 ONLSHP 94—2012-06-28
Law Society of Upper Canada v. Sebastiano Cammisuli, 2012 ONLSHP 51—2012-03-28
Law Society of Upper Canada v. Ernest Guiste, 2011 ONLSHP 24—2011-03-08
Law Society of Upper Canada v. Julia Carmen Ranieri, 2011 ONLSHP 94—2011-07-26
Law Society of Upper Canada v. Colin Cameron Leon Lyle, 2011 ONLSHP 34— 2011-04-15
Law Society of Upper Canada v. Kevin Russell Marshall, 2010 ONLSHP 81—2010-08-17
Law Society of Upper Canada v. Kevin Mark Murphy, 2010 ONLSHP 23—2010-03-23
Law Society of Upper Canada v. Andrew Bishop Tulk, 2009 ONLSHP 85— 2009-09-18
Law Society of Upper Canada v. Julia Carmen Ranieri, 2009 ONLSHP 39— 2009-04-27
Law Society of Upper Canada v. George Nelson Carter, 2005 ONLSHP 24— 2005-10-06