Discouraging Excellence

By Joseph Groia, Nic Wall, Elizabeth Carter and Shakaira John

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Shakaira John is an articling student at Groia & Company.

Nic Wall and Elizabeth Carter are former summer law students at Groia & Company.

Joseph Groia is solely responsible for this paper and any errors contained in it.

"I would rather lose in a cause that will someday win, than win in a cause that will someday lose"

- Woodrow Wilson

I. Introduction

(Please see the disclaimer at the end of this paper.)

These are perilous times for Canadian lawyers and their clients who face unprecedented challenges and an unpredictable future. 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, which has become a central element of self-regulation in the last 15 years, is decidedly discordant with the interests of lawyers and the public. In our view, zealous advocacy and fearless representation of our clients are at the core of our duties as lawyers, while the determined pursuit of civility and the zealous prosecution of incivility threatens the profession's very existence. If there is to be tension, why isn't civility the adversary of professional duties?

This short paper will consider the role of civility in a broader context. Why do lawyers worry so much about civility and incivility? Is there any empirical evidence to support the determined efforts of regulators to stamp out acts of perceived incivility? What are the consequences of policing civility? In short, we ask the questions why do we do this, what is gained and what is lost?

We also want to clear up a few of the misconceptions about our supposed opposition to the civility movement.[1] First, we are not opposed to civility as an aspirational initiative. We readily acknowledge that there has been and always will be some need for the regulation of

[1]When we refer to the civility movement, we 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 we describe it seems to have begun at the end of the last century and continues to be a significant part of the regulatory programme for the Law Society of Upper Canada ("Law Society") and other law societies in 2016.

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 place limits on the independence of lawyers and the judiciary, and to interfere with the freedom of expression of lawyers in argument, all in the hope of promoting their notions of professionalism among lawyers.

In many ways this is the most elemental part of our disagreement. 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 to be found. In the *Groia* case, [2] the Law Society expressed no real concern that an OSC prosecutor could suggest that he was being "shafted big time" by the *Felderhof* defence team and the Court,[3] 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 to call another lawyer a "bomb thrower," then this panel may be a waste of our time and efforts.[5] Regrettably, while each of these statements were actually made by prosecutors in *Felderhof*, it would appear that the defence lawyers in the same case were given a different test.

Second, the legal issues in the *Groia* case go far beyond the civility debate. They are also outside the scope of this paper. We are focused herein on the issues that have greater import for the profession as a whole; it is in our leave application to the Supreme Court of Canada that we come to grips with the hard legal and regulatory issues raised by the Law Society prosecution and the defences thereto. All we will attempt to show in this paper is that the civility movement not only adversely affects the public interest, but also hurts the legal profession as a whole. This is not to say that civility is always bad and incivility is always good. Rather, this paper argues against the harsh absolutes now posed by the civility debate. In our view civility is not always desirable, nor is incivility always undesirable.

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[2] *Law Society of Upper Canada v Groia*, 2012 ONLSHP 94, rev'd in part 2013 ONLSAP 41 [*Groia*].
[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/#dashboard/follows/>.
[5] *Ibid*.

This is supported by a significant amount of research. We have compiled a comprehensive list of materials – case law, articles and studies – which consider civility in both Canada and abroad. We hope that this list will provide additional insights on the sorry state of zealous advocacy, and that it will also serve as a resource for those who wish to further study the subject.

Third, we believe the civility movement affects the public and hurts the profession in at least three profound ways:

1) It diverts resources and time away from more important goals such as access to justice. As Professor Dodek said:

> The *Groia* case is emblematic of much that is wrong with our justice system and with the regulation of lawyers: too much time and money spent on cases that do not warrant it at the expense of addressing other issues.[6]

2) We fear that it has caused lawyers to be more worried about the style of their speech than the substance of their arguments for fear of becoming the next Joe Groia; and

3) It has introduced new rules for the conduct of trials and has had a chilling effect on the willingness to bring applications for abuse of process and prosecutorial misconduct.

Further, the harm of civility prosecutions is especially dangerous in the context of uncriticized in-court conduct. In such situations, civility prosecutions have the impermissible effect of usurping the constitutional responsibility of judges to maintain the nation's courtrooms.

Finally, we will argue that civility is often used as a method to help maintain the establishment by discouraging full, frank, and if necessary, harsh criticism. An undue emphasis on civility promotes mediocrity and discourages excellence. As long as lawyers stay away from violent, highly-offensive, sexist, racist or expletive-filled comments or conduct, we should be encouraging, not discouraging, what the Law Society has condemned as "incivility" in *Groia*.[7]

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[6] Adam Dodek, "An Education and Apprenticeship in Civility: Correspondent's Report from Canada." (2011) 14 Legal Ethics 239 at 242.
[7] *Groia, supra* note 2.

II. The Problem with Defining Civility

The Oxford English Dictionary's definition of incivility is simply "rude or unsociable speech or behaviour."[8] The difficulty with defining civility in these terms is that it is subjective; what is rude or unsociable is in the eye of the beholder. The most recent legal definition, that of the Supreme Court in *Doré v. Barreau du Quebec*,[9] says that incivility encompasses "potent displays of disrespect for the participants in the justice system…beyond mere rudeness or discourtesy."[10] The Court also said this about their assessment of civility:

> But in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the Charter, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular.[11]
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> In *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, where Steel J.A. upheld a disciplinary decision resulting from a lawyer's criticism of a judge, the critical role played by lawyers in assuring the accountability of the judiciary was acknowledged:
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> > Not only should the judiciary be accountable and open to criticism, but lawyers play a very unique role in ensuring that accountability. As professionals with special expertise and officers of the court, lawyers are under a special responsibility to exercise fearlessness in front of the courts. They must advance their cases courageously, and this may result in criticism of proceedings before or decisions by the judiciary. <u>The lawyer, as an intimate part of the legal system, plays a pivotal role in ensuring the accountability and transparency of the judiciary. To play that role effectively, he/she must feel free to act and speak without inhibition and with courage when the circumstances demand it.</u> [Emphasis added; para. 71.][12]

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[8] *The Oxford English Dictionary*, online ed, *sub verbo* "incivility".
[9] 2012 SCC 12, 1 SCR 395 [*Doré*].
[10] *Ibid* at 61, quoting Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can Crim LR* 97 at 101.
[11] The Court cites the following in support of this statement: Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed 2009), at 26-1; *R v Kopyto* (1987), 62 OR (2d) 449 (CA); *and Attorney-General v Times Newspapers Ltd*, [1974] AC 273 (HL).
[12] *Doré*, *supra* note 9 at 63-64, quoting Steel, J.A. in *Histed v Law Society of Manitoba*, 2007 MBCA 150, 225 Man R (2d) 74 at para 71.

Moving far beyond offensive speech, such as what was found in *Paletta*,[13] civility is now said to include instances of falsely and gratuitously impugning the good faith, motives, conduct or professionalism of another participant in the legal system, despite the limits set out by the Supreme Court in *Doré*. The recent civility cases decided by various law societies disclose a myriad of factual circumstances which are difficult to categorize in any meaningful way. Can we seriously contend that the profession has not lost its way if saying "f*** you" to an offensive peace officer in a heated discussion outside of a courtroom merits a professional conduct hearing and punishment?[14]

Prosecuting incivility is said to be justified on the basis that it is thought to threaten the fairness of trial proceedings. Civility has often been called the "glue" that holds the legal system together.[15] As Justice Morden said:

> There is a general concern that standards of civility in the profession are declining. Civility is not just a nice, desirable adornment, to accompany the lawyers conduct themselves, but is a duty which is integral to the way lawyers are to do their work. In the field of litigation, civility is the glue that holds the adversary system together, that keeps it from imploding.[16]

III. Where's the Evidence?

What was most startling to those who worked on this paper was the lack of any empirical evidence to support the broad and sweeping generalizations that are used by advocates for civility in the legal profession. The alleged damaging connection between incivility and trial fairness, or conversely the inevitability and potential value of incivility in the legal profession, has not been studied carefully in any article we could find. Nor did we find any attempt to measure in any rigorous way whether instances of actual uncivil conduct (as opposed to complaints of alleged incivility) are on the rise. Our sense, and this is also by no means

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[13] In *Law Society of Upper Canada v Paletta*, [1996] LSDD No 99 at para 4, it was found that, '[d]uring a telephone conversation with his former client, the Solicitor made anti-Semitic references to the solicitor then acting for the client as follows: "that god dam son-of-a-bitch Jew"; "let's blame the god dam Jew"; "that god dam motherfucker cocksucker "; "by being a typical fuckin' Jew" and "I know the way these Hebrews work."'

[14] Michael Friscolanti, "Do you swear, and tell the truth?", *Maclean's* (21 June 2014) 21.

[15] The Honourable J W Morden, "Call to the Bar Address" (Speech delivered at the Call to the Bar Address, Toronto, 22 February 2001); Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can Crim LR 97 at 107.

[16] *Ibid*.

scientific, is that complaints about uncivil conduct and the fear of being prosecuted for incivility are at an all-time high. We have also seen (and have been told about) many examples of the use of civility complaints for tactical reasons in a manner similar to what happened in *Felderhof*.[17] A very cogent assessment of the problems with civility prosecutions, including *Groia*, comes from Donald Bayne who said:

> A competing value (one that serves Canadian democracy and the rule of law well) to the eradication of uncivil advocacy is the assurance of fearless advocacy on behalf of an individual facing the power and resources of the state, advocacy that may at times be distasteful. It may well be that the value of a robustly fearless and independent defence bar (much like freedom of expression to obscenity) outweighs the cost of some consequent and occasional "distasteful" submissions, and this could be part of a community standards test for incivility. Without a meaningful test and criteria for assessing incivility, we will remain in the unhappy state of decrying — and calling for sanctions for — something we can't define, something that is only retrospectively identified and something that exists entirely in the foggy world of "excessive degree."[18]

VI. Civility and Punishment

One key difference between incivility in the business world and incivility in the legal world is the latter's repeated use of punishment of incivility as a means of promoting civility. The business community already knows that while civility is desirable to some extent, it ought not come at the expense of an individual's engagement, nor in their willingness to voice dissent; even in a manner that those in authority would consider to be uncivil.

The desire to prevent or limit the emotions that often result in uncivil behaviour can result in the stagnation or alienation of business professionals.[19] In the business world, the notion of punishing participants for speaking up or out is virtually unknown. The same tensions and

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[17] *Felderhof*, *supra* note 2, it was clear to all that the Ontario Securities Commission (OSC) was starting to lose the *Felderhof* trial. They wanted to hit the re-set button and start the trial over. They lost their application to remove Justice Hryn for bias and a loss of jurisdiction before Justice Campbell ([2002] OTC 829) when they said that 80% of their application had nothing to do with civility. In the Court of Appeal of Ontario ((2003), 68 OR (3d) 481), their concerns about civility went from 20% of their case to 80% of their case.

[18] Donald Bayne, "Some Problems with the Prevailing Approach to the Tension Between Zealous Advocacy and Incivility" 4 CR 301. Mr. Bayne also concluded that defence counsel were many times more likely to be charged with incivility than were prosecutors.

[19] Jamie L Callahan, "Incivility as an Instrument of Oppression: Exploring the Role of Power in Constructions of Civility" (2011) 13 Advances in Developing Human Resources 10 at 14..

problems are also evident in the legal world but lawyers uniquely face the fear of prosecution as a consequence. In addressing these tensions the Supreme Court in *Doré* said:

> Lawyers potentially face criticism and pressure on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.[20]

Doré is significant in a number of ways, particularly for the limits it places on the use of discipline and punishment. The Court's discussion regarding degrees of impropriety is also important; prior to *Doré*, civility and incivility were usually equated with good and bad. In *Doré* the Court held that fearless advocacy only crosses the line into incivility and misconduct when there is an excessive level of "vituperation" present; accordingly, some level of vituperation is acceptable. [21] Second, in considering the reprimand that Mr. Doré received, the court said:

> In the circumstances, the Disciplinary Council found that Mr. Doré's letter warranted a reprimand. In light of the excessive degree of vituperation in the letter's context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives.[22]

However, the Court also said:

> Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *Kopyto*, the fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the Charter . This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.
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> We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an

[20] *Doré, supra* note 9 at para 68.
[21] *Ibid* at para 71.
[22] *Ibid.*

> individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.[23]

By requiring regulators to pay heed to the expressive rights of lawyers and to balance the "fundamental importance of open and even forceful criticism," there can be no doubt that the Supreme Court has substantially raised the threshold that must be met before alleged incivility can be called professional misconduct and sanctioned as such.

This leaves open the possible application of a lawyer's judgment rule similar to the safe harbour provided to directors by the business judgment rule. According to the business judgment rule a director of an organization is entitled to a degree of deference when her or his past decisions are evaluated by the court.[24] As stated by Weiler J.A.:

> The court looks to see that the directors made a reasonable decision not a perfect decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision.[25]

A similar degree of deference should also be owed by regulators to lawyers on matters of civility. Like directors, lawyers are often required to make quick decisions in the heat of the moment in trying to fulfill their fiduciary obligations. The business judgment rule acknowledges that these decisions can appear troublesome in retrospect. A lawyer can also retrospectively appear to have engaged in what regulators conclude is misconduct, even when the lawyer made the best decision possible based on the information available at the time. This is particularly true when the regulatory body has been moving the goal posts on what constitutes misconduct. However, in matters of incivility, particularly those that occur in the courtroom which do not involve abusive, violent, discriminatory or derogatory language, a similar deference should be owed to counsel. As with directors, lawyers should be presumed to have been acting honestly and in good faith (a rebuttable presumption), and be allowed a wide latitude to choose a path among a reasonable set of options without fear of prosecution.

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[23] *Ibid* at paras 65-66.

[24] *Kerr v Danier Leather Inc*, 2007 SCC 44 at para 54, [2007] 3 SCR 331.

[25] *Maple Leaf Foods Inc v Schneider Corp*, 42 OR (3d) 177 at 192, [1998] OJ No 4142 (CA).

V. How Does the Civility Movement Harm the Profession?

In our view it does so in at least three ways.

1. **The civility movement diverts resources and time away from more important goals such as access to justice, an adequate number of articling positions, and lawyer employment.**

As Adam Dodek has noted, too much time and money is spent on matters that are less important (civility) at the expense of issues that warrant immediate attention. The CBA has referred to the state of access to justice as "abysmal."[26] Recently, the Supreme Court had this to say in their first sentences of *Hryniak*:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
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> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system.[27] [Emphasis added.]

The defence in *Groia* has already spent well over $1,000,000 in legal fees and lost time. At the original hearing alone, the Law Society claimed in their costs submissions they had done over 1,100 hours of billable work on the hearing. We are now in the midst of a *third* appeal. How many more people could have been served had the skilled lawyers involved in *Groia* been engaged in *pro bono* work, particularly at a time when access to justice is a fundamental concern of our society? How many more scholarship opportunities could have been made available at a time when the cost of law school is soaring? Students entering law school this fall will pay an

[26] The Canadian Bar Association Access to Justice Committee, *Reaching Equal Justice Report: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013) at 6.
[27] *Hryniak v Mauldin*, 2014 SCC 7 at paras 1-2, 453 NR 51 [*Hryniak*].

approximate annual total of tuition and fees of $23,000 at University of Western Ontario,[28] $26,000 at Osgoode[29] and $33,320 for University of Toronto, to name just a few.[30]

The fact that new lawyers are, and will continue to be, increasingly concerned with paying back their student debts means fewer lawyers can afford to work in public interest jobs, and fewer lawyers are able to provide their services at more accessible rates. What if the Law Society's *Groia* resources had been put towards providing articling jobs? We believe that the resources used to prosecute incivility matters – such as in *Groia* – are unquestionably better put to use in these areas. Further, we believe that the "culture shift" that is "necessary" to ensure access to justice will be hindered while we remain committed to the civility movement.

The Toronto Star recently ran a series of articles accusing the Law Society of being lax when it comes to dishonest lawyers.[31] As was expected, the Law Society responded with its own "For the Record"[32] statements on its website.[33] Whoever is right, there is no doubt that many members of the public must be troubled to see that one of the Law Society's most important prosecutorial initiatives over the last five years has been to prosecute a lawyer who acted almost entirely for free while he secured an acquittal for an innocent client, and about whom they received no formal complaint; all happening at the same time that the Law Society is being accused of ignoring or mishandling complaints about dishonest lawyers.

2. The civility movement has led lawyers to be worried more about the style of their speech rather than the substance of their arguments for fear of becoming the next Joe Groia.

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[28] Western University Tuition and Ancillary Fee Schedule for 2014-2015 (online at: <http://www.registrar.uwo.ca/student_finances/fees_refunds/pdfs%20fee%20schedule%20/Fall%20Winter%202016-2017%20UGRD%20fee%20schedule%20CDN.pdf >).

[29] Osgoode Fees and Financial Information Guide (online at: http://www.osgoode.yorku.ca/sites/default/files/documents/financial-services/Osgoode%20Fees%20and%20Financial%20Information%20Guide%202016-17_0.pdf).

[30] University of Toronto Student Fees (JD Program) (online at: http://www.law.utoronto.ca/academic-programs/jd-program/financial-aid-and-fees/student-fees-jd-program).

[31] Kenyon Wallace, Rachel Mendleson & Dale Brazao, "Two Faces of Justice" *The Toronto Star* (online at: http://projects.thestar.com/broken-trust/index.html)

[32] The Law Society of Upper Canada, "For the Record: Toronto Star Coverage" (2014) (online at: http://www.lsuc.on.ca/with.aspx?id=2147498667)

[33] Ironically, "For the Record" seems to have been started by the Law Society to respond to public criticisms of its prosecution in *Groia*.

The intersection between zealous advocacy and incivility is precarious and largely undefined, requiring careful navigation. The problem with not precisely defining this intersection is that legal professionals are left unsure of where to draw the line for their own conduct, and are left to doubt their own strategies in the courtroom, potentially abandoning avenues of defence which may have otherwise been available to their client. Any lawyer who reads the *Groia* and *Laarakker*[34] decisions, and sees those punitive sanctions, will either decline to represent clients in more acrimonious cases or present their clients with less than the wholehearted defence they deserve.[35] This presents particularly significant problems for criminal lawyers and their clients, as these cases are often high-stakes and involve some of the most marginalized individuals in society; cases where it is especially important for advocates to be able to present any defence available, without fear of crossing into uncivil territory and professional misconduct prosecutions.

Professor Woolley writes that:

> 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 with his clients.[36]

In the real world, the interests of lawyers often conflict with those of their clients.[37] The existence of conflicting interests in itself is not the primary issue. Lawyers are expected to always put their client's interests ahead of their own. That is what a fiduciary does. The issue arises when the lawyer's interests increasingly incentivizes a lawyer to act in a way that may be to the potential detriment of her client. In discussing conflicts of interest, Chief Justice McLachlin said in *McKercher*:

> The second main concern, which arises with respect to current clients, is that the lawyer be an effective representative — that he serve as a zealous advocate for the interests of his client. The lawyer must refrain "from being in a position where it

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[34] *Law Society of British Columbia v Laarakker*, 2011 LSBC 29, [2011] LSDD No 175 [*Laarakker*].
[35] Yamri Taddese, "Trial Judges Better Suited to Regulating Civility: Panel" *Law Times* (17 December 2012) as quoting Professor Alice Woolley. Online: Law Times < http://www.lawtimesnews.com/201212172119/headline-news/trial-judges-better-suited-to-regulating-civility-panel >.
[36] *Ibid*.
[37] We are, after all, being paid by our clients. Decisions to go to trial, for example, mean further income for the lawyer at the expense of the client.

> will be systematically unclear whether he performed his fiduciary duty to act in what he perceived to be the best interests" of his client: D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 968. As the oft-cited Lord Brougham said, "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client": *Trial of Queen Caroline* (1821), by J. Nightingale, vol. II, The Defence, Part I, at p. 8.
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> Effective representation may be threatened in situations where the lawyer is tempted to prefer other interests over those of his client: the lawyer's own interests, those of a current client, of a former client, or of a third person: *Neil*, at para. 31.[38]

The question we ask is why demand the extreme notion of civility described in *Groia* when legal arguments often require harsh rhetoric to meet legal standards, and those arguments are intended to produce harsh results? The very nature of our legal system is characterized by the zealous pursuit by each side (represented by their lawyers) of their own case as being more legitimate than that which is presented by the opposition. The person who 'wins' does so at the expense of the other party, whether it be imprisonment, the forfeiture of money or property, or losing custody of children. Nothing about these outcomes is 'civil,' yet some lawyers still believe that the process for reaching these conclusions must always be free of emotion and "in an atmosphere of calm". It is for this reason that Bradley Berg, the President of the Advocates Society, has issued a public defence of Marie Henein, in light of the recent media criticism of her conduct in defending Jian Ghomeshi, which emphasizes that "our justice system depends upon strong advocacy by lawyers fulfilling their ethical duties to their client, the court and the public."[39]

3. The civility movement has introduced new rules for the conduct of trials, the use of applications for abuse of process and prosecutorial misconduct.

The most alarming consequence of the *Groia* decision is that it has caused a far-reaching and long-lasting chill on zealous advocacy. While regulators deny that this is the effect of the decision, there is absolutely no doubt that there have been serious and adverse consequences as a

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[38] *Canadian National Railway Co v McKercher LLP* 2013 SCC 39 at paras 25-26, [2013] 2 SCR 649 ["*McKercher*"].

[39] Bradley E. Berg, "Message from the President", The Advocates Society, online: <http://secure.campaigner.com/csb/Public/show/dkpj7--b09lv-8vs1l79>, Appendix B.

result. If it can now be considered professional misconduct to call the OSC "the government,"[40] what form of speech, colourful or otherwise, will escape the scrutiny of the civility regulators?

This chill has also damaged the likelihood that the profession will be allowed to continue to self-regulate. The public is entitled to expect, and does expect, lawyers to be fearless in their representation and self-critical about the failures of their profession. Sanctioning incivility causes lawyers to be reluctant to criticize each other, even when circumstances demand it. They do so to protect themselves from the consequences of the allegations of incivility (what Professor Alice Wooley has dubbed "professional protectionism").[41] Knowing the difficulty of defending an allegation of professional misconduct and the consequences that flow from the charges alone (like exclusion from The Mobility Agreement) causes lawyers to be reluctant to take any risk.

Kip Daeschel had the following comment on the *Groia* prosecution by the Law Society, saying that it sent:

> [A] chilling message to Ontario lawyers that, before vigorously advancing an aggressive argument on behalf of their clients, they must first consider their own personal need to avoid offending third parties who are not in the room.[42]

His comment was also supported by the fact that neither the trial judge nor the opposing counsel referred Mr. Groia's conduct to the Law Society; rather, the Society intervened on its own accord.

We still believe that the paramount duty of lawyers remains as set out in *Rondel v. Worlsey:*

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he [or she] thinks will help his client's case.[43]

The very core of the duties of lawyers is in fundamental tension with the notion of civility; casting doubt on the integrity of the prosecution and questioning their motives must fall under the duty of raising every possible defence. By imposing new limits of civility on that core

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[40] *Supra* note 3 at para 123.
[41] Alice Woolley, "Does Civility Matter?" (2008) 46 Osgoode Hall LJ 175 at 177.
[42] Kip Daeschel, "LSUC pursuing civility at the expense of justice" *The Law Times* (29 August 2011), online: The Law Times < http://www.lawtimesnews.com/201108292537/commentary/lsuc-pursuing-civility-at-expense-of-justice>, referring to the original *Groia* prosecution and hearing.
[43] *Rondel v Worlsey*, [1969] 1 AC 191 (HL) at para 227.

duty (indeed the Hearing Panel in *Groia* said lawyers have an "overriding duty" to ensure that trials proceeded "efficiently" in an "atmosphere of calm"),[44] the Law Society has hampered the ability of advocates to pursue some of these less pleasant avenues of defending the accused, and introduced hesitancy into the "fearless" presentation of a zealous defence for their worry about personal sanctions. Alice Woolley suggests that the regulation of lawyers on these matters is theoretically incoherent, and this divergence is difficult to apply to an advocate's duty to present both a zealous defence and a civil demeanor.[45] She further suggests that in choosing to impose certain regulations on lawyers' ethics, regulatory bodies must consider the implications of their choices, and what these choices say about the type of lawyer they want their society to have.

It is also necessary for advocates to be able to precisely determine the boundaries of their behaviour ahead of time, or even at the time, particularly if the lawyer knows that he or she might be facing an investigation and sanctions many years after the completion of the trial. While it is unethical for a lawyer to focus more on defending her or his interests than the client's interests, that is exactly what lawyers are now forced to do.

VII. The Special Harm of Civility Prosecutions based on Uncriticized In-Court Conduct

One way to limit some of these problems would be for the Law Society to step back from its interference with the jurisdiction of courts to control the cases before them. Every trial has its own dynamic, and a lawyer who goes outside the boundaries of what a judge will accept does so at her peril. At the same time, disciplining a lawyer for conduct that is accepted or encouraged, or at the very least not criticized by a judge, is extremely troubling. As the unanimous Supreme Court in *McKercher* stated:

> Courts of inherent jurisdiction have supervisory power over litigation brought before them. Lawyers are officers of the court and are bound to conduct their business as the court directs. When issues arise as to whether a lawyer may act for a particular client in litigation, it falls to the court to resolve those issues. The courts' purpose in exercising their supervisory powers over lawyers has traditionally been to protect clients from prejudice and to preserve the repute of the administration of justice, not to discipline or punish lawyers…

[44] *Groia*, *supra* note 3 at para 137.
[45] *Supra* note 35 at para 6.

> Both the courts and law societies are involved in resolving issues relating to conflicts of interest — the courts from the perspective of the proper administration of justice, the law societies from the perspective of good governance of the profession: see *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331. In exercising their respective powers, each may properly have regard for the other's views.[46]

Unfortunately, the competing interests of zealous advocacy and civility force lawyers to sacrifice one ideal at the expense of the other. The pursuit of absolute civility is "fruitless and unattainable."[47] Defence counsel have an especially difficult set of issues in this regard, as they are required to balance their duties to their clients, to the court and to the administration of justice. When the tension between these duties forces advocates to choose one or more of them at the expense of the others in open court, interference by a regulator not only usurps the courts' supervisory role, it also damages the administration of justice. Neither Justice Hryn, nor Mr. Felderhof, had any complaint about Mr. Groia's conduct in *Felderhof*, nor was there a formal complaint by the prosecutors to the Law Society.

In the Ontario Court of Appeal decision in *Groia*, Brown J.A., in his forceful dissent from the majority decision, hones in on the particular harm of allowing regulators to prosecute conduct that went formally uncriticized, and that was dealt with by the trial judge.[48] Brown J.A. rightly articulates that it is the responsibility of judges, not law societies, to manage the nation's courtrooms. The dissent contemplates a three-pronged test for professional misconduct that takes into account: i) what the barrister did; ii) what the presiding judge did about the barrister's conduct and how the barrister responded to the directions of the presiding judge; and iii) what effect the impugned conduct had on the fairness of the court proceeding.[49] This test subsumes all of the necessary factors discussed in the courts below, while also placing a proper emphasis on the judge's role.

A presiding judge is best positioned to opine on the appropriateness of in-court conduct by virtue of being the closest arbiter of the particular facts, context and nuances of the proceeding. In the case at bar, the trial judge was in no way silent about the impugned conduct. As stated by Brown J.A., "what emerges is the picture of a trial judge who responded to the

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[46] *Canadian National Railway Co v McKercher LLP* 2013 SCC 39 at paras 13 & 16, [2013] 2 SCR 649.
[47] Taddese, *supra* note 35.
[48] *Groia v. Law Society of Upper Canada*, (2016) ONCA 471 ["*Groia ONCA*"].
[49] *Ibid* at para 319.

prosecution's complaints about Mr. Groia's conduct and attempted to deal with them".[50] Importantly, Mr. Groia listened to the trial judge's directions and the conduct complained of stopped. To say that a lawyer remains exposed to Law Society sanction for professional misconduct after complying with directions given by a presiding judge is to completely supplant the authority and control of that judge over his or her courtroom. Such review of a judge's management of a court proceeding properly falls to an appellate court – not to a government regulator.[51] This argument is rooted in the Constitutional principle of judicial independence; "at the core of judicial independence lies the power of the court to control its own process",[52] which is "essential to the maintenance of the rule of law itself".[53]

If a government regulator is allowed unfettered reign to review in-court conduct of lawyers, there is a high risk of a decision being made that second-guesses the judge's management of the proceeding. To prevent such an impermissible result, the regulator must be required to take into account and give great weight and deference to trial judges' rulings on lawyer conduct as part of its professional discipline review.[54] The Law Society "must abide by the principle that control over the conduct of any participant in a proceeding in a courtroom ultimately rests with the judiciary".[55]

VIII. CONCLUSION

The crisis in the legal profession is not because lawyers are viewed as too passionate, too unruly, or too zealous. Even when they can afford a lawyer, the public worries about whether or not their lawyer is putting his or her own material interests ahead of their own. There have been too many wrongful convictions, too many instances of abuse of authority by government actors and too many cases of neglect for the public to tolerate. We fear that the civility movement has forced lawyers to rank civility above their fundamental duties of loyalty, zealous advocacy and integrity. No wonder there has been a loss of confidence in the profession. When members of the

[50] *Groia ONCA* at para 424.
[51] *Ibid* at para 330.
[52] *Ibid* at para 322 citing *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 at para 33 ["*MacMillan*"].
[53] *Macmillan, ibid*, at para 18.
[54] *Groia ONCA* at para 325.
[55] *Groia ONCA* at para 339.

public see little or no reaction from the profession or their regulators to wrongful convictions, access to justice and unemployed lawyers, they must be puzzled. When they see the significant resources devoted to stamping out incivility instead, they must be dismayed.

We hope that in the near future we may start to see the pendulum swing away from the pursuit of civility and towards the primacy of zealous advocacy. If it does, then and maybe only then there is some hope that lawyers will start to regain the public trust that has been so tragically lost.

APPENDIX A

A PERSONAL DISCLAIMER

It is very hard to write a useful paper on a topic that is so close to the heart of your career as a lawyer. Accordingly, I believed that a personal statement at the outset was required if there was any hope that the rest of our paper would be seen as anything more than a 'screech'.

The study of civility and the prosecution of incivility has been an important part of my personal and professional life for the last 12 years. It has had, and continues to have, numerous told and untold effects on my life. The tactical decision of the Ontario Securities Commission (OSC) to accuse me of incivility as part of their efforts to remove Judge Hryn from continuing to hear the trial of my client John Felderhof was a turning point for me. It also caused, or contributed to, so much heartache for so many people.

The criticisms by the reviewing courts of my conduct in *Felderhof,* rendered during the OSC's application, when I was unable and unwilling to defend myself as part of my duty to Mr. Felderhof, were devastating to me. To be compared to a bomb thrower – essentially a terrorist – in open court by an OSC prosecutor a few months after 9/11 was distressing. For the Law Society to charge me with professional misconduct without bothering to read the transcripts of the *Felderhof* trial ($6,000 was too much to spend to order them) was alarming. That three benchers would say that it was an abuse of process for me to even try to defend myself from allegations of misconduct was unfathomable. For five benchers to overturn that bizarre decision, but to then find me guilty of misconduct, while ignoring almost all of the evidence called at my hearing was, to say the least, disappointing.

Where do I now stand? My appeal to the Ontario Court of Appeal was dismissed in June, and I have applied for leave to appeal to the Supreme Court of Canada. My defence of Mr. Felderhof (mostly without pay), and my defence of the LSUC charges (mostly without hesitation), have left me financially drained, physically exhausted and professionally wounded.

However, lawyers do not often get the opportunity to stand up and fight for what we personally believe is right. But when we do, these become the cases that define us as lawyers. This is my case, and the misuse of civility is my cause. Should you ever have a similar chance, I urge you to grab onto it and hold fast, no matter the costs or burdens that may follow. I have had very few regrets in taking up this cause and I have no doubt that it will be my legacy as a lawyer

– either as a fearless advocate who fought for as long and as hard as he could – or perhaps as the Law Society hopes, as a disgraced convicted miscreant. I only hope that when you read this little paper, you do not dismiss our concerns out of hand. I am not afraid to tell you the story of my journey, and I do not fear judgment by the profession.

At the end I want to thank John Bernard Felderhof for his trust and confidence in me which I hope was not misplaced. One of my few regrets is that his well-deserved acquittal has been tainted by the Law Society's prosecution in my case. I also want to especially thank my family and all the members of the profession who have helped support me during these long and difficult travels. Your heartfelt contributions have not gone unnoticed, or unappreciated.

Joseph Groia
Toronto, Canada
November 28, 2016

APPENDIX B

Dear Member,

It is difficult to think of Marie Henein as someone in need of an advocate.

But as her fellow advocates, we have a duty to speak in defence not only of her – because she would likely tell me she's doing just fine, thank you - but the administration of justice in general. I am referring to the recent news cycle of criticism of Ms. Henein, who successfully defended former CBC radio host Jian Ghomeshi, for agreeing to speak at Bishop's University this coming February, with live-streaming to St. Francis Xavier, Acadia and Mount Allison universities.

Our justice system depends upon strong advocacy by lawyers fulfilling their ethical duties to their client, the court and the public.

The Rules of Professional Conduct, which every Ontario lawyer must uphold, require a lawyer to represent the client resolutely and honourably within the limits of the law. The lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer believes will assist the client's case. The lawyer's function as advocate is openly and necessarily partisan.

When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

In defending Mr. Ghomeshi, Marie Henein did precisely what she and all defence lawyers are ethically bound to do. The defence of unpopular clients and causes is part of the job. It is grossly unfair to condemn her for fulfilling her professional obligation.

Hearing from one of the leading defence counsel of our generation contributes to the continued strength of our bar and legal system.

Yours very truly,

Bradley E. Berg
President

APPENDIX C

EVERYTHING TO DO WITH CIVILITY

Jurisprudence

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