

## Civil Litigation

**Being rude in court: Disciplinary sanctions**By **Barb Cotton and Christine Silverberg**

Barb Cotton



Christine Silverberg

(August 5, 2020, 2:03 PM EDT) -- In part one of this series we summarized the scope of that rather elusive line as to when a lawyer would cross into uncivil communications with opposing counsel and reviewed a governing *Code of Conduct* and The Advocates' Society's principles regarding civility in support of our conclusions. In this part we will take a look at case studies in order to illuminate just what the boundaries of civil communications between counsel may be.

The Supreme Court of Canada has explicitly addressed the issue of uncivil communications, albeit within the context of communications between a lawyer and a judge. In *Doré v. Barreau du Québec* 2012 SCC 12, the lawyer appeared before a judge of the Superior Court of Quebec and, in the course of his argument, the judge criticized the lawyer. In his written reasons rejecting the lawyer's application, the judge levied further criticism, accusing the lawyer of bombastic rhetoric and hyperbole and of engaging in idle quibbling, amongst other things. The aggrieved lawyer then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, amongst other things. The judge was reprimanded by the Canadian Judicial Council for his part in the proceedings, and the lawyer was brought before the Disciplinary Council of the Barreau du Québec. The lawyer was reprimanded and suspended from practising law for 21 days. The lawyer appealed and the matter made its way to the Supreme Court of Canada.

On the issue of civility in communications, Justice Rosalie Silberman Abella for the court stated: "Lawyers potentially face criticisms and pressures 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."

The Alberta Court of Appeal has weighed in on what civility requires of a lawyer, in a general context. In *Goold v. Alberta (Child and Youth Advocate)* 2011 ABCA 63, the lawyer had been removed from the roster of children's counsel because of complaints she was rude, demeaning and abusive toward court workers and others, was characterized in a review hearing as having engaged in bullying behaviour, and had engaged in a heated exchange in the office which was seen as unprofessional. She applied to be reinstated, but the Alberta Court of Appeal supported the decision of the Office of the Child and Youth Advocate.

In another Alberta decision, which might represent the least egregious end of the spectrum where a professional sanction was applied, *Law Society of Alberta v. Pozniak* [2002] L.S.D.D. No. 55, a lawyer received a reprimand from the Law Society Hearing Committee for calling another lawyer "clueless" in written correspondence. The lawyer argued that he had not intended to be rude or offensive with his use of the word "clueless," but rather instructive, but the hearing committee found that it was a gratuitous insult and the lawyer was reprimanded with a reference to taking the "high road," without a fine or cost penalty.

Other examples are more egregious. In *Law Society of Upper Canada v. Ludmer* 2012 ONLSHP 191 the lawyer had been involved in his own family law litigation in which he alleged estrangement from his children on the basis of parental alienation syndrome. He had been a corporate and securities lawyer for most of his career but represented a client who also alleged to be suffering from the effects of parental alienation syndrome.

The hearing panel considered allegations of incivility in the lawyer's communications with opposing counsel, the wife of his client and other parties. There was a substantial agreed statement of facts filed before the hearing panel, in which the lawyer admitted to abusive and offensive conduct, including calling the wife a cockroach and a bold-faced liar in e-mail, and referring to her in correspondence as "sad and despicable," "uncivilized," a "child abuser," a "failure as a Mother" and as a "cult leader." He also threatened to report her lawyers to the law society for professional misconduct and wrote to them frequently in a threatening and demeaning manner.

The incivility was well documented and took place over a number of years. In the penalty hearing at *Law Society of Upper Canada v. Ludmer* 2013 ONLSHP 114, the lawyer was ordered to continue his mentoring with a retired judge to gain insight as to his behaviour for a two-year period after his return to practice following his suspension. With no prior disciplinary record and some evidence of remorse, the lawyer was suspended for two months.

In the more recent case of *Law Society of Upper Canada v. Botiuk* 2015 ONLSTH 143, the lawyer made inappropriate comments about a judge hearing a case he was trying, and also made threats and abusive comments in his communications with opposing counsel. He admitted his behaviour in an agreed statement of facts, which included accusing the opposing lawyers of tampering with the court file, threatening to ask the law society to investigate their conduct, threatening criminal proceedings if the defendants did not accept the plaintiff's offer to settle and threatening to write to the Ministry of Finance. He wrote to opposing counsel that he was "seething with rage." The hearing panel found his communications were repeatedly snide, derogatory and wholly inappropriate. In the submissions as to penalty he tendered a report from a psychologist which he stated explained his behaviour. He was sanctioned with a one-month suspension from practice and required to continue with ongoing psychological counselling for six months and to obtain further training in civility.

Thus, as stated in part one of this article, we conclude that a lawyer will cross the line into incivility with opposing counsel if the communication is:

- Demeaning or belittling;
- Threatening or bullying;
- Sarcastic or snide;
- Rude, abrasive, hostile or obstructive;
- Condescending or patronizing; or
- An insult or personal attack on opposing counsel.

This is especially if these types of communications take place over an extended period of time.

The watchword for communication with opposing counsel, as stipulated by the Supreme Court of Canada in *Doré*, is "dignified restraint."

This is the second of a two-part series. Read part one: [Being rude in court: Crossing the line.](#)

*Barb Cotton is the principal of Bottom Line Research and assists solo, small and specialized lawyers with their research and writing needs. She can be reached at (403) 240-3142, cell (403) 852-3462, e-mail [barbc@bottomlineresearch.ca](mailto:barbc@bottomlineresearch.ca). Christine Silverberg is a Calgary based lawyer with a diverse advocacy, regulatory and litigation practice. She can be reached at (403) 648-3011, [christine@silverberglegal.com](mailto:christine@silverberglegal.com) or through [www.christinesilverberg.com](http://www.christinesilverberg.com).*

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