Federal Court  Cour fédérale

New York State Bar Association – International Section Seasonal Meeting
Where Do We Go From Here?

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Speaking Notes of The Honourable Mr. Justice Harrington

Federal Court of Canada

"Ethics of Practice"

[1] Our Canadian constitution is rather mundane. It calls for "peace, order and good government".

[2] The Courts play a vital role in peacefully resolving disputes. The fundamental principle of natural justice is that parties be given a fair opportunity to make their case or defence, before an impartial (and hopefully competent) decision-maker.

[3] This is where you lawyers come in. Although parties, at least if they are human beings, are entitled to represent themselves, most lack the necessary skill sets. The State, by statute, recognizes the profession and, for the most part, allows Bar Associations to be self-governing. Among other things, these Bar Associations examine the qualification of candidates and regulate conduct.

[4] The focus of these notes is on litigation, both prior to and during trial.

[5] We are here to discuss the "Ethics of Practice". Ethics is defined in the Canadian Oxford Dictionary as the science of morals and human conduct, moral philosophy, rules of behaviour. "Civility" is a closely related word, defined as politeness. I am struggling through a recent book by Keith Thomas entitled: "In Search of Civility: Manners and Civilization in Early Modern England". To the ancient Greeks those who were civilized spoke Greek. Those who could not were Barbarians. In medieval England civility was a way of acting in the presence of the Monarch. Today, civility is defined by how we speak and act with one another.

[6] To my mind, the ability to make one's case or defence is prejudiced if ethics and civility are lacking. Various Bar Associations have adopted codes of conduct. For instance, the Federation of Law Societies of Canada has a Model Code of Professional Conduct which runs over 120 pages. It sets out various statements of principle followed by examples and commentary. As you might expect while the lawyer must represent a client resolutely and honourably, he or she is also an officer of the Court and must treat the Court and opposing counsel with candor, courtesy and respect [*Federation of Law Societies Canada*, Model Code of Professional Conduct at s. 5.1-1 and 5.1-5, as amended March 14, 2017 [***FLSC Code***], *Code of Professional Conduct of Lawyers*, CQLR c B-1, r 3.1 at s. 112, as amended April 13, 2016 [***Quebec Code***]]. Dignity, decorum and courtesy in the courtroom are essential because without order, rights cannot be protected.

[7] Another interesting statement of principles is set out in the Advocates Societies' Institute for Civility and Professionalism entitled: "Principles of Civility for Advocates". This statement of principles was prepared by Senior Ontario Litigators. It speaks to an advocate's duties to society, the profession, clients and witnesses, the Court, opposing counsel and access to justice. (http://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Principles_of_Civility_.pdf)

[8] I cannot resist mentioning that, even if legal, lawyers are not to tape conversations with their clients, except on consent [*Ayre v. Nova Scotia Barristers' Society*, 1998 CanLII 2624 (NS CA)].

[9] I will briefly deal with a few pre-trial matters before turning to the trial itself.

[10] The Court is frequently faced with *ex parte* applications. It is incumbent upon counsel to make a full and frank disclosure [*FLSC Code* at s. 5.1-2 (e), *Quebec Code* at s. 116]. Failure to do so may result in disciplinary proceedings by the Court or result in a complaint to the appropriate Bar Association. Even without that, judges talk. If word gets around of a lack of candor the rest of your career is going to be miserable [*Schreiber v. Mulroney*, 2007 CanLII 31754 (ON SC), ex: breaching an undertaking with opposing counsel not to obtain a judgment by default].

[11] The pre-trial discovery process in our Court has two components. The discovery of documents and the examination for discovery. A party must list and make available for inspection all relevant documents irrespective of whether they help his case. The good, the bad and the ugly must be produced. Counsel is required to certify that he or she has explained to the affiant the necessity of making full disclosure and the possible consequences of failing to do so. As Lord Wright put it in *Myers v. Elman*, [1940] A.C. 282, [1939] 4 All E.R. 484 (H.L.):

> "The order of discovery requires the client to give information in writing and on oath of all documents which are to have been in his corporeal possession or power, whether he is bound to produce them or not. A client cannot be expected to realize the whole scope of that obligation without the aid and advice of his solicitor, who therefore has a peculiar duty in these matters as an officer of the Court carefully to investigate the position and as far as possible see that the order is complied with. A client left to himself could not know what is relevant, nor is he likely to realize that it is his obligation to disclose every relevant document, even a document which would establish, or go far to establish, against him his opponent's case. The solicitor cannot simply allow the client to make whatever affidavit of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case. He does not discharge his duty in such a case by requesting the client to make a proper affidavit and then filing whatever affidavit the client thinks fit to swear to."

[12] The deponent on an examination for discovery testifies not only on knowledge, but also on information and belief. If the witness misspoke that error must be promptly rectified [*Federal Courts Rules*, SOR/98-106, at subsection 226 (1)].

[13] A rather touchy subject is the relationship between counsel and expert witnesses. The expert, although hired and paid by one party, is there to assist the Court. In our court, the expert is required to certify that he has read our Code of Conduct and will abide by it [*Federal Courts Rules*, SOR/98-106 at paragraph 52.2 (1) (c)].

[14] I don't think our jurisprudence is fully settled on the extent to which counsel may become involved in drafting the expert's opinion. While I was in practice, one of the issues in an upcoming trial was the state of foreign law. The other side's expert opinion was written in flawless English. Our expert wrote in rather broken English. The client thought we might improve the English somewhat. However, we did not – our expert was going to testify using the same broken English in which he wrote. It turned out that the other expert had had his opinion translated and he testified through an interpreter. While this may not have been the deciding point, the Court preferred our expert's testimony.

[15] The Supreme Court of Canada very recently dealt with ethics and civility in the courtroom in *Groia v. The Law Society of Upper Canada*, 2018 SCC 27. Stripped of its facts, this was yet another pronouncement by the Supreme Court of Canada on judicial review, more particularly the deference, if any, the courts owe to decisions of lower tribunals. The Court is going to reconsider this vexing issue in the months ahead: *National Football League, et al. v. Attorney General of Canada*, 2018 CanLII 40806 (SCC); *Minister of Citizenship and Immigration v. Alexander Vavilov*, 2018 CanLII 40807 (SCC); *Bell Canada, et al. v. Attorney General of Canada,* 2018 CanLII 40808 (SCC).

[16] For our purposes, Mr. Groia was defending his client on an insider trading charge brought by the Ontario Securities Commission. The trial was very lengthy and very rancorous. Mr. Groia personally attacked the prosecutors and alleged professional impropriety. At the heart of the dispute was a disagreement over the scope of the Commission's disclosure obligations and the admissibility of documents. Mr. Groia believed that it was not enough for the Commission to disclose documents; it also had to introduce those which might assist his client through its own witnesses.

[17] The trial judge initially adopted a hands-off approach but eventually directed Mr. Groia to stop repeating his misconduct allegations. For the most part Mr. Groia complied. At the end of the trial Mr. Groia's client was acquitted. Thereafter, the Law Society, on its own motion, brought proceedings against him for professional misconduct based on his behaviour during trial. He was found guilty. His licence to practice was suspended for two months and he was ordered to pay more than $200,000 in costs. That decision was varied by the Law Society's Appeal Panel. It reduced his suspension to one month and reduced the cost award to $200,000. The appeal panel developed a multi-faceted, context-specific approach to assess whether in-court incivility amounts to professional misconduct. Both the Ontario Divisional Court and the Ontario Court of Appeal upheld that decision on the basis that the standard of review was reasonableness and that the decision was reasonable.

[18] The majority of the Supreme Court of Canada granted Mr. Groia's appeal. They approved the Law Society's approach and also applied the reasonableness standard but found the decision to be unreasonable. The Supreme Court held that there were a number of factors to take

into account: what the lawyer said, the manner and frequency in which it was said, the presiding judge's reaction, and the behaviour of opposing counsel.

[19] Mr. Groia was found not guilty of professional misconduct because he honestly believed in the legal argument he advanced, which was rejected by the Court. No one came out of the case smelling like roses. Mr. Groia did not have a firm grasp on the law of evidence. Would the result have been different if he had simply been ordered to follow a continuing education course on that subject? Opposing counsel was also nasty, which contributed to the fiasco. When the judge finally put his foot down, the trial continued on a more civil basis. However, the Court did note that this was a non-jury trial. A jury trial that might raise other issues as an aggressive judge might be taken by a jury to favour one party over another.

[20] Here are a few issues which have given me cause for concern over the past fifteen years.

[21] It's important to bring to the Court's attention all cases which bear on the point at issue, not simply those which support your case [*FLSC Model Code*, at s. 5.1-2 (i)]. Lawyers are of course entitled, even expected, to distinguish those cases that might be unfavourable to their client's case. What matters is that they do not conceal on-point authorities or actively mislead the Court. As Lord Birkenhead said in *Glebe Sugar Refining Co. Ltd. v Greenock Harbour Trustees*, (1921), SC 72, at page 73:

> "It is not, of course, in cases of complication possible for their Lordships to be aware of all the authorities, statutory or otherwise, which may be relevant to the issues which in the particular case

> require decision. Their Lordships are, therefore, very much in the hands of counsel, and those who instruct counsel in these matters and this House expects, and indeed insists, that authorities which bear one way or the other upon matters under debate shall be brought to the attention of their Lordships by those who are aware of those authorities. The observation is quite irrespective of whether or not the particular authority assists the party which is so aware of it. It is an obligation of confidence between their Lordships and all those who assist in the debates of this House in the capacity of counsel."

[See also: *The Roman Catholic Episcopal Corporation for the Diocese of Sault Ste. Marie v. Axa Insurance (Canada),* 2015 ONSC 4755, at paragraphs 14 to 18]

[22] For instance, our court deals with patents, trademarks and other intellectual property. Every comma and every period in the *Patent Act*, and its predecessors, has been litigated over and over again. I must say, counsel are very diligent, perhaps even too diligent, in bringing to the Court's attention every domestic case which might bear on the point, as well as case law from other jurisdictions which have similar laws. A gem might be lost if hundreds of cases are cited in support of a single proposition.

[23] If a case you cite has gone to appeal, it is important to say so even if the appeal was dismissed. Judges also want to know whether a case has been criticized, especially by a higher court. The schedule of events for this conference refers to the old adage "if you lose the Court, you lose the case". Here are some of my bugbears.

[24] Do not interrupt your colleague while he or she is addressing the Court or examining a witness. You will have your opportunity to correct any perceived errors. I advise counsel to sit

on their hands, and when it is their turn to speak, if they really object to what was said, I suggest they say “my learned friend” rather than “my friend”. This will clue me in to the fact they are really upset. After several days of hearing, one comic got up and said: “May I have a moment my Lord to flex my fingers, they are numb from sitting on them.”

[25] I pay great attention to oral argument. Look me in the eye. If I ask a question don’t reply by saying that you will be getting to that point later on. The judge may actually be trying to help you out.

[26] You might find it necessary to list a dozen propositions in your Memorandum of Fact and Law. You don’t have to repeat them all. If you begin with five or six clunkers, you’ve probably lost the judge.

[27] Don’t simply read from your Memorandum of Fact and Law. Don’t read long quotes from the cases you have cited. That is why oral arguments are preceded by written arguments.

[28] Despite what you might see on TV, haranguing a witness doesn’t really work. Gently corral the witness in. Following a break in a cross-examination, the witness was asked whether he noticed a gentleman sitting in the corridor outside the courtroom. He said he did not. He was told the witness was going to come to court the next day to testify in contradiction to what was just said. Overnight the witness had an epiphany and corrected his testimony the next morning.

[29] Never discuss your witness's testimony during cross-examination. There is a divergence of opinion as to whether you can discuss upcoming testimony during breaks in the examination-in-chief. It appears to be acceptable that you may discuss matters not yet touched upon [*FLSC Model Code*, at s. 5.4-3 (commentary)]. However, I consider the temptation too great and always instruct the witness that he is in an isolation booth and is not to discuss his testimony with his counsel, or with anyone else.

[30] Here's one tip. We are an itinerant court often living out of suitcases and hotel rooms. Although we are slowly going digital some old fogies like me still prefer paper. The motion record may comprise several thick volumes. Keep your Memorandum of Fact and Argument in a separate thin volume. Why? If the judge puts anything in his briefcase and brings it back to the hotel, you want it to be your material!

[31] Always remember: "Be bright, be brief and be gone".

[32] These brief comments of course are my own and do not necessarily reflect the views of the Court at large.

Ottawa, September 21, 2018