

***Citizenship in the Legal Profession:  
Civility as an Instrumental Value in Self-Governance***

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**1. INTRODUCTION**

The beginning place for any consideration of professional behaviour has to be a recognition of, as well as a rededication to, our fundamental professional service mandate. With this central *raison d'etre* in mind our profession has been constituted as a self-governing institution.<sup>1</sup> Generally speaking, the form of professional self-governance is shaped by the following goals: (i) ensuring individual and institutional accountability to the public, (ii) ensuring standards of excellence, (iii) recognizing that membership entails privileges with corresponding obligations, and (iv) ensuring that the self-governance mandate is democratically instituted.<sup>2</sup>

I take the view that the creation of this self-governing institution amounts to the creation of our own *civil society* within the larger society. In this paper I will focus on the behaviour of legal professionals as *citizens* in this civil society, since “any regime of self-government must have an adequate supply of citizens who are skilled in the arts of self-government -- deliberation, +

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<sup>1</sup>*Law Society Act*, R.S.O. 1990, c.L.8, and *By-Laws of the Law Society of Upper Canada*, pursuant to ss. 62(0.1) and (1) of the *Law Society Act*.

<sup>2</sup>See, generally: Donald E. Buckingham *et al*, *Legal Ethics in Canada: Theory and Practice*, (Toronto: Harcourt Brace & Company), 1996.

minds.”<sup>6</sup> Furthermore, this ‘conduct of controversy’ is most certainly reflected in patterns of discourteous, thoughtless, and rude behaviour towards one another. These all too common incidents of uncivil behaviour represent moments where the balance between individual and community has been disrupted. In my view, if there are expressions of hostility, rudeness, or arrogance between lawyers in the courtrooms, in the boardrooms, or in correspondence, then I can no longer see the actors as citizens of our professional civil society. For this is behaviour which has forsaken the essential professional call to participate with each other in balancing the tension between individual excellence and public service. In short, the measure of success for our self-governance is the degree to which the tension between individualism and community mindedness is moderated or balanced.

In this regard, I believe that the most fertile grounds for moderation are available in these day-to-day interaction between lawyers. Specifically, thoughtful, open-minded, and mutually respectful interactions between legal professionals represent quintessentially civil conduct, and result in an amelioration of the fragmenting forces within our community. In this way, civility must be recognized as an instrumental value informing the conduct of citizenship in the legal profession. At a bare minimum, courteous and thoughtful interactions enhance our “work-a-day” life experiences. More than that, however, civility is instrumental in ensuring the maintenance of our professional institution and furthering our profession’s goals. Even beyond the goals of good intra-professional relations and institutional efficacy, however, I will stress that civility is a value that is embedded in the roots of our rule of law. Basically, to understand the gist of my argument is to understand how respect for each other amounts to respect for the rule of law.

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<sup>6</sup>Annemarie Micklo, “Civil Law?”, *Student Lawyer*, September 1999, pp. 31 - 33.

## 2. The Relation of Civility to the “Good Ol’ Days”, Professional Codes, and Ethics

In order to understand what I mean by civility I thought it might be helpful to outline how civility either relates or can be distinguished from some related concepts, that is manners, codes of conduct and ethics. Below I will put forward a more progressive and publicly-minded model of civility than that offered by the traditional conception of professional etiquette. As well, I will consider the connections between the concept of civility and the areas of legal ethical scholarship and the codified rules of professional conduct. While recognizing that there are connections between these areas, I wish to emphasize that the more abstract conceptions of ethics and/or rules do not possess the profound grassroots potential to sustain self-governance.

### *i. Good Old Fashioned “Esprit de corps”*

In the early days of the profession, lawyers were expected to conduct themselves as gentlemen and scholars. This was also a time where *only* gentlemen and scholars had any chance of becoming lawyers. Each legal professional looked a lot like the other professional – male, white, and of upper class origins. In 1960, Sir Thomas Lund, (the then Secretary of the British Law Society) best described this classical model of etiquette as follows:

...there is a breach of etiquette. That is really a breach of professional good manners and the only sanction for that in an extreme case would be the exclusion of the offender from membership of The Law Society on the ground that he did not conform with the accepted conduct and traditional behaviour of solicitors, who are gentlemen.<sup>7</sup>

Over thirty years later, John Honsberger published a call to return to these gentler professional times. In doing so, he noted that:

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<sup>7</sup>Sir Thomas Lund, C.B.E., *A Guide to the Professional Conduct and Etiquette of Solicitors*, (London: The Law Society), 1960 at p. 1.

Civility is behaviour proper to the intercourse of civilized people. Professions in classical times were recognized as necessary elements in the civilized state. An attribute of a profession is a measure of unselfishness or freedom from purely personal considerations. Traditionally too, one had to show evidence of being a “lady” or “gentleman” as well as a “scholar” before being allowed into a profession.<sup>8</sup>

To some degree I can empathize with this sentiment. However, Honsberger saw civility in the profession as being frustrated by two modern trends, i.e., increased numbers in the profession and new ideas:

It was easier to learn and absorb the traditions and civilities of the Bar and the profession when both were smaller and when most would know the D’Alton McCarthy’s and the John Cartwright’s and they knew you and when most of the profession in any centre could be gathered and did gather together in a single room for bar dinners. The problem of size is now compounded by the movement we see in our contemporary society towards “greater openness”, “less rigidity” and “freedom from authority” that produces an indiscriminate freedom in which old values have been rejected with no new ones to take their place.<sup>9</sup>

With respect, this is my point of departure with Honsberger’s views. I am concerned that simply calling for a return to the good old days is, at its best, a little pious and unrealistic. At its worst, it is reactive and undemocratic. On the contrary, in order for our profession to mature, explicitly inclusive civil values must be fostered within our civil society. These new civil values will assist us in displacing the ancient and socially inert values associated with maintaining rigid homogeneity within the profession.

For there is great richness in our country’s burgeoning diversity -- a richness that flows from differences in ideas, life experiences, and approaches. From a purely self-interested point of view, therefore, our profession must embrace and reflect this diversity in order to tap this rich resource.

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<sup>8</sup>John Honsberger, “Civility within the Profession”, *The Law Society Gazette*, at p. 176.

<sup>9</sup>*Ibid*, at p. 178.

On the other hand, we are responsible to remain meaningfully connected to the larger society, which means among other things, that our professional responsibilities includes ensuring that our community is representative of the larger society.

My call for civility, then, is a contemporarily focused one recognizing that we need to foster a kind of civility that is adept at embracing new people, ideas and challenges. As Professor Allan Hutchinson stated:

The cure for the perceived professional blight is not a return to the values and standards of yesteryear. On the contrary, these old standards are part of the problem. What is required is a fresh approach to legal ethics that is sensitive to the changing shape and style of modern legal practice, one that demands that lawyers aspire to a more diverse and critical self-image. Accordingly mindful that the homogeneity of lawyers is beginning to be replaced by more diversity in personnel...<sup>10</sup>

## *ii. Professional Codes of Conduct*

I was not surprised to discover that the tension between competitive individualism and community based service goals found expression in the Law Society of Upper Canada's rationale for the newly revised Rules of Professional Conduct.<sup>11</sup> Therein, the Law Society stated that the purpose of the rules is to "protect the public and to provide guidance to lawyers while also facilitating the creative practice of law and assisting the profession to remain competitive." Seen in this way, the codified rules are obviously intended to moderate the potentially fragmenting forces of individualism in the profession.

It is also worth noting that the underlying framework for the new rules is one of a series of *relationships*. Specifically, rule 2 is concerned with the lawyer's relationship to a client, rule 3 is

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<sup>10</sup>A. C. Hutchinson, *Legal Ethics and Professional Responsibility*, (Toronto: Irwin Law) 1999, at p. 6.

<sup>11</sup>The Law Society of Upper Canada, *Rules of Professional Conduct*, adopted by Convocation June 22, 2000, effective November 1, 2000.

directed at public relations, rule 4 is directed to the lawyer's relationship with the courts, rule 5 deals with relations with employees, and rule 6 is focused on relations to other lawyers. From my perspective, this 'relationship schema' for the rules is important and reflects positively on the intention of the framers of the rules. As I have stressed, it is essential that lawyers recognize that the quality of every professional relationship is directly tied to the quality of our self-governing institution. Again, self-governance is not activity reserved for the Bencher boardrooms, it is the stuff of every interaction in the work.

Despite the recognition of these positive aspects of the rules (even recognizing the specific provisions demanding professional courtesy), I believe that codes are insufficient mechanisms for fostering civility in our community. In essence the code has a very different capacity than that of civility. A code remains external or auxiliary to the highly integrated and every-day location of civility. At best the code provides a set of signposts about the obligations of citizens, as well as a mechanism to deal with infractions.

Judith Martin, also affectionately and most respectfully known as Miss Manners, commented that civility, etiquette or good manners provide unwritten "rules, symbols, and rituals of civilized life."<sup>12</sup> Historically, manners predated any institutional expression of law or rules and, as such, have provided the basic building blocks of civil society. The key recognition is that the practice of civility is undertaken on the basis of every individual *voluntarily* restraining his or her own impulses in favour of the greater good. Seen this way, good manners reflect civic sensibilities and are integrated into the personae of each civil actor, and are carried with each citizen as a set of informing principles

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<sup>12</sup>Judith Martin, "The Oldest Virtue", in *Seedbeds of Virtue, supra*, at note 3, p. 63.

for every possible interaction with another citizen. Thus, unlike black letter regulations, civility is immediately available and relevant in the most basic social processes. Furthermore, in an ongoing and organic manner, civility places the emphasis on personal responsibility rather than abstracting or off-loading this civic responsibility to black-letter regulations.<sup>13</sup>

### *iii. Civility and Ethics*

Typically, one does not equate civility with ethics. However, one must recognize that civility is inextricably tied to the value-focused or ethical context. If one accepts that questions of ethics relate primarily to questions of civilization, then questions of civility are in the same order. To illustrate this point I have set out the following dictionary definitions<sup>14</sup> for those words with the root “civil”. Upon review, the connection between good manners and civil society become obvious, since the concepts of citizenship, politeness and governance are all interconnected within this lexicon set.

- civil*: of or belonging to citizens; of ordinary citizens and their concerns; polite, obliging, not rude; of or relating to the state
- civility*: politeness; an act of politeness
- civilization*: an advanced stage or system of social development; the act or process of making or becoming civilized
- civilize*: bring out of a barbarous or primitive stage of society; enlighten; refine and educate

Now, allow me to set out the dictionary definitions for ethic, ethics and ethical:

- ethic*: the general character or ideals of character of a race or group of people
- ethics*: The study of the general nature of morals and of the specific moral choices

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<sup>13</sup>See A.C. Hutchinson, *supra*, at note 10.

<sup>14</sup>*The Canadian Oxford Dictionary*, (Toronto: Oxford University Press), 1998.

to be made by the individual in his relationship with others; ... *the rules or standards governing the conduct of members of a profession* [emphasis added]

*ethical:* In accordance with the accepted principles of right and wrong *governing the conduct of a group*. [emphasis added]

We see, therefore, that ethics are equally concerned with the *conduct of people*, as well as issues of civil society or governance.

Again, I wish to contrast the potency of civility to that of ethical enquiry. While I most certainly support our profession in asking and struggling with ethical questions, the power of civility lies in its immediacy and relevancy to the everyday context of the practice of law. If a lawyer conducts herself in a thoughtful, open, and generally considerate manner, you can bet that she is well on the way to satisfying some high order ethical ideals. In this way, the effectiveness of self-governance readily and more frequently depends on the everyday conduct of its members rather than the more abstract process of ethical scholarship.

### **3. How is Civility Integral to the Legal Profession?**

By way of contrasting civility to ethics, traditional notions of professional etiquette and professional codes of conduct, I have emphasized how civility is instrumental to our institutional capacities by counter-balancing the individualist drive with self-restraint and public spirit.<sup>15</sup> In short, our capacity for civility corresponds precisely with our capacity for dialogue, interaction and cooperation. In this way, civility is instrumental to our intra-professional capacities and efficacy. However, there is something even more fundamental about civility. Specifically, the value of

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<sup>15</sup>*Supra*, note 3, at p. 38.

civility is situated within the very bedrock of the legal profession since it is embedded in the rule of law.

His Lordship, Mr. Justice Charles D. Gonthier, of the Supreme Court of Canada, recently explored the value of “fraternity” as a larger unspoken and unrecognized element of our democracy and rule of law.<sup>16</sup> In defining fraternity, Justice Gonthier cited American philosopher Ralph Barton Perry as follows:

The full spirit of fraternity acknowledges the just pride of others, and gives in advance that which the other’s self-respect demands. It is the only possible relation between two self-respecting persons. It does not imply intimacy or friendship, for these must depend upon the accidents of propinquity and temperament; but **it implies courtesy, fair-mindedness, and the admission of one’s own limitations. It must underlie the closer relations of family, neighborhood, or vocation; but it must be extended to the broader and less personal relations of fellow citizenship and fellow humanity. It is the essential spirit of that finer companionship which even kings have coveted; but in a diffused and rarefied form it is the atmosphere which is vital to a democratic community.**<sup>17</sup>

From my point of view, therefore, the model of civility put forward in this paper perfectly corresponds to Justice Gonthier’s view of fraternity.

Indeed, in much the same way as discussed above, Justice Gonthier also stressed how “fraternity” has acted to balance the more individualistically focused constitutional principles of liberty and equality. Moreover, he saw fraternity as a communal force acting as a “glue that binds liberty and equality to civil society”.<sup>18</sup> In this regard, he stated:

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<sup>16</sup>The Honourable Mr. Justice Charles D. Gonthier, “Fraternity: The Unspoken Third Pillar of Democracy”, in *McGill Law Journal*, June 2000, pp. 567-589. Note: Justice Gonthier focused on “fraternity” as it has been expressed in various constitutions and declarations throughout the world. He did not, therefore, draw the term from its overly colloquial or potentially sexist context.

<sup>17</sup>*Ibid*, cited at p. 569, emphasis added.

<sup>18</sup>*Ibid*.

Liberty and equality are, in a way, antithetical to fraternity. Whereas liberty and equality emphasize the rights of the individual, fraternity emphasizes the rights of the community. **Whereas liberty protects the right to live free from interference, fraternity advances the goals of commitment and responsibility, of making positive steps in the community....fraternity is essential to the well-being of liberty and equality, because only with shared trust and civic commitment can one advance these goals of liberty and equality.** Further, the goal of fraternity is to work together to achieve the highest quality of individual existence. In short, liberty and equality depend on fraternity to flourish.<sup>19</sup>

Justice Gonthier then went on to set out how the “interrelated threads” that make up fraternity (empathy, cooperation, commitment, responsibility, fairness, trust, and equity) have “woven their way into the Canadian legal order.”<sup>20</sup> Specifically, this communal value is most certainly provided for in s.1 of the *Charter of Rights and Freedoms*<sup>21</sup>, as well as contained in s.23 (minority language rights), and s. 35 aboriginal rights. He pointed out that even those *Charter* rights which, at first glance, appear to be essentially individual liberty provisions, have been interpreted in terms of communal or civil values. In particular, he noted that the equality provision of s.15(1) of the *Charter* has been interpreted such that this constitutional guarantee provides for *substantive* rather than individually-based or formal equality.<sup>22</sup>

Justice Gonthier also pointed out that these values are equally alive in private law. For example, he noted that the law of fiduciary responsibilities was one of the most rapidly advancing areas of Canadian law. From his perspective, fiduciary duties in a private or commercial context act to promote an ethic of service while also giving effect to society’s protection of society’s most

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<sup>19</sup>*Ibid*, emphasis added.

<sup>20</sup>*Ibid*, at p. 572.

<sup>21</sup>Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>22</sup>*Ibid*, at p. 577.

vulnerable. In addition, Justice Gonthier pointed to the communal-minded aspects of the law of contract, by drawing attention to the doctrines of unconscionability, good faith, and the duty to mitigate. Again, these areas of the law balance the individual rights of individuals or corporations to contract with concepts of inclusion, fairness, equity, and trust.

His Lordship also went on to outline the impact of fraternity on trust law, and various aspects of family law. For the purposes of this paper, I am not able to do justice to his in-depth analysis of these issues and I urge you to review his paper. Suffice it to say, that fraternity or, for my part, civility is rooted in the rule of law.

Consequently, beyond the instrumentality of civility in preserving and sustaining our self-governing institution, we, as lawyers, are responsible to recognize civility as worthy of respect as an inherent component of the rule of law. In turn, our respect for this principle must energize our relations with the larger community. Specifically, lawyers have a civic obligation to educate the public about these laws and to act as role models in promulgating respect for the rule of law and the administration of justice.

#### **4. Conclusion: Fostering Civility**

Any exercise of self-governance presupposes a process by which the most instrumental and core values are fostered.<sup>23</sup> If institutions are to maintain the “pulse of life”, they must be animated by constant reference back to a justifying doctrine.<sup>24</sup> Consequently, the instrumental value of civility

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<sup>23</sup>James Q. Wilson, “Liberalism, Modernism, and the Good Life”, in *Seedbeds of Virtue*, *supra*, at note 3, p. 33.

<sup>24</sup>George F. Will, “Statecraft as Soulcraft”, (New York: Simon & Schuster, Inc) 1983, at p.18.

must be repeatedly recognized, held out for respect, and reaffirmed. In my view, there are four key components to the fostering exercise: (i) recognizing that civility is indeed integral to the rule of law and the operation of our self-governing society, (ii) as a citizenry, insisting that civility characterize the socialization process for new lawyers (including legal education), (iii) supporting the development of policies that will proscribe, mandate, and regulate behaviour with a view to bolstering civility and respect for the rule of law, and (iv) each of us taking personal responsibility to conduct ourselves accordingly.

This last point, taking it personally, is what I want to particularly emphasize in concluding this discussion. As I have noted throughout this paper, the power of civility lies in the possibility of its immediate application to every interaction in our professional lives. All of us have the capacity to crystallize any everyday professional interaction into a full expression of our professional and legal ideals. Professor Hutchinson made a similar point when he urged lawyers to ‘take ethics personally’:

My most central recommendation is to urge lawyers to take personal responsibility for what they say and do in their professional capacities. Although it seems a modest proposal, it has traditionally been treated as a radical import and implication. By rejecting the hackneyed and unsustainable notion of an entirely differentiated role, lawyers might begin to gain the respect of the public and themselves. **In the same way that “good oratory is a good person speaking well,” so good lawyering is a good person acting well.** As trivial and trite as this may seem, it is the best advice that can be given to the fledgling lawyer and the most compelling injunction to the jaded lawyer.<sup>25</sup>

Mr. Justice Frank Iacobucci, of the Supreme Court of Canada, made a similar plea in his paper on professional responsibility. Therein, he challenged the profession as follows:

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<sup>25</sup>*Supra*, at note 10, p. 195, emphasis added.

I want to close with an old and well-known story that I find particularly inspiring. Many years ago, a group of workers were busy at a construction site. A passer-by asked them what they were doing. The first worker said, "I'm making \$5.00 a day." The second worker replied, "I'm cutting stone." But the third worker replied: "I'm building a cathedral."

We must re-discover law as a calling, as rendering high service to our fellow men and women. Again I challenge you: do you have the courage to build cathedrals and to be proud of it?<sup>26</sup>

I most heartily endorse the retelling of this story as an inspiration and a challenge to our profession, however and with respect, I want to take licence and change the words of the third worker to read "Together, we're building a cathedral".

★The author wishes to thank Julie Lee for her assistance in the preparation of this paper.

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<sup>26</sup>The Honourable Mr. Justice Frank Iacobucci, "The Merchant Lawyer", in *Legal Ethics in Canada: Theory and Practice*, *supra*, at note 2, at p. 219.