

Advocates' Society  
**Quick Reference Guide for Dealing with Out-of-Court Incivility**  
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**Speakers:** Matt Gottlieb, Lax O'Sullivan Lisus Gottlieb LLP

Nadia Campion, Polley Faith LLP

**Moderator:** Norm Emblem, Dentons

There are more than 50,000 lawyers in Ontario and while many of these lawyers are very civil, there are some who are not. Whereas judges can often control in-court conduct and take steps to prevent incivility, out-of-the-courtroom incivility is more difficult to control.

The guiding principles for all lawyers, whether inside or outside of the courtroom, are **Integrity** and **Civility**.

**Integrity** is captured by Rule 2.1: "A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity." The commentary to Rule 2.1-1 states:

- Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession.
- If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

**Civility** is defined as treating others, like opposing counsel, with courtesy, dignity and kindness.

Integrity and civility are the hallmarks of the best counsel and the cornerstones of the public's confidence in the justice system. Yet, every day, lawyers come across other lawyers who not only behave in a manner that many would regard as uncivil, but as outright sharp practice.

Incivility is most commonly encountered in settings that are not monitored by the judiciary. To address this issue, the Law Society has enacted several rules to address communications and conduct between lawyers.

In particular, among other things, Rule 7 regulates responsibilities between lawyers and with others in the profession. The key responsibilities include:

- A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice. (Rule 7.2-1);
- A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client. (Rule 7.2-1.1);

- A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights. (Rule 7.2-2);
- A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer. (Rule 7.2-4).

There are many examples of problematic conduct that lawyers frequently encounter outside of the courtroom. The following are four of the most common examples of such conduct and practice tips for responding to and addressing such conduct.

1. **The Scheduling Squabbler** – lawyers who refuse to agree to or respond to requests for availability for court dates such as 9:30 appointments, motions, applications etc. This is particularly problematic in circumstances where the court requires counsel to confer and agree upon mutually acceptable dates before booking a date with the court.
  - Practice Tip #1: Give a deadline by which to respond failing which a date will be unilaterally selected.
  - Practice Tip #2: Remember that civility requires lawyers to respond promptly to correspondence and communications from opposing lawyers, and lawyers should cooperate regarding scheduling matters in a reasonable manner so as to avoid conflicts that use up scarce court resources.
2. **The Ankle Biter** – lawyers who engage in annoying tactics before court i.e. incessant self-serving emails, texts and voicemails, delivered for the purpose of “padding” the court record. This category also captures lawyers who mischaracterize telephone and in-person discussions, whether in the context of settlement or otherwise.
  - Practice Tip #1: Do not respond in an uncivil manner. Rather, capture the incivility on the record and demonstrate that, notwithstanding the poor conduct, you are being civil in response. Remember that it is not in your interests or those of your client to reciprocate uncivil conduct.
  - Practice Tip #2: Respond completely but concisely to any misstatements to the extent necessary to protect your client’s interests. Resist the temptation to deliver a lengthy response or to engage in a never-ending letter writing campaign.
  - Practice Tip #3: If misleading accounts of discussions occur frequently, bring another lawyer or student to witness the discussions and prepare

notes or a memorandum capturing the discussion after the meeting or telephone call.

3. **The Delayer** – lawyers who deliberately delay in providing materials to the opposite side and engage in unnecessary short-service of materials.

- Practice Tip #1: Unless severely prejudicial to your client, try to address the materials notwithstanding the late delivery. If prejudicial, write to the opposing lawyer to advise that additional time will be required and requested from the court.
- Practice Tip #2: Resist the temptation to reciprocate by delaying in delivering responding or reply materials. Use your best efforts to maintain any timetables agreed to or imposed by the court, notwithstanding the delays by the opposing lawyer.
- Practice Tip #3: Only complain to the court about the delayed delivery if absolutely necessary. The courts are not interested in listening to squabbling lawyers.

4. **The Senior Bully** - lawyers who invoke their seniority or experience to justify personal snipes or gratuitous attacks levied against lawyers on the opposite side, or who engage in unnecessarily threatening or intimidating behaviour.

- Practice Tip #1: Do not respond in kind or allow yourself to be baited by such conduct. Inform the lawyer that you will communicate in writing only and, in doing so, avoid the temptation to “sink to their level”. However, ceasing to communicate verbally should be a last resort. It is important for lawyers to be able to discuss issues with one another in meetings or over the telephone.
- Practice Tip #2: In responding to abusive correspondence, focus on the substance of the issue in the litigation, rather than on the gratuitous comments. Avoid invective in your response.
- Practice Tip #3: Prepare your response but do not send it until you have had a chance to cool-off and consider your tone and message. Write each piece of correspondence keeping in mind that it may end up in the hands of a judge or arbitrator down the road.
- Practice Tip #4: Stand your ground. Call the opposing counsel on their poor behaviour in a calm and considered manner. Do not inflame the situation unnecessarily. Do not get personal. Make your point in a rational manner.

In addition to the practice tips provided above, it is also useful to:

1. Review and consider the Advocates' Society's Principles of Civility for Advocates, which among other things, encourage all counsel to:
  - engage with opposing counsel in a civil manner even when faced with challenging issues, conflict and disagreement;
  - Extend professional courtesies to one another; and
  - avoid sharp practice and not take advantage of, or act without fair warning to opposing counsel, upon slips, irregularities, mistakes or inadvertence;
2. Ask colleagues for advice on how to deal with incivility – undoubtedly they too have “been there and done that”;
3. Try to understand where the opposing lawyer is coming from and work towards finding a way to deal with the issues raised without being overly judgmental about the lawyer on a personal level;
4. Try not to take opposing counsel's conduct too personally. Poor behaviour often occurs because the opposing lawyer thinks they can act in an uncivil manner by virtue of their seniority and/or experience, and because they think they can get away with it. It is also commonly a reflection of insecurity;
5. Sometimes ignoring uncivility or pettiness is more productive than challenging it, provided it is reasonable to ignore the conduct in the circumstances. It is often the case that the pettiness appears in communications that also contain helpful and conciliatory information. In such circumstances, focus on the positive aspects of the communication and not the negative aspects of the communication; and
6. Follow the golden rule i.e. “treat others as you would have them treat you”. As stated in the Advocates' Society's Principles of Civility for Advocates, remember that the paths of lawyers may cross and re-cross over and over again. Lawyers have long memories, particularly about the conduct of colleagues.

Ultimately, it is imperative all lawyers remember that incivility slows down the administration of justice and undermines the system - it costs money and wastes judicial resources – and most importantly, it takes a toll on your reputation.

In short, when faced with incivility, stay on the high road at all times.

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