SECOND SESSION

EXCELLENCE IN THE PRACTICE OF LAW

FACILITATORS:

HON. JUSTICE MOJEED A. OWOADE, J.C.A. (RTD)
HON. JUSTICE OLAYINKA FAJI, J.
MR. ADEMOLA AKINRELE, SAN

Discussions:

- *Understanding the culture and demands of continuous excellence at the Inner Bar: Court of Appeal perspective.*
- *The Senior Advocate of Nigeria: A Rebuttable Presumption of Excellence and Scholarship in Legal Practice? A View from the Bench.*
- *The Relationship of Senior Advocates with other Lawyers.*

A Lawyer's Duty to the Court

BY ROBERT BELL AND CAROLINE ABELA

- A lawyer shall use tactics that are legal, honest and respectful of courts and tribunals
- A lawyer shall act with integrity and professionalism, maintaining his or her overarching responsibility to ensure civil conduct
- A lawyer shall educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice

INTRODUCTION

A lawyer's duty to the court is a fundamental obligation that defines a lawyer's role within the adversarial system. However, a lawyer's duties are not carried out in a vacuum. While facing financial and competitive pressures, lawyers must fulfill and balance their duties to the client, opposing counsel, the administration of justice and society.[1]

In order to facilitate discussion within the profession and, ultimately, provide some guidance to practitioners on the topic of a lawyer's duty to the court and potential conflicts a lawyer may perceive regarding this duty, this paper is divided into three main sections. The first section addresses the question of why a lawyer's duty to the court matters. The section discusses the many factors that relate to the duty to the court and strike at the heart of a lawyer's role vis-à-vis clients and the public interest. The second section of this paper sets out the three key duties to the court, which are:

(1) to use tactics that are legal, honest and respectful to courts and tribunals;
(2) to act with integrity and professionalism, while maintaining his or her overarching responsibility to ensure civil conduct; and,
(3) to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice.

In order to illustrate these duties and the consequences of their infringement, a number of examples from case law and disciplinary panel decisions are discussed. The third section of this paper addresses whether a lawyer's duty to the court is paramount over his or her other duties. Finally, the paper also contains fact patterns for discussion on the conflict between different duties of a lawyer.

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[1] See discussion in Furlong, Jordan "Professionalism Revived: Diagnosing the Failure of Professionalism among Lawyers and Finding a Cure" (Keynote Commentary to be delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf> at 2.

(1)
WHY A LAWYER'S DUTY TO THE COURT MATTERS

While it is not difficult to agree that lawyers owe a duty to the court, defining those duties in a comprehensive way is not a simple task. This difficulty relates, at least in part, to the number of concepts that inform or are informed by a lawyer's duty to the court. These concepts include: duties to the public interest, the profession's independence, the limits of zealous representation of a client and the consequences of failing to uphold a lawyer's duty to the court.

With these many related factors that strike at the heart of a lawyer's role, formulating a definition that satisfactorily balances and accounts for all of them is an important challenge. However, formulating a definition is not merely an academic task. It requires a better understanding of a lawyer's duty to the court and having this understanding is meant to serve very practical ends: to help identify and address the conflicts between different duties that may arise over the course of a career in law. Contrary to popular thought, it may not be sufficient to rely only on one's instinct and the notion that "I will know it when I see it".

A lawyer's duty to the court relates to his or her status as a professional who serves, not only clients, but also the public interest. Historically, a professional was distinguished from a tradesperson by a public declaration – demonstrated today by the oath taken at admission to the Bar – to serve others and devote their intellect and efforts to the public good.[2] This was captured by E.W. Roddenberry's 1953 article *Achieving Professionalism* in which he states:

> *It was probably inevitable that certain occupations requiring public avowals of faith or purpose should become known as professions. Originally, there were three: medicine, law, and theology. They were dignified by that title and set apart from other occupations because they were more than a livelihood: they represented a calling to some higher satisfaction than a commercial gain...Although rigorous asceticism was seldom required, doctors, lawyers and clergymen demonstrated enough selflessness down through the years to gain general respect.*[3]

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[2] *Ibid.*, at 2-3.

[3] Roddenberry, E.W. "Achieving Professionalism" (1953) 44 *Journal of Criminal Law, Criminology, and Police Science* at 109 cited in Jordan Furlong, "Professionalism Revived: Diagnosing the Failure of Professional among Lawyers and Finding a Cure" (Keynote Commentary delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: <http://www.lsuc.on.ca/media/tenth_colloquium_furlong.pdf> at 2.

As E.W. Roddenberry suggests, dedication to serving the public good is not a matter of blind altruism. Rather, it is a foundation upon which lawyers earn the confidence of the community and, as a result, are able to play their essential role in the administration of justice.

A lawyer's duty to the court also relates to the profession's independence, or what has been described as "the high degree of autonomy that lawyers experience from external controls other than those imposed by self-regulation."[4] Self-regulation is a privilege that comes with substantial obligations that are intended to protect the rights of individuals. David W. Scott, Q.C. set this out as follows:

> *The Bar is independent of the State and all its influences. It is an institutional safeguard lying between the ordinary citizen and the power of the government. The right to counsel, which as mentioned, is inter-related with the law of privilege, depends for its efficacy on independence.*
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> ...
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> *In order to fulfill the heavy responsibilities imposed on lawyers as officers of the court, a meaningful and practical environment of independence is essential. It is always within the framework of this relationship that the commercial interest of the client and the lawyer's interests must give way to the overriding duty to the court. This is not an obligation shared by other professionals...Our duties as officers of the court could not possibly be discharged other than in an environment of total independence.*[5]

In other words, a lawyer may not be able to act in a way that serves the client's best interests if doing so would put the administration of justice and the community's confidence in the profession at risk.

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[4] Lesage, The Honourable Patrick J. Q.C., "Professionalism: The Tool-Kit (Session VI: How to Protect Your Professional Reputation)" (June 6, 2006) excerpt available online: <http://rc.lsuc.on.ca/jsp/pageFromCLE/loadPageCleMonth.do?id=46>.

[5] Scott, David W. Q.C., *Law Society of Upper Canada Report to Convocation of the Futures Task Force Working Group on Multi-discipline Partnerships* (September, 1998) cited in Paul Perell, "Elements of Professionalism" (Chief Justice of Ontario Advisory Committee on Professionalism June 2002) online: <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf> at 5.

A lawyer's duty to the court also helps define the limits of the zealous representation of a client. The need to create ethical boundaries within an adversarial system was addressed by Gavin MacKenzie in his article *The ethics of advocacy*.

> *Adversarial tactics tend to escalate despite the best of intentions in a competitive system. Lawyers adopt adversarial tactics...because to refrain from doing so would put their clients at a competitive disadvantage relative to the clients of lawyers who show no such restraint...We should be sceptical of justifications of questionable conduct that appeal to the ethics of the adversary system.*[6]

On one hand, lawyers are asked to "raise fearlessly every issue, advance every argument and ask every questions, however, distasteful...".[7] On the other hand, a lawyer's duty to the court may take priority over the interests of the client. Without such limits being adequately defined and respected, the profession risks an ethical race to the bottom.

The duty to the court is also important because there are consequences for lawyers who do not uphold it. This is demonstrated by the penalties attached to civil and criminal contempt.[8] However, contempt does not necessarily apply to all actions that may erode, tarnish or delay the administration of justice. For instance, contempt of court has proven to be a tool of limited use in efforts to curb incivility in the litigation process.[9] Certainly, less egregious acts may be addressed through cost awards or the Law Society's rules and disciplinary process. This raises an issue that is beyond the scope of this paper, but important nonetheless: whether there are adequate mechanisms for the enforcement of a lawyer's duty to the court. However, before that question can be considered, how we define a lawyer's duty to the court must be set out. The answer to that question is the purpose of this paper.

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[6] MacKenzie, Gavin "The ethics of advocacy", *The Advocates' Society Journal (September, 2008)* at 26-7.
[7] Commentary to Rule 4.01(2) of the *Rules of Professional Conduct* (Law Society of Upper Canada).
[8] *Poje v. Attorney General for British Columbia*, [1953] 1 S.C.R. 516 citing *Oswald's Contempt of Court*, 3rd ed., at 36. "...the distinction between contempts criminal and not criminal seems to be that contempts which tend to bring the administration of justice into scorn, or which tend to interfere with the due course of justice, are criminal in their nature; but that contempt in disregarding orders or judgments of a Civil Court or in not doing something ordered to be done in a cause, is not criminal in its nature. In other words, where contempt involved a public injury or offence, it is criminal in its nature, and the proper remedy is committal--but where the contempt involves a private injury only it is not criminal in its nature."
[9] Perrell, Paul M. "The Civil Law of Civility" (delivered at the Chief Justice of Ontario's Tenth Colloquium on the Legal Profession March 28, 2008) online: < http://www.lsuc.on.ca/media/tenth_colloquium_perell.pdf> at 12.

(2)
A LAWYER'S DUTY TO THE COURT

As set out above, we have distilled a lawyer's duty to the court to three key duties: (A) to use tactics that are legal, honest and respectful to courts and tribunals; (B) to act with integrity and professionalism while maintaining his or her overarching responsibility to ensure civil conduct; and (C) to educate clients about the court processes in the interest of promoting the public's confidence in the administration of justice. Below is a discussion of these three duties.

(A)
A LAWYER'S DUTY TO USE TACTICS THAT ARE LEGAL, HONEST AND RESPECTFUL

A lawyer has a duty to use tactics that are legal, honest and respectful. This duty is often referred to as the duty of candour. Under this umbrella of a lawyer's duty to the court, lawyers are primarily responsible for ensuring that they do not employ strategies that will mislead the court; this includes misleading the court on evidentiary and legal points as well as making use of tactical strategies that are likely to affect a case.

Misleading on Evidentiary Issues. A lawyer cannot knowingly offer or rely on false evidence or misstate evidence.[10] Misleading the court includes actions such as knowingly misrepresenting or misstating the facts in argument, inducing a witness to state misleading evidence and knowingly maintaining a false pretence.

There are several examples of a lawyer being sued[11] or reprimanded for misleading the court on evidentiary issues. In one case, a lawyer misled the Halton Region in terms of what an Order-in-Council said. The lawyer subsequently attempted to rely on what he said was a clerical error by an employee at Halton Region; however, the error was based on the lawyer's misrepresentation. This action, culminated with falsely swearing a *Land Transfer Tax Act* affidavit, and then misleading the court about the validity of such transaction, bought the lawyer disciplinary sanctions.[12] Other examples of misleading the court include: where a lawyer prepared and delivered a letter containing information he knew to be false and which he knew

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[10] Law Society of Upper Canada's *Rules of Professional Conduct*, (as of December 7, 2008), rule 4, on-line: <http://www.lsuc.on.ca/regulation/a/profconduct/>

[11] A client sued its counsel when, among other things, an Anton Piller Order was vacated because the order granting the Anton Piller Order "lacked candour". See Law Times (November 12, 2007), on-line: <www.lawtimesnews.com>

[12] *Law Society of Upper Canada v. Punnett* 1997 CanLII 824 (ON L.S.D.C.).

would likely be relied upon by others in civil proceedings, the Law Society imposed sanctions for such conduct.[13] Similarly, where a lawyer attempted to induce a witness to sign a statement containing a different version of events related to the facts at issue rather than what actually transpired, the Law Society imposed sanctions for inducing this false evidence.[14]

An example of the court invoking or enforcing consequences for submitting false evidence includes *R. v. Wijesinha*. In that case, the Supreme Court of Canada upheld a criminal conviction for obstruction of justice after a lawyer had knowingly submitted false declarations to the Law Society.[15] The lawyer was being investigated by the Law Society pursuant to allegations that he offered to pay a referral fee to a police officer each time a new client was retained following a failed breathlyzer test. The lawyer prepared declarations for the police officers and three clients, portions of which were false, and submitted them to the Law Society for its investigation.

Recently in the United States, the Chancery Court in Delaware dismissed a party's motion for reargument because a party mislead the Court. The Court stated:

> *In essence, the plaintiff sought to have a motion for reargument granted, but not by way of proper argument, but instead on the basis of a misleading recitation of the facts. In this opinion, I conclude that an order of dismissal is the only fitting remedy for this misconduct. When a party knowingly misleads a court of equity in order to secure an unfair tactical advantage, it should forfeit its right to equity's aid. Otherwise, sharp practice will be rewarded, and the tradition of civility and candor that has characterized litigation in this court will be threatened.*[16]

More and more, clients, as well as lawyers, are being sanctioned for lawyers' unseemly conduct.

Similar to blatantly offering false evidence, knowingly maintaining false pretences is another way a lawyer can mislead the court. Where counsel knows that the court is operating under a mistaken assumption and actively maintains the false pretence, the lawyer is guilty of misleading the court. An example of such unacceptable behaviour would be a circumstance in which a judge is referring to a witness by an improper title (i.e. referring to a

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[13] *Law Society of Upper Canada v. Hilborn* 1992 CanLII 379 (ON L.S.D.C.).
[14] *Law Society of Upper Canada v. Hainsworth* 1995 CanLII 1768 (ON L.S.D.C.); see also *Law Society of Upper Canada v. Kamin* 1988 CanLII 17606 (ON L.S.D.C.).
[15] *R. v. Wijesinha*, [1995] S.C.J. No. 49.
[16] *Parfi Holding AB* v. *Mirror Image Internet, Inc.*, 2008 WL 4110698 (Del. Ch., Sept. 4, 2008), p. 915.

Certified General Accountant as a Chartered Accountant or referring to a defendant as a Chief Inspector when he had been demoted to the rank of station sergeant[17]) without being corrected. Failing to correct a false statement or pretence is a breach of a lawyer's duty of candour.

Misleading the Court on Legal Issues. Corresponding to our duty not to knowingly mislead the court on evidentiary issues, a lawyer cannot misstate the law. Lawyers are under a positive duty to make full disclosure of all the binding authorities relevant to a case. This means that all such authorities on point must be brought before the court, whether they support or undermine the position being argued by that party, even if opposing counsel has not cited such authority.[18] This element of the duty includes drawing a judge's attention to any legal errors which have been made so that they can be corrected. This duty, however, should not be misconstrued as requiring the lawyer to present a disinterested account of the law. In fact, lawyers are obliged to distinguish those authorities which do not support their client's position. Thus, while a lawyer does not need to assist an adversary and is permitted to be silent on certain matters, they are not permitted to *actively* mislead the court. This obligation applies to contested and uncontested cases.

(B)
A LAWYER'S DUTY TO ACT WITH INTEGRITY AND PROFESSIONALISM WHILE MAINTAINING HIS OR HER OVERARCHING RESPONSIBILITY TO ENSURE CIVIL CONDUCT

Lawyers are officers of the court and as such, must act with integrity and professionalism while maintaining their overarching responsibility to ensure civil conduct. Under this second branch of a lawyer's duty to the court, a number of areas are covered; these areas include: (1) avoiding sharp practice; (2) having respect for the court; and (3) maintaining civility in dealing with others.

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[17] See *Meek v. Fleming*, [1961] 2 Q.B. 366.

[18] This requires lawyers to be knowledgeable in the area of law which is at issue. If they do not possess sufficient knowledge of the law at issue, they must take steps to inform themselves.

(1) Avoiding Sharp Practice. Lawyers shall avoid sharp practice, which includes taking advantage or acting without fair warning upon slips, irregularities, or mistakes on the part of other lawyers.[19] A most recent example of sharp practice was displayed in *Schreiber v. Mulroney*.[20] In that case, the lawyer for Mr. Schreiber had agreed not to obtain default judgment against Mr. Mulroney. Despite this agreement, Mr. Mulroney was noted in default. In setting aside the default judgment, Justice Newbould stated:

...

> *(5)* [Mr. Schreiber's lawyer] *breached his agreement with* [Mr. Mulroney's lawyer] *when he sought default judgment. It was an egregious breach that* [Mr. Schreiber's lawyer] *had no right to commit and Mr. Schreiber had no right to instruct his solicitor to commit.*
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> *(6)* [Mr. Schreiber's lawyer] *did not give any advance notice to* [Mr. Mulroney's lawyer] *that he was going to note the defendant in default or take default judgment proceedings. In the circumstances of this case it is quite obvious that he should have done so. It constituted sharp practice that should not be condoned. While the "Principles of Civility for Advocates" published by the Advocates' Society are not the force of law, the lack of notice to* [Mr. Mulroney's lawyer] *breached those principles of civility. Incredibly, even after instructions had been given by* [Mr. Schreiber's lawyer] *to obtain a default judgment, he wrote on July 24, 2007 suggesting that there were still interlocutory matters to be dealt with without disclosing the default proceedings.* [Mr. Schreiber's lawyer] *conceded that his client had not told him not to provide advance or post notice to* [Mr. Mulroney's lawyer], *so this is something that* [Mr. Schreiber's lawyer] *took on his own behalf. This lack of frankness should not be condoned.*[21]

This act of incivility and breach of duty was later sanctioned through cost consequences against the client and his lawyer, personally.

In addition to not taking advantage of slip ups, this umbrella of a lawyer's duty to the court requires that lawyers refrain from influencing the decisions or actions of courts or tribunals by anything other than open persuasion. This rule applies both inside and outside the

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[19] Law Society of Upper Canada's *Rules of Professional Conduct*, (as of December 7, 2008), rule 6.03(3), on-line: <http://www.lsuc.on.ca/regulation/a/profconduct/>

[20] 2007 CanLii 34441 (ON S.C.).

[21] *Schreiber v. Mulroney*, 2007 CanLII 31754 (ON S.C.) at para. 24.

courtroom. Lawyers may not make allegations of dishonesty unless they have evidence to support such allegations and shall not interfere with the administration of justice.

(2) Having Respect for the Court. Lawyers must respect the court. Respect comes in all forms – preparedness and timeliness are one aspect of consideration. Being familiar with the facts and law applicable to your case, and knowing your client's position is the most fundamental display of respect for the court process. This duty to the court is, in effect, an overlapping duty of competency we have to the client.

A lawyer should not abuse the court process. A lawyer should not unreasonably raise or defend an action for which there is no legal justification.[22] In particular, when a lawyer knows there is no merit to the client's claim but pursues the claim for some other reason, this is an abuse of the court process. In the United Kingdom, for example, where there is wilful abuse of process by a lawyer who commences a claim without legal justification, the court awards sanctions against the lawyer. In one case, expenses were awarded against a solicitor who commenced an action which was "manifestly incompetent and irrelevant."[23] In another case, expenses were awarded where the lawyer ought to have known that the argument was insupportable.[24]

Similarly, a lawyer should not waste time on irrelevancies, even if prompted to do so by the client and should not make frivolous and vexatious objections. In addition, requests for adjournments should not be taken lightly. Adjournments of cases can cause disruption to court sittings, inconvenience to jurors and witnesses and also as a result of the passage of time cause problems for a witness's memory. In essence, adjournments drain court resources.

Not appearing for court is a common failure of a lawyer's duty to the court. It is not an infrequent occurrence when a lawyer does not appear before the court because the client has so instructed the lawyer (either because the claim will not be disputed or the client does not want to spend further money for various reasons). However, despite a client's instructions, it is a lawyer's duty to appear before the court if he or she is counsel of record.[25]

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[22] This is not to say that cases with little merit are an abuse of process.
[23] *Manson v. Chief Constable of Strathclyde* as cited in Paterson, Alan and Bruce Ritchie, *Law, Practice and Conduct for Solicitors* (W. Green: Edinburgh, 2006), p.8.
[24] *Blyth v. Watson* 1987 S.L.T. 616.
[25] *Duca Community Credit Union Ltd. v. Tay*, [1995] O.J. No. 3282 (Gen. Div.).

Being late for court, although highly irritating and a waste of time, is generally not conduct that is considered egregious and neglectful of a lawyer's obligation. However, in our view, tardiness is a breach of a lawyer's duty to the courts because it, among other things, causes delay and disruption to the court process. Tardiness effects the administration of justice. For example, in *LSUC v. Ducas*, the Law Society hearing panel found, *inter alia*, that the lawyer had breached his duty to the court by appearing 25 minutes late for his own motion by which time the motion had been dismissed.[26] In a separate incident, the same lawyer called the plaintiff's counsel on the day scheduled for trial to inform him that he could not attend because he had another, previously scheduled hearing. The judge refused an adjournment and granted a judgment against the lawyer's client.

(3) Maintaining Civility in Dealing with Others. When dealing with others, a lawyer shall be courteous, civil and act in good faith with all persons with whom he or she deals with during the course of practice.[27] This civil conduct extends to those in the legal profession and to those individuals who are integral to our legal process.

A lawyer's duty to be civil to opposing counsel, includes the following conduct:

- the duty not to engage in acrimonious exchanges with opposing counsel or otherwise engage in undignified or discourteous conduct;
- the duty to be honest and truthful with opposing counsel; and
- to be accommodating and flexible regarding scheduling and routine matters.

Acrimonious exchanges with opposing counsel come in all forms – sarcasm, intimidation, rudeness and unfounded personal attacks. One fitting example of a personal attack is again set out in the *Schreiber v. Mulroney* case described above. Mr. Schreiber's lawyer wrote to Mr. Mulroney's lawyer. His letter stated:

> *Your letter is not deserving of a response. Your conduct of last week was inappropriate and unethical and worthy of Law Society sanction. Your letter is nothing more than a weak and pathetic effort to cover up your disgraceful conduct – or as is said in the vernacular – it is nothing more than a CYA effort.*

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[26] *LSUC v. Ducas*, [1996] L.S.D.D. No. 203.

[27] Law Society of Upper Canada's *Rules of Professional Conduct*, (as of December 7, 2008), rule 6.03(1), on-line: <http://www.lsuc.on.ca/regulation/a/profconduct/>.

> *I have taken the liberty to copy the managing partner of your firm with this letter because I am sure that you have kept the events of last week and our recent exchange of correspondence under the radar within your firm.*[28]

Michael Code has highlighted four distinct ways in which civility effects our legal system: (a) when incivility takes the form of personal attacks on counsel's competency and integrity, the lawyer is distracted from his or her work of planning and preparing the evidence for trial; (b) personal acrimony between counsel does not allow the trier of fact to focus on the real issues; (c) personal acrimony between counsel unnecessarily lengthens court proceedings; (d) the legitimacy of our legal system is lost if counsel were able to display incivility in open court.[29] Expanding on the last point, open court provides the public with access to the judicial system allowing them to opine and criticize lawyers and judges. Such behaviour undermines the general respect of all citizens for law and the judicial process, which is essential to the continued functioning of a democratic society.

A lawyer also has a duty to maintain an honest relationship with opposing counsel. The failure to fulfill this obligation is demonstrated in *LSBC v. Jeffery*. In that case, during the course of the litigation, a court official instructed a lawyer that the trial, which was scheduled to begin in three days, had been taken off the trial list.[30] The lawyer undertook to inform opposing counsel. However, in the hopes of reaching a settlement with the defendant, the lawyer did not tell opposing counsel immediately but instead sent a revised offer to settle. Opposing counsel subsequently discovered from a different source that the trial had been adjourned. The discipline panel held that the lawyer was under an obligation to the court to promptly pass on the information. It rejected the argument that this was "a situation analogous to that of a lawyer possessed of information developed during the adversarial process for the use of his client."[31]

A lawyer's duty of civility extends to those individuals who are integral to our legal process – such as witnesses. Like our duty to opposing counsel, lawyers have a duty to

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[28] *Schreiber v. Mulroney*, 2007 CanLii 34441 (ON S.C.) at para. 38.
[29] Code, Michael "Counsel's Duty of Civility: An Essential Component of Fair Trials and Effective Justice System" *Canadian Criminal Law Review* (February 2007), p. 6.
[30] *Law Society of British Columbia v. Jeffery*, [1996] L.S.D.D. No. 250.
[31] *Ibid.*

treat witnesses in a civil and courteous manner. They must not harass, demean or actively intimidate a witness. The failure to abide by this duty was vividly demonstrated by the case of *LSBC v. Ewachniuk*. In that case, a lawyer in a civil dispute intimidated two witnesses and also requested that Crown Counsel lay charges against the witnesses to prevent them from traveling to Canada to give testimony prejudicial to his clients. On judicial review of the disciplinary panel's decision, the British Columbia Court of Appeal noted that "acting to suppress evidence constitutes a 'serious interference in the administration of justice' and is wrongful conduct that strikes at the heart of the barrister's duty to the court...".[32]

For our own witnesses, lawyers should advise witnesses how to address the court and educate them about the procedures that will be followed in eliciting their evidence. Further, we may draw their attention to relevant issues, assist in refreshing their memories by referring to known facts or other evidence and prepare them to stand up to a hostile cross-examination. We may not, however, suborn perjury, persuade witnesses to avoid summonses or obstruct access to witnesses by other parties. Although we must prepare witnesses, we must take care not to put words into the mouths of witnesses or advise them to manipulate or withhold evidence. In general, as set out in part 2A to this discussion paper, we must not permit witnesses to be presented in a misleading way.

(C)
A Lawyer's Duty to Educate Clients about the Court Processes in the Interest of Promoting the Public's Confidence in the Administration of Justice

This third branch of a lawyer's duty to the court requires that a lawyer educate clients about the court processes in the interests of promoting the public's confidence in the administration of justice. This requires us to educate clients about the limits of the law, as well as about our professional obligations. We share responsibility for ensuring that broader society has a knowledge and understanding of the law and an appreciation of the values advanced by the rule of law. Every lawyer must make an effort to educate the public about our judicial system and the value of lawyers, judges, juries, and the many other participants in the system.

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[32] *Law Society of British Columbia v. Ewachniuk*, [2003] B.C.J. No. 823 at para. 19 (B.C.C.A).

(3)
IS A LAWYER'S DUTY TO THE COURT PARAMOUNT TO ALL OTHER DUTIES?

There is a perception that a lawyer's duty to the court may conflict with a lawyer's other duties, such as the duties a lawyer owes to his or her client. While academic analysis on the point is important, in practical terms the respective duties set the boundaries of the adversarial process. In our view, in the long run, violating the duty to the court in fact harms a client's interests. Rationalizing behaviour which is inconsistent or which undermines the duty to the court under the guise of having a duty to the client is quite simply, offside.

Canada. Gavin MacKenzie, in his recent article on *The ethics of advocacy*, states that a lawyer's duty to the client and duty to the court are given equal prominence. He writes:

> *In the United States the duty to the client is generally seen as the lawyer's primary duty, while in Britain the duty to the court is pre-eminent. In our rules, the two duties are given equal prominence – which may make ethical choices in advocacy more difficult in our jurisdiction.*[33]

In our view, a lawyer must do what he or she can to first assess whether there are competing duties and in effect, attempt to ensure the duty to the court is respected as the pre-eminent duty. The case of *Schreiber v. Mulroney* is a good example of this analysis. Again the facts are that the lawyer for Mr. Schreiber had agreed not to obtain default judgment against Mr. Mulroney but did so in any event. As a result, counsel for Mr. Mulroney moved to set aside the default judgment. In the course of the proceeding, Mr. Schreiber's lawyer wrote scandalous correspondence to Mr. Mulroney's lawyer, accusing him of unethical conduct and copying the letter to members of the legal profession, as well as the managing partner of the lawyer's law firm. In granting costs against Mr. Schreiber and his counsel, personally, for such egregious conduct, Justice Newbould commented on the competing duties of a lawyer:

> *[29] The conduct of* [Mr. Schreiber's lawyer] *that I described in my reasons of August 3, 2007 as being egregious and wrong constitutes conduct sufficient to warrant an order that costs to be paid personally by him. During argument on costs,* [Mr. Schreiber's lawyer] *said that while he believed that he had acted properly, if he was guilty of anything, he was guilty of an error of judgment in not telling* [Mr. Mulroney's lawyer] *of his instructions to note Mr. Mulroney in default and proceeding to a default*

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[33] MacKenzie, Gavin "The ethics of advocacy", *The Advocates' Society Journal (September, 2008)*, p. 26.

> *judgment. He said that it has never been clear to him which duty takes precedence when a solicitor's duty to his client conflicts with a duty owed to other counsel and to the court.*
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> *[30] In my view, in the circumstances of this case, there should have been no conflict between those duties.* [Mr. Schreiber's lawyer's] *duty to his client was to fully inform him of the agreement not to note Mr. Mulroney in default and to advise him that he could not take that step. The failure to do so has resulted in wasted steps being taken that have been set aside at the expense of Mr. Schreiber. In this case Mr. Schreiber wanted to take the default proceedings, but that is no answer. A lawyer cannot rely on a client's instructions as a defence if the lawyer has acted in a manner inconsistent with the goals of the judicial system, but most decline to follow instructions that would constitute misconduct. See Orkin, The law of Costs, 2nd Edition at para. 220.2.*

Put another way, a lawyer must not compromise his or her professional standards in order to please the client. As is seen in the *Schreiber* case, the path does not end up assisting the client's cause at all. In this sense, is there any reason to actually consider which duty is paramount?[34]

Let us consider the experience in other jurisdictions.

Britain. In contrast to the United States where the duty to the court is subservient to the duty to the client, in Britain, the duty to the court is the dominant duty. One of the most often cited quotes with respect to this issue comes from Lord Denning in the case of *Rondel v. Worsley*, in which he states:

> [The advocate] *has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state* [sic] *the facts. He must not knowingly conceal the truth...He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline.*[35]

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[34] With some exceptions that have been recognized in law, such as that of solicitor-client privilege.
[35] [1966] 3 W.L.R. 950 (Eng. C.A.) at 962-63.

This reasoning makes sense. It may be argued that an important component of our system of justice is the adversarial approach to issues, which assists the trier of fact in arriving at a just and sensible decision. If there was a brutish and purely partisan approach, the truth would almost certainly be obscured. In this event, decisions on disputes would not, in our view, be accepted as fair or just and the public would quickly lose confidence in the administration of justice.

While the bar must be fearless in advancing a client's cause, there are almost certainly boundaries, be it through Rules of Civil Procedure, the Code of Professional Conduct or normative limits which inform counsel and their role in our system of justice. As such, if "a tie goes to the runner" the runner would be the lawyer's duty to the court and this should take priority over a lawyer's duty to the client in considering examples that are close to the line.

Australia and New Zealand. Australia and New Zealand follow in the footsteps of Britain. While both a duty to the court and a duty to the client are recognized, the literature is clear that conflict is resolved in favour of the court:

> *The performance by counsel of his paramount duty to the court will require him to act in a variety of ways to the possible disadvantage of his client. Counsel must not mislead the court, cast unjustifiable aspersions on any party or witness or withhold documents and authorities which detract from his client's case. ... It is not that a barrister's duty to the court creates such a conflict with his duty to his client that the dividing line between the two is unclear. The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary. Rather it is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow.*[36]

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[36] Pagone, G.T. *The Advocate's Duty to the Court in Adversarial Proceedings* (Melbourne: Supreme Court of Victoria, 23 July 2008), citing *Giannarelli v. Wraith*, (1988) 165 CLR 543, 556-7.

(4)
SCENARIOS FOR DISCUSSION

The following two fact scenarios for discussion are taken or adopted from the American College of Trial Lawyers, *Trial Ethics Teaching Programme – Canadian Manual.*[37]

1. A significant client of the law firm of which you are senior partner, who is also a friend, is served with a claim in which the plaintiff seeks money owed and interim relief, including a writ of attachment on some of the client's assets. The client tells you he owes the money and has no defence to the action but needs to delay for as long as possible because an immediate judgment would cause personal and financial ruin and extreme embarrassment. He expresses hope that other pending business deals will enable him to pay his creditors in due course, and he asks you to do everything you can to stall, to defeat the claim for interim relief, and to delay judgment until he can get his affairs in order.
Assume the same facts, except that you are a fifth year associate in the firm and will be reviewed for partnership in six months. A partner who is on the firm's Management Committee relates the client's problems and instructs you to handle the matter.

In each case, what do you do?

2. You are consulted by two middle-aged brothers, who look very much alike. They were at a club recently and were repeatedly harassed by a drunken stranger. John is a successful investment banker. As a result of his success, he owns several unencumbered properties in the downtown core. John, on the evening in question, threw an empty beer bottle at a man just before closing. It struck him on the temple and caused him to fall against a chair. He died from his injuries five days later and the family has brought a civil suit against John. The bar was dimly lit and identification of the person who threw the beer bottle will be an issue. John's brother Jim, who has bounced around from job to job, is currently unemployed. He does not have any assets or income and wants to take responsibility for throwing the beer bottle so that his brother will not be held liable and lose all of his assets.

How do you advise the brothers? Can you represent either?

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[37] *Trial Ethics Teaching Programme – Canadian Manual* (American College of Trial Lawyers, 2005), online: American College of Trial Lawyers. <http://www.actl.com/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=2441>.

CONCLUSION

A lawyer's duty to the court touches upon nearly every aspect of his or her practice. Yet, beyond the most obvious cases, determining when duties to the client are secondary to those owed to the court may not always be crystal clear. The goal of this paper was not only to demonstrate the difficulties that may face lawyers when duties conflict but also to provide guidance to practitioners when similar situations arise. And, given the varied circumstances and pressures by the profession today, there is little doubt that new and challenging problems will come about. The hope is that lawyers will be better prepared to address them equipped with a fuller understanding of their duty to the court.

In sharing examples of lawyers who have not respected the duty to the court, we risk reinforcing negative stereotypes or simply adding to the list of commentators disappointed at a lack of civility and professionalism. However, the duties discussed are, in our respectful view, fundamental to the privilege of continuing as an independent and self-regulated profession. Finally, while there are those who may disagree with the approach to the duty to the court, the interplay of duties and professionalism arguably define the lawyer's role in the administration of justice and in serving the public interest.

APPENDIX A
THE LAW SOCIETY OF UPPER CANADA'S RULES OF PROFESSIONAL CONDUCT
EXCERPTS OF RULE 4 – RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

Advocacy

4.01 (2) When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,

(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer,

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

(h) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(i) dissuade a witness from giving evidence or advise a witness to be absent,

(j) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(k) needlessly abuse, hector, or harass a witness,

(l) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge, and

(m) needlessly inconvenience a witness

Courtesy

4.01 (6) A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings in the course of litigation.

Encouraging Respect for the Administration of Justice

4.06(1) A lawyer shall encourage public respect for and try to improve the administration of justice.

APPENDIX B
THE LAW SOCIETY OF UPPER CANADA'S RULES OF PROFESSIONAL CONDUCT
EXCEPTS OF RULE 6 – RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

INTEGRITY

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

Courtesy and Good Faith

6.03 (1) A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

6.03 (2) 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.

6.03 (3) 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 licensees not going to the merits or involving the sacrifice of a client's rights.

...

Communications

6.03 (5) A lawyer shall not in the course of a professional practice send correspondence or otherwise communicate to a client, another licensee, 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.

APPENDIX C
EXCERPTS FROM THE ADVOCATES' SOCIETY'S PRINCIPLES OF CIVILITY

PART I - RELATIONS WITH OPPOSING COUNSEL

General Guidelines for Relations with Opposing Counsel

1. Counsel should always be courteous and civil to counsel engaged on the other side of the lawsuit or dispute. It is the responsibility of counsel to require those under their supervision to conduct themselves with courtesy and civility as well.

...

3. Counsel should always be honest and truthful with opposing counsel.

...

Cooperating with Opposing Counsel

5. Counsel should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with opposing counsel whenever practicable.

...

Conduct Which Undermines Cooperation Among Counsel

17. Counsel should avoid sharp practice. Counsel should not take advantage of, or act without fair warning to opposing counsel, upon slips, irregularities, mistakes or inadvertence.

18. Counsel should not falsely hold out the possibility of settlement as a means of adjourning a discovery or delaying a trial.

19. Subject to the Rules of Practice, counsel should not cause any default or dismissal to be entered without first notifying opposing counsel, assuming the identity of opposing counsel is known.

...

Conduct at Examinations for Discovery

21. Counsel, during examination for discovery, should at all times conduct themselves as if a judge were present. This includes avoiding inappropriate objections to questions, discourteous exchanges among counsel and excessive interruptions to the examination process.

...

25. Counsel should not engage in examinations for discovery that are not necessary to elicit facts or preserve testimony but rather have as their purpose the imposition of a financial burden on the

opposite party.

...

Accommodating Requests from Opposing Counsel

30. Counsel, and not the client, has the sole discretion to determine the accommodations to be granted to opposing counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights. This includes, but is not limited to, reasonable requests for extensions of time, adjournments, and admissions of facts. Counsel should not accede to the client's demands that he or she act in a discourteous or uncooperative manner toward opposing counsel.

31. Counsel should abstain from obstructing any examination or court process.

32. Subject to applicable practice rules, counsel should give opposing counsel, on reasonable request, an opportunity in advance to inspect all evidence or all non-impeaching evidence.

PART II - COMMUNICATIONS WITH OTHERS

...

Communications with the Judiciary Outside of Court

35. As a general principle, unless specifically provided in the Rules of Practice, a practice direction or a notice to the profession, counsel should not communicate directly with a judge out of court about a pending case, unless invited or instructed to do so by the court.

...

PART III - TRIAL CONDUCT

...

45. Counsel should avoid hostile and intemperate communication among counsel at all times, particularly close to trial when stress levels are high. Such communication will only deteriorate further during the trial and adversely affect the administration of justice in the case.

During Trial

...

52. When the court has made a ruling on a matter, counsel should in no way attempt to re-argue the point or attempt to circumvent the effect of the ruling by other means.

...

54. Counsel should never attempt to get before the court evidence that is improper. If counsel

intends to lead evidence about which there may be some question of admissibility, then counsel should alert opposing counsel and the court of that intention.

...

56. Counsel cannot condone the use of perjured evidence and, if counsel becomes aware of perjury at any time, they must immediately seek the client's consent to bring it to the attention of the court. Failing that, the counsel must withdraw. Nothing is more antithetical to the role of counsel than to advance the client's case before the court, directly or indirectly, on the basis of perjured evidence.

57. Counsel, or any member of their firm, should not give evidence relating to any contentious issue in a trial.

...

59. Counsel should be considerate of time constraints which they have agreed to or which have been imposed by the court.

...

PART IV - COUNSEL'S RELATIONS WITH THE JUDICIARY

What Judges Can Expect from Counsel

62. Judges are entitled to expect that counsel will treat the court with candour, fairness and courtesy.

63. Judges are entitled to expect that counsel are by training and experience competent to handle the matter before the court.

64. Notwithstanding that the parties are engaged in an adversarial process, judges are entitled to expect that counsel will assist the court in doing justice to the case.

65. Judges are entitled to expect counsel to assist in maintaining the dignity and decorum of the courtroom and their profession and avoid disorder and disruption.

66. Judges are entitled to expect counsel to be punctual, appropriately attired and adequately prepared in all matters before the courts.

67. Judges may expect counsel to properly instruct their clients as to behaviour in the courtroom, and any court-related proceedings. Counsel are expected to take what steps are necessary to dissuade clients and witnesses from causing disorder or disruption in the courtroom.

68. Judges are entitled to expect that counsel, in their public statements, will not engage in personal attacks on the judiciary or unfairly criticize judicial decisions.

APPENDIX D

EXCERPTS FROM THE CANADIAN BAR ASSOCIATION'S CODE OF PROFESSIONAL CONDUCT

RULE

When acting as an advocate, the lawyer must treat the court or tribunal with courtesy and respect and must represent the client resolutely, honourably and within the limits of the law.

Commentary

Guiding Principles

1. The advocate's duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law" must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.

Prohibited Conduct

2. The lawyer must not, for example:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party;
(b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;
(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with such officer that give rise to real or apparent pressure, influence or inducement affecting the impartiality of such officer;
(d) attempt or allow anyone else to attempt, directly or indirectly, to influence the decision or actions of a tribunal or any of its officials by any means except open persuasion as an advocate;
(e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
(g) make suggestions to a witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition;

(h) deliberately refrain from informing the tribunal of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent;
(i) dissuade a material witness from giving evidence, or advise such a witness to be absent
(j) knowingly permit a witness to be presented in a false or misleading way or to impersonate another;
(k) needlessly abuse, hector or harass a witness;
(l) needlessly inconvenience a witness.

Errors and Omissions

• The lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this Rule and discovers it, has a duty to the court, subject to the Rule relating to confidential information, to disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Duty to Withdraw

• If the client wishes to adopt a course that would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If the client persists in such a course the lawyer should, subject to the Rule relating to withdrawal, withdraw or seek leave of the court to do so.

The Lawyer as Witness

• The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings. There are no restrictions upon the advocate's right to cross-examine another lawyer, and the lawyer who does appear as a witness should not expect to receive special treatment by reason of professional status.

Interviewing Witnesses

6. The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way. The lawyer shall not approach or deal with an opposite party who is professionally represented save through or with the consent of that party's lawyer.

A lawyer retained to act on a matter involving a corporation or organization that is represented by another lawyer should not approach

(a) a director, officer, or person likely involved in the decision-making process for the corporation or organization, or
(b) an employee or agent of the corporation or organization whose acts or omissions in connection with the matter may have exposed it to civil or criminal liability, concerning that matter,

except to the extent that the lawyer representing the corporation or organization consents or as otherwise authorized or required by law.

Unmeritorious Proceedings

7. The lawyer should never waive or abandon the client's legal rights (for example, an available defence under a statute of limitations) without the client's informed consent. In civil matters it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections or attempts to gain advantage from slips or oversights not going to the real merits, or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

Undertakings

14. An undertaking given by the lawyer to the court or to another lawyer in the course of litigation or other adversary proceedings must be strictly and scrupulously carried out. Unless clearly qualified in writing, the lawyer's undertaking is a personal promise and responsibility.

Discovery Obligations

15. Where the rules of a court or tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate, shall explain to the client the necessity of making full disclosure of all documents relating to any matter in issue, and the duty to answer to the best of the client's knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal; shall assist the client in fulfilling the obligation to make full disclosure, and shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Courtesy

16. The lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though not punished as contempt, might well merit disciplinary action.

Role in Adversary Proceedings

17. In adversary proceedings, the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under paragraphs 2(h) or 7 above) to assist an adversary or advance matters derogatory to the client's case. When opposing interests are not represented, for example, in ex parte or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot be obtained, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the court is not misled.

Communicating with Witnesses

18. When in court the lawyer should observe local rules and practices concerning communication with a witness about the witness's evidence or any issue in the proceeding. Generally, it is considered improper for counsel who called a witness to communicate with that witness without leave of the court while such witness is under cross-examination

Agreements Guaranteeing Recovery

19. In civil proceedings the lawyer has a duty not to mislead the court about the position of the client in the adversary process. Thus, where a lawyer representing a client in litigation has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgment of the court, the lawyer shall disclose full particulars of the agreement to the court and all other parties.

Scope of the Rule

20. The principles of this Rule apply generally to the lawyer as advocate and therefore extend not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.

EXCELLENCE AND PROFESSIONALISM IN THE PRACTICE OF LAW: THE SENIOR ADVOCATE OF NIGERIA: A REBUTTABLE PRESUMPTION OF EXCELLENCE AND SCHOLARSHIP IN LEGAL PRACTICE? (A VIEW FROM THE BAR)

By Olumide Sofowora Esq., SAN, C.Arb.[1]

I want to thank BOSAN for considering me worthy of presenting this sub-topic – "The Senior Advocate of Nigeria: A rebuttable presumption of excellence and scholarship in Legal Practice? (A view from the Bar)" at this Induction Programme for the newly appointed Senior Advocates of Nigeria before the conferment on them of the noble rank.

Both in common law and civil law, a rebuttable presumption which in latin means: *praesumptio iuris tantum* is an assumption made by a court that a fact is taken to be true unless the contrary is proved. In criminal law, a defendant is presumed to be innocent until proven guilty. A rebuttable presumption is often associated with prima facie evidence.[2] Therefore, is the conferment of the rank of Senior Advocate of Nigeria a rebuttable presumption of excellence and scholarship in Legal Practice?

In order to answer this question appropriately one must consider the meaning of the words "Excellence" and "Scholarship". In the Compact Oxford English Dictionary, the word "Excellence" which is a noun is defined as "the quality of being excellent" while the word "Excellent" which is an adjective is defined as "extremely good, outstanding". The word "Scholarship" also a noun has several definitions but the one appropriate for this discourse is the definition that says the word means "academic achievement; learning of a high level". I recall that the late Hon. Justice Kayode Esho, JSC was more prone to referring to thesauri in his judgments particularly when the definition of a word is in issue or under consideration by the Court. A thesaurus is a synonym dictionary which enables ideas to be aptly and fitly expressed. Therefore the Oxford Compact Thesaurus defines the word "Excellence" as "distinction, quality, superiority, brilliance, greatness, merit, calibre, eminence, pre-eminence, supremacy, peerlessness; skill, talent, virtuosity, accomplishment, mastery" and "Excellent" as Very Good, superb, outstanding, exceptional, marvellous, wonderful, pre-eminent, perfect,

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[2] Wikipedia available at Rebuttable presumption - Wikipedia

matchless, peerless, supreme, first-rate, first-class. There are other informal expressions of the word which do not apply in this instance. In the Oxford Compact Thesaurus, the word "Scholar" is more appropriate for our purpose than the way the word "Scholarship" is defined. It says a "Scholar" is an Academic, intellectual, learned person, man/woman of letters, mind, intellect, savant, polymath, highbrow, authority, egghead, and several other informal words which are also not appropriate for this discourse.

The Legal Practitioners Act, Cap. L11 Laws of the Federation of Nigeria 2004 provides that:

> "No person shall be conferred with the rank of Senior Advocate of Nigeria unless he/she has qualified to practice as a Legal Practitioner in Nigeria for a period of not less than ten (10) years, and that such a person has achieved distinction in the Legal Profession in such a manner as the Legal Practitioners Privileges Committee may determine from time to time."

The above stated provision of the law makes the conferment of the rank of Senior Advocate of Nigeria a confirmation of an exemplary and distinguished career at the Bar and in Academics. From the above definitions of the words "Excellence" and "Scholarship", a presumption is raised that you are all excellent scholars having gone through stringent evaluation standards employed to scrutinize and select the best to be added to the noble rank by the Legal Practitioners Privileges Committee. These evaluation standards included amongst others the filtration processes which consist of basic criteria of number of appearances in the Supreme Court, Court of Appeal, Federal High Court, National Industrial Court, Federal Capital Territory High Court, various State High Courts, recommendations by the Supreme Court Justices and Justices of Superior Courts, Chambers Inspectors, approval of your eligibility and integrity by the Nigerian Bar Association, Body of Senior Advocates of Nigeria and the general public amongst other requisites, and of course the various Scholarly publications of Academic applicants, before the 72 of you were considered deserving of the rank. However, the presumption is rebuttable when a Senior Advocate fails in his duty to uphold the dignity of the rank or engages in conduct unbecoming of the rank to which he has been appointed.

In the book **"Professional Conduct of Legal Practitioners in Nigeria"**[3], the Functions and Privileges of a Senior Advocate of Nigeria as provided for in the

[3] Hon. J. Olakunle Orojo at pages 84 – 86

Senior Advocates of Nigeria (Privileges and Functions) Rules[4] made by the Legal Practitioners Privileges Committee and which Rules came into effect on 28 September, 1979 are therein set out as including:

> "(i)Exclusive right to sit in the Inner Bar
> Rule 1 provides that notwithstanding the provisions of the rules of any court, but without prejudice to any enactment, all courts of law in Nigeria before which legal practitioners are entitled to appear, shall accord to every Senior Advocate of Nigeria the following rights and privileges:
>
> (a)the exclusive right to sit in the inner bar or where no facilities exist for an inner bar, on the front row of the seats available for legal practitioners;
>
> (b) the right to mention any motion in which he is appearing, or any other cause or matter which is on the list for mention and not otherwise listed for hearing out of its turn on the Cause List;
>
> (ii) Appearance in Court in civil cases to be with counsel
> Rule 2 provides that a Senior Advocate of Nigeria shall not appear as counsel in any civil case before a Superior Court of record except with a Junior or with another Senior Advocate of Nigeria, but he may appear with or without another counsel in any motion or other civil cause or matter in Judge's Chambers or elsewhere not in open court.
>
> However, rule 3 provides that a Senior Advocate of Nigeria may appear as counsel in any criminal cause or matter before any court of superior record with or without another counsel.
>
> (iii) Restriction on Application for Process
> Rule 4 provides that a Senior Advocate of Nigeria shall not apply for or issue originating process or any other process from or before a court in any cause or matter except in relation to those matters in which he is entitled to appear pursuant to rules 2 and 3.
>
> (iv) Minimum Fees
> Rule 5 provides that a Senior Advocate of Nigeria shall not be engaged or agree to be engaged in drafting any instrument where the appropriate or prescribed fee is less than ₦400, but this restriction does not apply in respect of:

[4] Cap. 207 Laws of the Federation of Nigeria (LFN) 1990. This regulation was excluded from LFN 2004

a. drafting any instrument free; or
b. drafting any instrument connected with parliamentary processes for a lesser charge than as prescribed."

Concomitant with those privileges, there also exist the significant roles you will play in the profession and in the society at large which roles demand high ethical standards and a commitment above all to justice, integrity and the rule of law. Senior Advocates help the people realize their lawful rights in accordance with the laws. Our precious heritage of the profession's core principles and values places a heavy responsibility on Senior Advocates to maintain and safeguard them in a way that measures up to the forebears of our legacy and to the expectation of our future successors.

In carrying out these responsibilities therefore, Senior Advocates of Nigeria are expected to school young lawyers in civil practice, criminal practice and other specialist areas of the law; take them to Court and allow them to be part of consultations with Clients. Seniors are to also supervise the drafting of pleadings and opinions by juniors, discuss with them the preparation and presentation of cases and encourage young lawyers to give free representation by way of pro bono services as a part of a commitment to providing access to justice for all. As such, the burden of a Senior Advocate of Nigeria is more magnified as he is expected to lead by example and to discharge these responsibilities to the fullest possible extent.

In his lecture titled **"The Evolving Role of Senior Advocates in the Administration of Justice and Nation Building"**[5], Professor Fidelis Oditah summarized the role of Senior Advocates, some of which are as follows:

(i) To assist the court to achieve the objectives of civil and criminal litigation;
(ii) Leadership in and out of court: members of the rank of Senior Advocate of Nigeria must be an example of good behavior at all times, showing courtesy to the Court and other practitioners, and be a voice of reason and moderation;

[5] Delivered at the BOSAN Maiden Annual Lecture on 28th June, 2018

(iii) Senior Advocates of Nigeria must see themselves as role models with an obligation to groom the younger practitioners, and actively go out of their way to develop young members;
(iv) Ensure the prestige and survival of the rank: cases are to be settled whenever the opportunities arise;
(v) He advised that Senior Advocates of Nigeria should be the pool from which Judges should be appointed. He noted that in England, most Judges are those who had been mad Queens' Counsel and this has enhanced the quality of judgments of that country's Courts.
(vi) Senior Advocates of Nigeria are not to aid and abet corruption by frustrating the process of the fight against corruption;
(vii) Senior Advocates of Nigeria are to maintain discipline and the highest level of integrity; and
(viii) Senior Advocates of Nigeria and indeed all Legal Practitioners should refrain from using interlocutory applications, jurisdictional applications and interlocutory appeals based on jurisdiction to slow down or frustrate the administration of justice.

It is clear from the roles summarized above that a Senior Advocate of Nigeria plays a crucial role in the legal profession and ultimately the administration of justice. He is to assist the Courts to attain justice and in doing so, must espouse an impeccable standard of diligence, integrity, discipline and demonstrate the highest standard of advocacy. A keen understanding of how the law affects the daily lives of people and the promotion of the rule of law to facilitate the fair administration of justice in our nation should be the primary responsibility of a Senior Advocate. The title "Senior Advocate of Nigeria" is therefore a culmination of years of dedicated service, brilliant performance in advocacy and an illustrious career at the Bar for the Advocate applicants and also years of well researched Scholarly publications for the Academic applicants. As already stated above, it comes with great responsibility.

Being granted the status of Silk is certainly a considerable personal achievement and cause for celebration. At the same time however, it is more than just a personal accolade and reward. It brings with it responsibility for maintaining the distinguished tradition and expectation of both service and leadership that has been central to the institution for years. The significance of the institution of Silk, however, has not diminished, and the values it embodies remain just as important today as at any time in its history.

There should be more tolerance and patience on the part of the new Silk for these are qualities of the Bar which are most appreciated by newcomers to the Bar struggling with early briefs. These qualities encourage both the young and older members of the Bar and lead to a much closer and smoother working relationship between the Bar and the Bench.

The Bar has a duty to respect the Court and the Court ought to be treated with extreme courtesy and deference because respect begets respect. Members of the Bar too must, through hard work, thorough preparation of their cases before appearance, purposeful cross-examination, beauty of language, strict adherence to the unwritten laws of the legal profession, and by engaging in diligent practice on the basis of sincerity and truth which are the basis of success or hallmarks at the Bar, would no doubt command the respect of the Bench. Where a Senior Advocate of Nigeria believes that a Judge has engaged in impeachable conduct or is not holding the scales of justice with equal poise it were better that he maintains his calm and tranquil composure and write a petition to the National Judicial Council than confronting or challenging the judge in open Court. Since the Court should not be turned into a place of ridicule or contempt. After all we are all Ministers in the Temple of Justice and must be seen to act as such. The renowned Jurist of blessed memory – Owolabi Kolawole, JCA in a case stated thus:

> "I should like to recall the memorable words of Crampton, J. who laid down the forensic duty of the advocate:
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> > "This Court in which we sit is a temple of justice; and the Advocate at the Bar as well as the Judge upon the bench, are equally Ministers in that temple. The object of all equally should be the attainment of justice....Slow and laborious, and perplexed and doubtful in its issue that pursuit often proves; but we are all – Judges, Jurors, Advocates and Attorneys – together concerned in this search for truth: the pursuit is a noble one, and those are honoured who are the instruments engaged in it."
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> See *R. v. O'Connell* (1844) 7 IR.LR 261 at 312, 313."[6]

This was equally the reasoning of our respected former Justice of the Supreme Court, Hon. Justice Chukwudifu A. Oputa of blessed memory in his book

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[6] CHIEF CAPTAIN O. S. PEPPLE v. CHIEF (DR.) E. T. D. GREEN [1990] 4 NWLR (Pt. 142) 108 at 118

"Conduct at the Bar and The Unwritten Laws of the Legal Profession"[7] where he stated that the Bar is not just a trade or business. It is a Vocation. He went further to deal with the Code of Conducts and Ethics of the Profession which is to maintain High Standards.

This respected Justice and author insists on the Duty of the members of the Bar to respect the Court which implies inter alia:

1. That Counsel is always punctual. The Court cannot wait for counsel.
2. That Counsel ought always to stand up when addressed by the Bench or when he himself desires to say anything.
3. That Counsel should note that the proper attitude in Court is always of importance and scarcely goes unnoticed. Counsel should also speak with energy, clearness and conviction.
4. That Counsel should endeavour and be extremely careful not to quarrel with the Court and not to fall foul of the Bench unnecessarily.
5. Duty to assist and never to mislead the Court.
6. It is one of the unwritten laws of the Profession in dealing with the Bench that the Bar must exhibit and maintain complete and Absolute Frankness".

Apart from the duty Senior Advocates of Nigeria owe to their Clients, which consist of Duty of Honesty which encompasses representing a Client within the bounds of the Law without breaching any fiduciary relationship; the Duty of Skill and Care without incurring any liability for negligence and the Duty of Professional Secrecy and Privilege including the duty not to disclose confidential information even after the engagement has ceased, they also owe a duty to their fellow colleagues, be they members of the Inner or Outer Bar. Again in his book **"Professional Conduct of Legal Practitioners in Nigeria"**, the learned Jurist of blessed memory Hon. Justice Olakunle Orojo stated thus on a Lawyer's relationship with other Legal Practitioners:

> "The relationship between legal practitioners, it has been said, should be governed by the maxim, "Do unto others as you would have them do unto you." By the nature of their profession and occupation, lawyers are required to show considerable amount of fellowship, understanding and respect for

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[7] (1976) Unpublished. Printed by Cyanco International Press Ltd. Quoted in "THE BAR AND THE BENCH AND THE CHALLENGES OF ETHICS IN THE LEGAL PROFESSION IN NIGERIA" by Chief B.O. Benson SAN - Former National President of the Nigerian Bar Association (1978 – 1980)

one another. Indeed, they address and refer to one another as "learned friend". Cordial relationship and honest dealing among legal practitioners not only facilitate the dispatch of their work and the discharge of their duties, but is absolutely essential in the interest of the client and public at large."[8]

All these duties, responsibilities and obligations owed to the Court, the Client and Lawyer colleagues are clearly provided for in the Rules of Professional Conduct 2007. Where you fail in any of these duties, you will be opening yourself to severe sanctions which may be imposed by both the Legal Practitioners Privileges Committee (LPPC) by way of suspension of the rank and additionally by the Legal Practitioners Disciplinary Committee (LPDC) which may strike your name from the Roll of Legal Practitioners depending on the gravity of the infraction, professional misconduct or breach of professional ethics as the case may be. It is on record that at least four Senior Advocates of Nigeria were suspended from the rank for about two years for professional misconduct or conduct found to be unbecoming of the rank. Another lost his rank completely and was disbarred after being convicted for perverting the cause of justice.

My prayer is that you will all wear the Silk with the honour and dignity it deserves so that it would not be said by anyone that the honour was undeservedly bestowed on any of you.

Thank you for listening.

[8] At page 214