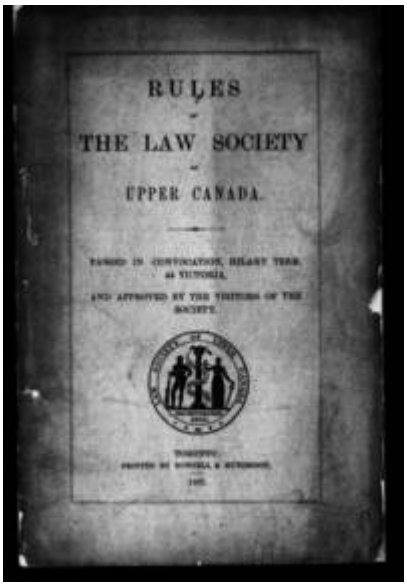
The solicitor's duty to the courts

This section contains case summaries and observations regarding a solicitor's duty to the courts. The section highlights the courts' view of a solicitor's duty, not the Law Society's. The Law Society's view of the solicitor's duty to the courts and the profession more generally may be found in the *Rules of Professional Conduct*.

Tangent about legal history


RULES
OF
THE LAW SOCIETY
OF
UPPER CANADA.

With that said, and by way of an introductory history lesson, the profession has always been beholden to the courts, and especially the courts of superior jurisdiction. In Ontario, this link was more pronounced when the Law Society of Upper Canada was first created. At that time, the Law Society was something of an extension of the Bench. It was, therefore, supervised by the Bench: judges were visitors to the Law Society.

Visitors are recognized in common law and equity as the legal custodians of charitable institutions. This definition packs a wallop. A visitor can, within the scope of its remit, overrule a charity's board of directors. It can disallow by-laws passed by the board or the charity's members. It can reverse a decision or substitute its own. In short, it is akin to the Crown within the bounds of a charity.

The judges' involvement in the Law Society's affairs as visitors thus gave the Bench direct control over the management of the bar and solicitors. In some jurisdictions, such as Newfoundland and Labrador, what some consider an archaic formula still exists. The *Law Society Act* declares that “The judges of the Supreme Court continue to be visitors of the society.” The Court of Appeal for Newfoundland and Labrador went further to describe a visitor's jurisdiction, such as a judge's jurisdiction to act as visitor to a prison, as being created by “canon law and other non-statutory sources”, which may mean that a visitor's jurisdiction survives even its removal from a statute, such as Ontario's current *Law Society Act* (2013 NLCA 42, para. 37).

Judges' formal roles as supervisors of the legal profession may then continue to exist in Ontario even after that role has been removed from legislation. The courts certainly take this position, for they continue to exert inherent jurisdiction to sanction barristers and solicitors who overstep the mark when dealing with the courts.

Blake and Blake, 2021 ONSC 7189 (Div. Crt.)

Full text

[57] Lawyers are professionals whose conduct is governed by the Rules of Professional Conduct. While the Law Society regulates the legal profession, our courts may in appropriate circumstances sanction the conduct of a lawyer. One of the better-known examples of such a sanction can be found in Rule 57.07(1) of the Rules of Civil Procedure. Another example can be found in the court's inherent jurisdiction to find a lawyer in contempt of court. On the facts of this case, another way the court can sanction a lawyer is through the reasons of the court that become part of the public record.

Duty of candour

The Law Society of Ontario's *Rules of Professional Conduct* require barristers and solicitors to be candid with the courts and tribunals before which they appear. This duty is owed to the court or tribunal because counsel are officers of the courts. Commentary to rule 5.1 makes the LSO's expectation plain:

[6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

Courts have found that the duty of candour extends to counsel's clients, notably with respect to the continuing obligation to produce freshly discovered relevant information in the course of civil proceedings (Caldwell v. Caldwell, 2007 CanLII 1913 (ON SC), para. 53). This rule is taken one step further in the *Rules of Civil Procedure*. Rules 37.14 and 38.11 allow the Court to set aside orders made when an opposing party does not appear or cannot be found. When explaining the scope of the Court's power to set aside orders under these rules, the courts have said that

A party who seeks relief from the court in proceedings without notice is obliged to make full and fair disclosure of all material facts. This is a common law rule that is enshrined in rule 39.01(6). See also Sangster v. Sangster, 2003 CanLII 48248 (ON CA), [2003] O.J. No. 69 (C.A.), at para. 7. It is unnecessary to find that the court was deliberately misled before a court will set aside such an order. The basis of the rule is fairness. As the rule confirms, the failure to make such disclosure is a reason, in itself, to set aside the order made: Mariani v. Mariani, [2010] O.J. No. 1464 (S.C.); Balanyk v. Greater Niagara General Hospital, [1997] O.J. No. 4867 (C.A.).

Misir v Misir, 2017 ONCA 675, para. 17.

This obligation was further detailed by the Supreme Court of Canada in *Ruby v Canada*. In that case, the applicant alleged that sections of the *Privacy Act* violated the *Canadian Charter of Rights and Freedoms*. The Court, commenting on the nature of certain provisions of that *Privacy Act*, said, *obiter*,

that

> 26 Ex parte proceedings need not be held in camera. Indeed, ex parte submissions are often made in open court (in interlocutory matters, for example). In fact, an order will still be considered ex parte where the other party happens to be present at the hearing but does not make submissions (for instance, because of insufficient notice): Royal Bank v. W. Got & Associates Electric Ltd., 1994 CanLII 8922 (AB KB), [1994] 5 W.W.R. 337 (Alta. Q.B.), at para. 10, aff'd 1997 ABCA 136 (CanLII), [1997] 6 W.W.R. 715 (Alta. C.A.), aff'd (without reference to this point) 1999 CanLII 714 (SCC), [1999] 3 S.C.R. 408. On the other hand, other ex parte proceedings are, by necessity, not held in public. An application for a wiretap authorization, for instance, must be made both ex parte and in camera.
>
> 27 In all cases where a party is before the court on an ex parte basis, the party is under a duty of utmost good faith in the representations that it makes to the court. The evidence presented must be complete and thorough and no relevant information adverse to the interest of that party may be withheld: Royal Bank, supra, at para. 11. Virtually all codes of professional conduct impose such an ethical obligation on lawyers. See for example the Alberta Code of Professional Conduct, c. 10, r. 8.

Vide Caldwell v. Caldwell, 2006 CanLII 11850 (ON CA).

Two points obtain from these paragraphs. The first is that a proceeding may be considered *ex parte* despite the respondent being present and able to hear the proceedings. A proceeding is *ex parte* when the respondent cannot be heard, whether by absence or inability to formulate a cogent and considered response. This broad definition of "*ex parte*" leads to the second observation best made by reviewing paragraph 27. The duty of candour in the face of an empty chair is one of "utmost good faith". Courts require these *bona fides* from their officers because, as Justice Brown said in *Re Sprott Resources Lending Corp.*,

> [j]udges learn from experience that most stories have two sides to them, thus the great reluctance of judges to deal with requests for orders on an ex parte basis… Such applications mark a radical departure from the adversarial approach to truth-finding upon which our common law system is built and an exception to the general transparency and openness of our courts when they make orders which affect other parties.

2013 ONSC 4350

Put differently, when an advocate fails to disclose all material facts or law to the court, the advocate impedes the administration of justice writ large.

Remedy for failure in the duty of candour

The test for setting aside an *ex parte* order thus favours the absent party. It was recently described in only a few lines:

> [16] In determining whether the moving party has failed to fully and frankly disclose all material facts, the applicable inquiry is not whether the

subject order would have been granted had the omitted facts been disclosed, but “whether the omitted facts might have had an impact on the original granting of the order” [emphasis in original] (see: Mazza v Gucciardi, 2013 ONSC 4882, at paras. 24-26).

2024 ONSC 2422, para 16.

Consent to draft orders

***Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. (Master)*,**

1991 CanLII 7311 (ON SC)

The solicitor for the defendants indicated that he was no longer able to act for the clients at the hearing of a motion before a master. The clients agreed. The defendants sought an adjournment. The master hearing the motion endorsed the record granting an adjournment on terms. Plaintiff's counsel prepared a draft of the order. Solicitor for the defendants admitted that the draft order did not contain any faults. Solicitor for the defendants refused to approve the order because: 1. solicitor for the defendants was no longer acting with defendants' authority; 2. defendants specifically instructed the solicitor not to approve the order.

Two issues arise for the Court:

1. What is involved in the approval of an order?
2. What are the rights and obligations of solicitors in a situation such as this?

What is involved in the approval of an order?

An order is an administrative act made for the benefit of officers of the Court from which the order issues and for the appellate court. Approving an order does not concede any point in litigation. While legitimate objections may be taken to a draft order, “specious or frivolous objections in order to gain collateral advantage” are “an abuse of process”.

What are the rights and obligations of solicitors in a situation such as this?

Solicitors are agents and must act pursuant to their clients' instructions, unless their clients' instructions are unlawful. A solicitor has a duty to approve an order to which there is no legitimate objection. Even if the solicitor ceases to act for the client, the solicitor remains bound to approve an order that results from their appearance before the Court. Solicitors have a duty to the Court to avoid creating breakdowns in the Court's process.

***Folkes v. Greensleeves Publishing Limited*,**

2002 CanLII 44917 (ON CA)

47. [31] Mr. Folkes indicates that counsel for the respondents acted improperly in endorsing the approval of Mr. Folkes’ counsel on the formal order of this court at a time when Mr. Folkes had indicated he intended to proceed on his own behalf. I reject this submission. In Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. (1991), 1991 CanLII 7311 (ON SC), 5 O.R. (3d) 65 Master Peppiatt noted that counsel have a professional obligation to

the court and other counsel to approve an order to which there is no valid objection even after ceasing to act. I agree with his conclusion. To hold otherwise would create an inappropriate impediment to the proper processing of orders of the court.

***Vallie Construction Inc. v. Carol Minaker*,**

2012 ONSC 4577

, para. 69

The solicitor's obligation to approve draft orders may extend to approving draft reports prepared by an associate justice or other referee pursuant to rule 54 of the *Rules of Civil Procedure* or under the *Construction Act*.

***Mayer v. Rubin*,**

2018 ONSC 1826

[3] Settling an order is an administrative act that counsel is required to conduct in good faith. The order is to be drafted simply. It records, in the appropriate format, the operative terms of the tribunal’s endorsement. Settling an order is not an opportunity for clients to negotiate or for counsel to regret a consent given. Rather, settling an order is a professional matter that counsel is required to perform regardless of the positions or preferences of the client. Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd. (1991), 1991 CanLII 7311 (ON SC), 5 OR (3d) 65 (MC).

[10] It is perfectly obvious that the current motions are uneconomical and are designed to make tactical points among counsel. This litigation has been extremely hard fought and expensive already. There is a very substantial amount of money at stake. The principal parties are siblings. The allegations among them have been exceptionally nasty and betray an underlying personal bitterness that perhaps only family members can hold toward one another. The siblings are now engulfed in a sea of professionals poised to engage on a very extensive and expensive voyage through years and years of legal and accounting documentation to re-package history to best suit their own current positions. The costs and distress of the process seem to be more attractive to the parties than sitting down, splitting a difference, and salvaging whatever is left of their family ties while their mother remains alive. There is enough money available that none of them will notice the difference in the long run. Instead, they choose to play out their damaged family dynamics in a public forum at great expense and with immense personal emotional cost.

[12] Normally, parties recognize that case management should encourage reasonable compromise and cooperation. Most parties do not want to show themselves to be taking unreasonable positions in front of a judge whom they know will be seeing them over and over again. Moreover, most reasonable parties recognize that with some cooperation on procedural matters such as scheduling, there are great advantages available in case management like streamlining the issues and reducing delay in the proceedings. Parties usually realize a case management premium by cooperating.

See also:

Law Society of Alberta, Signing court orders (2017)

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