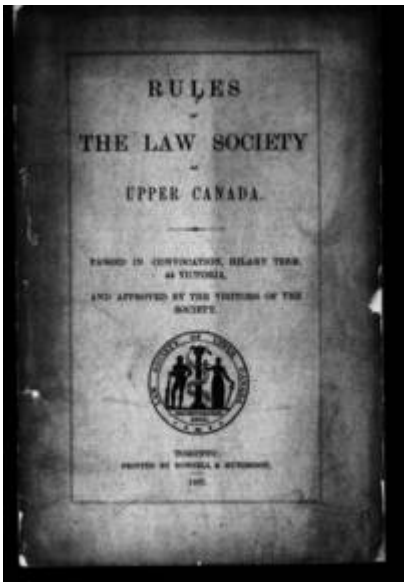
The solicitor's duty to the courts

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.

Specific duties

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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