Civil Procedure
Fall Term 2024

Lecture Notes No. 2

I. INTRODUCTION (cont'd)

Professionalism: What role do lawyers play in litigation?

Lawyers are obligated to act competently and in the best interests of clients. For advocates, this means putting forward a client's case to the best of the lawyer's ability and using all available procedures and evidence. There are limits, however, imposed by the Law Society's *Rules of Professional Conduct*. Some organizations provide "best practices" guideline; for example, see the Advocates Society's publications on point and their *Principles of Civility and Professionalism for Advocates*.

Law Society of Ontario v. McCallum
2024 ONLSTH 29 (OLSTHD)

This was a disciplinary proceeding against a lawyer. The conduct at issue related to the representation of the defendant CAS in a tort action in negligence brought by the plaintiff respecting an historical sexual assault when plaintiff was a 14-year-old foster child who was assaulted by her foster father. The litigation became quite acrimonious, extending to communications between counsel. In the introduction to the decision, the Chair provided an overview:

> [2] Mr. McCallum swore an affidavit in a civil action involving alleged sexual abuse of a girl in a foster home by her foster father. The affidavit was for the purpose of a status hearing at which the issue was whether the action should be dismissed for delay.
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> [3] Mr. McCallum accused the plaintiff's lawyer of misrepresentation for saying that the sexual abuse took place while the plaintiff was "in childhood". Mr. McCallum testified that the plaintiff was "a sexually mature young woman, not a 'child' as conventionally understood". This statement gave rise to this conduct application.
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> [4] Mr. McCallum now says that he intended to observe that the plaintiff was sexually mature in a biological sense and that his concern was that plaintiff's counsel intended to evoke disgust by impliedly alleging pedophilia in referring to "childhood".
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> [5] The Law Society alleges that Mr. McCallum failed to act honourably and with integrity in making the statement.

[6] This is something of an unusual case. Many cases address professional conduct rules that are much more specific. In contrast, Rule 2.1-1 is general in nature. Mr. McCallum acknowledges that his statement was ill-advised. However, his position is that Rule 2.1-1 is not breached absent morally blameworthy conduct, which he says is not the case here. As a result, we are required to interpret and apply Rule 2.1-1. The Tribunal's jurisprudence does not much address the interpretation of Rule 2.1-1. Following the hearing, we asked the parties to provide written submissions as to the appropriate interpretation of Rule 2.1-1.

[7] There are a number of issues that arguably arise in respect of Mr. McCallum's statement. The Law Society's position was that the impugned statement was not made in the interests of Mr. McCallum's client's interests and caused harm to his client's interest. The Law Society characterized the statement as being impulsive and irresponsible.

[8] The Law Society further submitted that the statement caused harm to the plaintiff, being another participant in the justice system. The Law Society also emphasized harm caused to the public's confidence in the legal professions and the administration of justice. The Law Society submitted that the statement tended to cause particular harm on members of the public who are minors and have been abused by people in positions of trust and power on victims of sexual abuse.

[9] These submissions by the Law Society raise quite different issues. The first submission invokes the lawyer's duty of commitment to the client cause, which is a fundamental aspect of the duty of loyalty. The second submission invokes difficult questions about lawyers' obligations as advocates, particularly in the context of allegations of sexual abuse and, even more particularly, in the context of allegations of sexual abuse of girls by people in positions of trust.

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[17] The plaintiff's counsel and Mr. McCallum both swore affidavits for the status hearing. In his affidavit, Mr. McCallum responded to the affidavit for the plaintiff saying that:

> To aid her purpose the plaintiff has undertaken two stratagems:
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> (a) she has engaged in a process that can only be called a surreptitious ad hominem attack on the Society's lawyer (namely, me);
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> (b) she misrepresents facts.

> [18] Mr. McCallum did not merely challenge the evidence of plaintiff's counsel. He alleged that her affidavit was a "surreptitious ad hominem attack" on him personally. He alleged that plaintiff's counsel misrepresented the facts. Mr. McCallum's affidavit was a personal attack on plaintiff's counsel.
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> [19] In support of his claim of factual misrepresentation by plaintiff's counsel, Mr. McCallum testified that her affidavit was "rife with errors, imprecisions, and misrepresentations, most of which are minor and for that reason neither will I dwell on them. I will however present a few instances before proceeding." With respect to one of these instances, Mr. McCallum testified that (emphasis added):
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> she states that the alleged assaults took place while the plaintiff was "in childhood". The plaintiff was born in March 1967. The alleged abuse took place in 1981-82. A fourteen or fifteen girl is a sexually mature young woman, not a 'child', as the term is conventionally understood; …
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> [20] The Law Society alleges that the making of the statement that "A fourteen or fifteen girl is a sexually mature young woman, not a 'child', as the term is conventionally understood" (the impugned statement) is a failure to act honourably and with integrity, contrary to Rule 2.1-1 of the Rules.
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> [21] Mr. McCallum's position is that he did not say what he meant to say and that, for reasons discussed below, he intended to address what he took to be allegation of pedophilia as plaintiff's counsel intended to evoke disgust in referring to childhood and thereby suggesting pedophilia.

The tension in the case is in respect of the lawyer's obligation to act in a client's best interests but to do so "honourably and with integrity." Thus,

> **[106] The Law Society submitted that the impugned statement was offensive, insensitive and amounted to victim-blaming. It submitted that Mr. McCallum breached Rule 2.1-1 because making the impugned statement was not in his client's interests, given its legislative mandate as a children's aid society, because Mr. McCallum did not have instructions from his client to make the impugned statement and because of the offensive nature of the impugned statement and its impact on the plaintiff. The Law Society submitted that making the impugned statement did not inspire the confidence, respect and trust of his client and the community, and did not reflect favorably on the legal professions and the administration of justice, as required by Rule 2.1-1[4].**
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> **[107] Mr. McCallum acknowledged to the investigator that his impugned statement was "extraordinarily stupid" as he was**

representing a children's aid society. He conceded that he wouldn't "object terribly" to the terms "shocking, outrageous or deeply concerning" being applied to his statement. However, his position is that his statement was correct in fact and that making the statement was not morally blameworthy. On this basis, his submission is that making the statement was not in breach of Rule 2.1-1.

[108] In support of his submission, Mr. McCallum relied on the definition of "professional misconduct" in Rule 1.1-1, Rule 2.1-1 and its commentaries and Rule 5.1-1 and its commentaries. Mr. McCallum did not submit any cases that applied or interpretated Rule 2.1-1.

[109] Mr. McCallum submitted that the definition of professional misconduct in Rule 1.1-1 requires at least some form of wrongdoing and, focusing on subsections (b) to (g) of the definition of professional misconduct, seriously morally culpable wrongdoing. Focusing on Rule 2.1-1, Mr. McCallum submitted that there could be no breach of Rule 2.1-1 absent moral blameworthiness. His submissions treated acting honourably and acting with integrity as largely having the same meaning in Rule 2.1.1. Mr. McCallum also submitted that Rules 2.1-1 and 5.1-1 should be interpreted together given the common reference to acting honourably and that the requirement to act honourably must be understood in the context of the requirement of resolute representation.

After a lengthy consideration of the Rule 2.1, the decision continued:

[177] We interpret Rule 2.1-1, in its requirement to act honourably, to generally prohibit professional conduct that is contrary to the professional and legal obligations of a lawyer, or which is contrary to applicable law, which tends to bring discredit on the legal profession. Conduct that breaches the requirement to act honourably is not only conduct that is morally blameworthy or involves moral turpitude. That said and referring back to Mr. MacKenzie's text, Rule 2.1-1 is not an invitation to "nit-pick."

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[238] Making the impugned statement was contrary to his client's interests, without authority, and irresponsible. While Mr. McCallum carefully did not agree at his interview with the investigator that he had been irresponsible, he acknowledged that he got sidetracked, that he lost track of the main issue, that it was extraordinarily stupid of him to refer to the plaintiff as a sexually mature young woman, that he should not have written the impugned statement at all, and that he would not object terribly to the description of his statement as being shocking or outrageous or deeply concerning.

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[241] This is one of the unusual cases in which, in our opinion, a specific professional conduct rule does not apply but where there is professional misconduct. As a result, Rule 2.1-1 was cited. The Law Society could have simply relied on the general definition of professional misconduct in the Rules, which is "conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession".

[242] As said above, our interpretation of Rule 2.1-1 is that it is a general rule that requires proper professional conduct and compliance with applicable law in support of the goals of legal services regulation. Said another way, Rule 2.1-1 can be breached by conduct contrary to a lawyer's client or other professional obligations. As discussed above, we do not accept that moral blameworthiness is required. While "honour" may have this implication in other contexts, these Rules are not about chivalry or similar matters but rather are about ensuring the professional conduct required to make a legal system in a free and democratic society work.

[243] We agree with Mr. McCallum's assessment of his own conduct as detailed above. He did not serve his client's cause. He did not seek instructions when he should have. He acted unnecessarily and irresponsibly. Mr. McCallum's only real disagreement with the allegation is that he says that his conduct was not morally blameworthy, in the sense of not being inherently wrongful or involving some sort of moral culpability. But we do not agree that this is a necessary element for there to be a breach of Rule 2.1-1. We also do not agree that this is a mere error in judgment as was submitted. We find that Mr. McCallum's conduct breached Rule 2.1-1.

[244] In any event and alternatively, we are not constrained strictly by the invocation of Rule 2.1-1. The notice of application is not to be treated as an indictment.[24] Mr. McCallum's impugned statement, his rationale for making the impugned statement, his client obligations, and his client's interests have been well canvassed in the hearing of this application. For the same reasons that we have concluded that Mr. McCallum's conduct breached Rule 2.1-1, we conclude that his conduct tended to bring discredit upon the legal profession and is therefore professional misconduct as defined in Rule 1.

[245] In respect of these findings, we do not see the duty of resolute representation being relevant in the sense that it was in Groia. Our findings are primarily about a failure of proper client representation, considering the interests of the client rather than protection of the administration of justice.

> We also do not see expressive freedom to be much engaged. Mr. McCallum's speech was on behalf of his client. While advocates have their own expressive freedoms as in Doré,[25] at issue here was expression on behalf of the client. Mr. McCallum was not speaking for himself. He spoke for his client, in a manner that was inconsistent with his client's legislative mandate, and he did so without his client's knowledge and instructions.
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> [246] Having considered the importance of resolute representation and having weighed the importance of expressive freedom in this context against the importance of ensuring proper professional conduct, we find that Mr. McCallum engaged in professional misconduct by breaching Rule 2.1-1 by failure to comply with his client obligations in making the impugned statement. In context, making the impugned statement tended to bring discredit upon the legal profession and that Mr. McCallum acted dishonourably in doing so.

What was the key error made by the lawyer?

II. WHO PAYS FOR THE LITIGATION?

1. Fees and Assessments

Fees = charges for professional services performed under a contract.

The usual practice is **hourly fees**; in some areas, **contingency fees** (payable at a percentage of an award only in case of success) or **block fees** are used. Minimum fees may be charged. In some cases, lawyers work *pro bono* or their fees are paid by Legal Aid (on an hourly or block-fee basis) or are ordered by the Court to be paid by the Crown (rarely). A contract between a lawyer and a client is called a **retainer agreement**. Money paid 'on retainer' is held in trust and applied to the amount owing after **an account is rendered**.

A client can have a lawyer's account '**assessed**' under the *Solicitors Act*, s.3 by an 'Assessment Officer' within 30 days after the final account is rendered. The bill can be reduced where it is outside the retainer agreement or unreasonable based on the following factors:

1. The time expended by the solicitor;
2. The legal complexity of the matters to be dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matter to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;

8. The ability of the client to pay; and
9. The client's expectation as to the amount of the fee.