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Quote of the week

"They destroyed my life. They took a flourishing business and they destroyed it. It would have been better for them to take my licence instead of keeping me in this state of perpetual suspension."

—David Michael O'Brien

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LSUC civility crusade sparks debate

Are prosecutions impinging lawyers' fearless advocacy?

BY MICHAEL McKIERNAN
Law Times

The law society must be cautious not to impinge on the ability of lawyers to provide fearless advocacy in its prosecution of uncivil lawyers, according to a Toronto lawyer facing disciplinary action over his behaviour.

"It's certainly in the public interest that lawyers be civil with one another, but at the same time, we must be very, very careful not to create a situation where over-emphasis on civility can be used as an instrument to undermine the effectiveness of my role to advocate on behalf of my client," Ernest Guiste tells *Law Times*.

Guiste was one of three lawyers who faced hearings last month over charges of misconduct related to civility. His matter stemmed from his behaviour at a mediation session during a sexual harassment case. In an agreed statement of facts signed Dec. 13, he admitted to much of the law society's account of his actions but denied they constituted misconduct. The hearing panel has reserved judgment following a two-day hearing.

In another matter, Julia Ranieri had her licence revoked on Dec. 17 after a panel found her guilty of misconduct for, among other things, the rude and abusive language she used towards a law clerk on the other side of a real estate deal she was involved with in July 2008.

"She just kept ranting and raving about how it was my fault that the deal wasn't yet closed," the clerk said of the 20-minute phone call in documents filed in the matter.

Ranieri failed to attend the hearing and was also found guilty of misappropriating funds and acting for clients while suspended. That suspension was just the first of three imposed by the law society on her, including another in which she received a 10-month suspension for breaking a client's nose with a punch to the face. She couldn't be reached for comment.


Photo: Sandra Strangemore

Derry Millar would prefer to have disciplinary action be a last resort for incivility cases.

In addition, Colin Lyle has been suspended on an interlocutory basis since December 2009, by which time the law society had what the hearing panel chaired by Carl Fleck described as "an alarming" 22 complaints against him related to his practice that primarily focuses on family law and child protection matters.

In March, he apologized in writing to complainants, including a former client who objected when Lyle allegedly said his girlfriend was "sleeping around."

"If you want to make her into a slut, that is your problem," Lyle allegedly told the client on the phone.

In his apology, Lyle thanked the client for the complaint, saying it had made him reconsider his career direction.

"I apologize for any abrasiveness. . . . I have sold my law practice and I am working toward a more balanced lifestyle," he wrote.

Lyle couldn't be reached for comment, and his lawyer, Janet Leiper, declined to speak about the matter. His hearing is due to reconvene on Jan. 20.

Former law society treasurer Derry Millar says he hopes the new continuing professional development requirement will keep civility top of mind for lawyers and stop problems before they arise. Three out of the 12 hours are reserved for professionalism and ethics courses.

"When people think about it, it helps them modify their behaviour," Millar says. "I think there is a heightened sensitivity and I think we'll keep people thinking about it."

His term included a number of civility initiatives, such as the development of protocols with the three levels of court in Ontario that make

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Will election derail contentious legislation again?

BY MICHAEL McKIERNAN
Law Times

Legal observers are gearing up for a busy legislative year in Ottawa with a number of high-profile bills back up for discussion following the Christmas break.

Parliament has past only 11 bills so far during this session, and after prorogation wiped the legislative slate clean at the start of 2010, the threat to the order paper this year comes in the form of a looming election as some commentators forecast a possible poll as early as this spring.

Intellectual property lawyer Barry Sookman is hoping the minority government can hold on long enough to pass bill C-32, the long-awaited copyright modernization act currently at the committee stage in the House of Commons.

Sookman, a partner at McCarthy Tétrault LLP, says that as Canada's current Copyright Act is still firmly rooted in the 20th century, bill C-32 is "sorely needed" to bring it up to date.

"The Copyright Act as it exists today was pretty much modeled after analogue technology," he says. "It has not been brought into the 21st century to take into account digital developments, including the Internet and network systems. All of our international trading partners have updated their laws to make them more adapted to digital technologies, so it's high time we joined them."

Sookman sees the copyright update as a major hole in Canada's legal infrastructure for dealing with the Internet age. The government has updated privacy legislation, while an anti-spam bill finally received Royal assent in December after prorogation derailed it.

One sticking point appears to be over digital locks. The legislation proposes a ban on copying materials such as video games, movies, music, and TV shows for personal use if they contain them.

But Sookman says the issue has been overblown. He believes the Liberals largely favour digital locks and says iTunes, which controls almost two-thirds of the digital music market, has no locks on its songs. "I actually don't see a big divergence between the Conservatives and the Liberals and certainly not as great as it's been painted," he says, noting minor amendments will probably bridge the gap between the parties.

Sookman adds that most of his concerns with the bill are on a technical level, including that the wording of provisions intended to crack down on pirate sites could offer loopholes to escape enforcement. Still, he hopes MPs will iron those issues out in order to get the legislation passed.

"We all hope that this bill does not get bogged down in politics and that an election doesn't result in having to start over again," he says.

One person who may be more enthusiastic about the prospect of an early election is Frank Addario. The

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Opposing lawyer told to 'shove it'

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it easier for judges to raise concerns about a lawyer's behaviour. According to Millar, judges had been reluctant to complain to the LSUC because of the perception that cases would disappear without a trace. But now they're better informed about the progress of a complaint, he notes.

Millar also chaired the law society's civility forum that heard from members of the profession in 11 different locations across Ontario. "We had a real interaction, and I think it raised the whole profile of the issue," he says. "It's an important issue because lack of civility impacts on the administration of justice and ultimately it undermines the public's trust in lawyers and the legal system."

Nevertheless, he'd like to see disciplinary action reserved as an avenue of last resort for problems with civility. "We would prefer to have people improve and mend their ways," he says, noting that suitable candidates are referred to mentorship programs run by professional organizations.

But in his case, Guiste was never offered mentoring, although his matter dates back to 2007, long before Millar's civility forum toured the province.

The complaint against him stems from a mediation session in a sexual harassment case in which he told an opposing lawyer to take his opening offer and "shove it up your ass."

Guiste admits he "got upset" and "said some things that he shouldn't have" but maintains the context is important when determining whether his behaviour was uncivil. He says his client broke down following the offer, which Guiste believed was deliberately low in an attempt to shake the client's confidence in him. In addition, he notes the mediator wasn't offended by his actions. He also filed an expert report by mediator Jules Bloch who said he had seen much worse behaviour in the particularly emotionally charged atmosphere of a mediation dealing with sexual harassment.

"Feelings often run high," Bloch wrote. "Counsels may find themselves pushing unpopular positions. This type of advocacy often leads to loud voices and the possibility of aggressive exchanges, which often involve swearing."

In any case, Guiste feels the session fell under the protection of a strict confidentiality agreement.

In another instance highlighted by the law society, Guiste rebuffed an assertion by the opposing lawyer and told him in an e-mail that he was "speaking nonsense."

"I'm from the Caribbean," he says in explaining his actions. "In our culture, when someone is speaking nonsense to you, you tell them. It's not seen as being uncivil. There's a lot of vagueness as to what is uncivil."

In another e-mail, Guiste told opposing counsel that "unlike yourself, I do not have a client that is a CASH-COW!" He says he was responding to a suggestion that the opposing client, a large corporation, was willing to go to the Supreme Court on a procedural matter.

"They're saying, 'My client has the bucks, so we're either going to do it our way or not do it at all.' They were saying they were prepared to fight my client tooth and nail. What are you going to say? Are you just going to roll over and die? In a context where a lawyer is dealing with a difficult lawyer on the other side, we can't just take it in a vacuum. When everything is taken in context, the e-mails and the communications that I wrote do not stand up to the jurisprudence I've seen about incivility." LT

Parties reluctant to challenge justice bills

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former president of the Criminal Lawyers' Association isn't happy about a raft of law-and-order bills on the government agenda. He fears Canada is heading down the tough-on-crime path already taken by a number of American states that now find themselves in trouble as a result.

"They can't empty their prisons fast enough because they've learned that imprisonment is one of the most expensive habits the state can develop," Addario says. "Instead of learning from that experience, the federal government seems doomed to repeat it. It's tough, it's muscular but it's ultimately ineffective criminal law legislation. The taxpayer gets shafted because they were promised safer streets when five years later they discover the streets are no safer, but the money's been spent."

In Addario's view, bill C-16, which would restrict a judge's ability to apply conditional sentences in certain cases, tackles a non-existent problem. "There is no evidence that judges in Canada are out of control or incapable of exercising their discretion in such a way as to meet the community need for deterrence and denunciation of property crimes and serious crimes," he says, adding that the removal of judicial discretion interferes with the ability of prosecutors to negotiate resolutions, thereby lengthening sentences and increasing the likelihood of recidivism.

Addario believes the opposition parties are reluctant to take a stand against the government's justice legislation for fear it will label them weak on crime, an issue that will only grow with an election looming. The Truth in Sentencing Act passed in 2009, for example, showed the opposition parties have "no inclination to challenge these bills on an effectiveness basis," he says.

Another hot election topic could be bill C-49, the federal government's response to human smugglers. The problem with the bill, according to Gordon Maynard, a past chairman of the Canadian Bar Association's national citizenship and immigration law section, is that "little of bill C-49 is directed at them." It instead targets the refugee claimants themselves regardless of whether their claims are valid or not, he says.

"It seems to be very political, very broad, very harsh, and inappropriate to the claimant's needs," says Maynard, who outlined the CBA's opposition to the bill in a submission at the end of last year.

The government tabled the bill after the arrival of a second ship of Tamil refugees on the coast of British Columbia last year. Under the legislation, refugees who arrive in those circumstances could face 12 months of detention without the possibility of review. Even if officials approve their claim, they'd be unable to apply for permanent residence or any travel documents for five years.

"They're in a very tenuous situation for those five years," Maynard says. "It's arguably contrary to obligations Canada has under international treaties as to how refugees should be treated. They're supposed to be integrated, not treated differently to anyone else, and the detention itself would probably run afoul of the Charter."

In December, the Liberals indicated they wouldn't support the bill, but Maynard suspects the government may put it up for a vote anyway to make a political point. "They may want to try and score points with people who think that one boat is too many and buy into the argument that unless there's a serious response, more boats are coming. We understand that mass arrivals by boat raise public ire. It offends people to see boats arrive. There are responses that one can take to it, but this response is excessive."

Lorne Waldman, a Toronto immigration lawyer, says the legislation may not even be necessary and notes that recent decisions by the Federal Court involving claimants who arrived on the Sri Lankan boats show the justice system is adapting the existing legislation.

In his Dec. 3 decision in *Canada (Citizenship and Immigration) v. B479*, Justice Russel Zinn stayed the claimant's release while noting that the nature of the arrival was a factor to consider.

"While detention is not taken lightly, those who arrive en masse should expect that this extraordinary occurrence will require significant resources and that it will take some significant time to resolve the public interest concerns of the country upon whose shores they have landed," Zinn wrote.

"The government says we need all these anti-smuggling laws because our current system isn't working properly," Waldman says. "I would argue that the court has already gone a considerable way towards adapting the current legislation to the new reality of mass arrivals by boat." LT