Lifelong Learning in Professionalism: a Role for the Academy

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A. Introduction

The recent *Review of Large and Complex Criminal Case Procedures [the Review* or *the Report]*[1] spent a large part of last year studying the modern phenomenon of extremely lengthy, and often dysfunctional, criminal trials. The Attorney General of Ontario perceived this problem to have reached crisis proportions, as have many other leading members of the bench and bar, and he commissioned former Chief Justice Patrick LeSage and myself to study the causes and recommend solutions.

The Report begins by identifying a number of broad law reform causes of this recent phenomenon, in particular, the 1982 passage of the *Charter of Rights and Freedoms,* the so-called "evidence law revolution" that the Supreme Court of Canada embarked on in 1990, and Parliament's decision to enact numerous complex *Criminal Code* amendments in the last two decades, for example, the 1997 and 2001 "criminal organization" reforms, the 2001 "anti-terrorism" legislation and the 1997 "third party records" legislation. Since none of these three broad law reform initiatives are likely to be reversed and, indeed, many of them can be justified, their contribution to undue prolixiy and complexity in the modern criminal trial must be taken as a given.

The Report then turns its focus to those aspects of modern legal culture that have exacerbated the above trends and that should be changed. Here, it identifies three further causes of the modern development of overly long and dysfunctional trials: first, the appearance of a culture amongst lawyers and judges that tolerates excess and delay; second, a tendency to "become both error-prone and fearful of error" in the much more difficult law reform environment created by *the Charter,* the Supreme Court of Canada and Parliament; and finally, a tendency towards rude, abrasive and unprofessional conduct in the court room.

It is this third and last phenomenon that needs to be addressed by the topic of today's symposium, namely, lifelong learning in professionalism.

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[1] The full *Report* was released in November, 2008 and is available online at : http://www.attorneygeneral.jus.gov.on.ca

B. The Nature of Professional Misconduct in the Court Room

The Report concludes that there has been an increase in professional misconduct in the court room, based on a number of sources. Extensive consultations during *the Review* with judges, lawyers, police officers and other justice system participants consistently identified this trend. The recent development of a body of appellate jurisprudence addressing the problem provides further confirmation. In addition, Law Society statistics are to the effect that complaints against lawyers relating to dishonourable, misleading and uncivil conduct have more than doubled in the last few years. Finally, four case studies of typical recent examples of large dysfunctional criminal trials, undertaken by the *Review,* revealed that they were all characterized by varying degrees of lawyer misconduct.

The Report described the phenomenon in the following terms[2] :

> The third and last of the broad cultural changes that we have noted is a significant increase in animosity and acrimony between counsel. Many of the recent major cases that have gone on for far too long have been characterized by abusive and uncivil conduct from one side of the bar or the other and, on occasion, from both sides. The adversary model of trial procedure has always been one that creates opportunities for conflict, given the oppositional roles of the parties. However, the significant reforms to the system summarized above have created many new opportunities for conflict. As already noted, the way in which certain rights and remedies have been defined in the case law seems calculated to increase the potential for personal attacks as between counsel. In other words, instead of calming down the inherently combative nature of the adversary system, by fostering respect and collegiality and cohesion amongst the parties, the reforms of the modern era have contributed to an environment of greater animosity.
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> This is a very serious development that must be stopped. When counsel attack each other, on a personal level, the adversary system breaks down because nothing gets settled out of court. Every petty dispute is fought out in the court room in a hostile and provocative way, and the trial ceases to focus efficiently on the real issues in the case.

The kinds of misconduct in the court room that go beyond being merely poor advocacy or bad judgement, and rise to the level of unprofessionalism, include: misleading the court, rude and abusive behaviour towards justice system participants, making allegations of *mala fides* that have

[2] *Supra* note 1 at pp. 16-17

no basis in fact or law, failing to follow judicial direction and falling below professional standards of competence.

The Report describes the impact of this kind of misconduct [3] :

> As discussed in Chapter 2, one noteworthy trend of the modern era has been an apparent increase in acrimonious relations between counsel. All four of our case studies were marked by open hostility, conflict, sarcasm or serious allegations of misconduct made against one counsel or another. For example, in *R. v. Mallory and Stewart*, the Court of Appeal felt it necessary to remark on the "unfortunate level of acrimony between counsel." Indeed, there is now a considerable body of Court of Appeal jurisprudence in Ontario, going well beyond our four case studies, that deals directly with this phenomenon of court room incivility. *R. v. Felderhof* is the most important case on this subject.
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> The impact of this kind of conduct on the length of criminal trials is obvious. As Justice Moldaver put it, counsel who have forgotten the professional duty of courtesy and respect between opponents will stop "communicating in a meaningful and productive way and instead, are at each other's throats." However, the impact goes beyond a breakdown in communication. In *Felderhof*, Justice Rosenberg described the more profound effect when allegations of "improper motives or bad faith" are made against opposing counsel:
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> > Those types of submissions are very disruptive to the orderly running of the trial. They sidetrack the prosecutor and the trial judge from the real issues at the trial.
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> When counsel stop communicating with each other, nothing gets resolved out of court and every issue is fought out in the court room. Furthermore, the court room acrimony deflects the trial from its real purposes and the judge may lose his/her focus. The inevitable result is that long hard cases become even longer and more difficult. It is probably safe to say that every dysfunctional mega-trial will have been characterized by hostile and uncivil relations between counsel. We believe that this problem is serious and it must be remedied if we are to make long criminal trials in Ontario more efficient and focused.
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> Incivility in the court room is unprofessional as it violates the most basic rules of professional conduct. Incivility also violates counsel's common law duties as "officers of the court". There have always been a small minority of uncivil and unprofessional lawyers in the criminal courts, both on the Crown side and on the defence side. When criminal trials were generally short and simple, some 30 years ago, these lawyers had minimal impact on the overall effectiveness of the justice system. Now that

[3] *Supra* note 1 at pp.120-121

> criminal trials have become long and complex, the damage caused by this kind of counsel is much greater. When a major case with a high public profile is conducted in an irresponsible manner, by Crown counsel or defence counsel, the financial and human costs and, more importantly, the damage to public confidence in the justice system, can be very significant. As a result, there is a more pressing need today to enforce the *Rules of Professional Conduct* and the common law duties of "officers of the court".

C. The Remedies for Unprofessionalism in the Court Room

The Report identifies a series of remedial responses to the phenomenon of declining standards of professionalism in the court room, noting that it is a shared jurisdiction that engages all participants in the justice system[4] :

> All of the leading studies of the "mega-trial phenomenon" have recommended that steps must be taken in this area, to educate counsel for the Crown and the defence about their duties as "officers of the court" and to enforce those duties.
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> Professional misconduct in the course of a long complex criminal trial is the joint responsibility of the judiciary, the Law Society, LAO (as most of these cases are publicly funded) and the Attorney General. We state this proposition because all four bodies possess jurisdiction, in their own spheres, to respond to court room misconduct ....
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> It is perhaps because all four bodies possess varying jurisdictions to remedy this problem that no one seems to take lead responsibility. As a result, there are almost never any serious consequences when professional misconduct occurs in the court room. We believe that all four bodies must exercise their jurisdictions in order to effectively respond to this issue.

The various remedies recommended range from increased internal oversight of Crown counsel and defence counsel on long complex trials, either by the Crown Attorney or by Legal Aid, increased emphasis on mentoring within the profession, resort to common law disciplinary remedies possessed by the judiciary to enforce the duties of their "officers" and, finally, more forceful and effective Law Society discipline when counsel's misconduct is reported by the judiciary. These remedies are a blend of preventative measures, to guide counsel, and punitive measures, to discipline counsel.

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[4] *Supra* note 1 at p.132

D. *Those Remedies that Engage Lifelong Learning in Professionalism*

There is one remedy recommended by *the Report* that should particularly engage this symposium as it concerns our approach to lifelong learning in professionalism. It is Recommendation 37 and it is framed in the following terms[5] :

> "The OCAA and the CLA should develop joint education programs in order to revive the traditions of collegiality and respect between the Crown and defence bars."

The background to this particular recommendation is set out in the paragraph that precedes it:[6]

> Finally, it was suggested to us by a number of participants, and we agree, that the respective cultures of the defence and Crown bars have become too entrenched and divided by hard ideologies and that traditions of collegiality and respect at the bar have been eroded. This, in turn, leads to poor communication, unnecessary disputes and a failure to resolve issues and shorten trials. Professionalism requires respect and courtesy towards one's opponent. These values must be taught in the law schools and they must be propagated in continuing education programs, including joint education programs. We strongly urge the Ontario Crown Attorneys' Association (OCAA) and the Criminal Lawyers' Association (CLA) to take on the task of rebuilding the traditions of respect and collegiality between the Crown and defence bars. These two organizations are each strong and highly respected. They both provided us with excellent submissions that were thoughtful and responsible. We believe that the OCAA and the CLA can and should work together on this vital project of breaking down some of the divisions that have grown up within the bar.

The leading continuing legal education programs within the criminal bar in Ontario are conducted by their two professional associations. The OCAA holds a spring conference, a fall conference and a summer school for all members of the Crown bar. The CLA holds a large fall conference and a number of smaller educational events during the year for all members of the defence bar. These programs are excellent at what they do but they also have some serious shortcomings. First, they tend to focus on important developments in substantive, procedural and evidence law and do not stress professionalism as an ongoing theme that infuses all aspects of legal practice. Second, they operate in complete isolation from one another, further emphasizing the divisions within the bar.

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[5] *Supra* note 1 at p.143
[6] *Supra* note 1 at p.142

The OCAA and the CLA have both become very strong organizations in this province. They have large memberships, effective leadership, stable finances and broad respect and support within the justice system. They must be encouraged to take leadership in breaking down the culture of two solitudes that currently exists in Ontario. Their present approach to continuing legal education arguably contributes to those two solitudes.

It must be remembered that the legal profession emerged at the same time in our history as the courts and that all lawyers were and remain "officers of the Court". As Orkin puts it in his leading text on *Legal Ethics:*[7]

> Failure to appreciate the dual role of the lawyer as an officer of the court and the representative of his client has been responsible for much misunderstanding of the lawyer's true function. The bar is an important part of the Court; originally the serjeants [the earliest English barristers] were on almost an equal footing with the judges and as fellow members of the great guild which administered the law they and the judges addressed one another as "brother" and lodged together at the Serjeants' Inns. To this day the lawyer is neither the servant of his client nor of the Court. He is, in the words of Lord Eldon, "an officer assisting in the administration of justice", and his status as an officer of the Court has been one of the most important influences in formulating the ethical principles which govern his conduct.
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> ... The preamble to the Canons of Legal Ethics approved by the Canadian Bar Association sums up his status and responsibilities in these words:
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> > "The lawyer is more than a citizen. He is minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honourable and learned profession. In these several capacities it is his duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself"

When barristers act either for the Crown or for the defence they must balance their duty to the client with their duty to the court. As Orkin puts it, it is this "dual role" as both "officer of the court" and "representative of the client" that has been the cause of "much misunderstanding of the lawyer's true function". It is widely accepted that Crown counsel have special duties as "minister

[7] Mark Orkin, *Legal Ethics* (Toronto: Cartwright & Sons, 1957) at pp. 4-13

of justice" but it is often forgotten that defence counsel have similar duties. As Lord Denning put it in *Rondel v Worsley*, an advocate[8] :

> ....is a minister of justice equally with the judge. He has a monopoly of audience in the higher courts. No one save he can address the judge unless it be a litigant in person. This carries with it a corresponding responsibility.... He must ... do all he honourably can on behalf of his client. I say "all he honourably can" because his duty is not only to his client. He 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.

In its earlier days, the criminal bar was not rigidly divided into Crown counsel and defence counsel. A barrister could take a brief for either side and, in some jurisdictions, they still do. As the bar became divided in Ontario, into two separate professional camps, continuing legal education became divided. The common duties to the court that bind all counsel together as "ministers of justice" have tended to become lost and lawyers increasingly define themselves by reference to the one side of the litigation that they invariably represent.

It may be unrealistic to think that the OCAA and the CLA can turn back the clock and abandon their current practice of holding completely separate educational events. There is, perhaps, a unique role here for the academy and the judiciary to take the lead and host continuing legal education events where the emphasis is on the common standards of professionalism that apply to all lawyers, whether they act for the Crown or the defence. If an annual conference on professionalism was organized by leaders of the academy and the judiciary, and all members of the Crown and defence bars were invited, the two cultural solitudes that currently exist might begin to break down. The academy and the judiciary are particularly well-suited to take on this role as their allegiances are more overtly owed to the justice system as a whole and not to one side or the other of the bar.

E. Conclusion

If the findings of *the Report* are well founded, and there seems to be ample evidence of declining standards of professionalism and its impact on the trial process, then lifelong learning in professionalism is an obvious remedy.

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[8] *Rondel v. Worsley* [1967] 1 Q.B.443 (C.A.); aff'd [1969] 1 A.C.191 (H.L.)

However, the current structure of continuing legal education in Ontario is ill-suited to solving the problem as it tends to accentuate the cultural divisions between the Crown and the defence rather than stressing the common duties that both sides share.

The Chief Justice of Ontario's annual symposium on professionalism has begun the process of reviving broad joint educational programs on this subject. What needs to happen next is the development of more specialised programs, targeted specifically to the criminal trial context. Both Crown and defence counsel should be invited to joint programs, led by the judiciary and the academy, where standards of professionalism in the criminal trial process would be the main focus of continuing education.