NOVA SCOTIA
BARRISTERS' SOCIETY

Conduct Unbecoming

WHAT SHOULD THE SOCIETY DO WHEN IT COMES TO GOSSIP, ONLINE POSTS AND BAD BEHAVIOUR ON SOCIAL MEDIA?

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"lawyers…not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint." Justice Abella, writing for the Court, *Doré v. Barreau du Quebec*, para 68.

Introduction

Concerns with lawyers' conduct on social media are increasingly being reported to the Society. We are receiving calls and complaints about what lawyers post online, whether it be via Facebook, Twitter, or Instagram. Social media is a platform for speech and its use is ubiquitous: most lawyers have at least some online presence, personally and professionally.

This paper seeks to explore the Society's role in reviewing the speech of its members outside of their professional lives. There are a number of responsibilities and obligations that come with the privilege of practicing law. While lawyers have the same Charter guarantees as anyone else, including the s. 2(b) right to freedom of expression, this right is restricted by the ethical obligations a lawyer owes as a licensed member of the legal profession. There are limits placed on lawyers, even in their personal life, when it comes to speech.

First, I will set out three categories that impugned speech could fall into that correspond with the rules in the *Nova Scotia Barristers' Society Code of Professional Conduct*[1] (the "*Code*") as it applies to a lawyer's private conduct. Then I provide an overview of the meaning of "conduct unbecoming", which is the threshold for a lawyer's conduct to be subject to formal discipline, and I provide a summary of a discussion about the Society's reach. Then I explore the Supreme Court of Canada's comments in *Doré*[2] and *Groia*[3] with respect to balancing of the right to freedom of expression with the ethical obligations of lawyers. Lastly, I provide a more detailed exploration of the three identified categories of speech and some suggested principles that can be used in conducting an ethical analysis of a lawyer's speech outside of their professional life.

Categories of speech and the *Code*

To determine whether and to what extent the Society regulates the speech of its members, I have identified three categories that reported speech could fall into, which correspond with the three rules in the *Code* that explicitly engage a lawyer's conduct in their private life. These categories are drawn down from the rules. I would go so far as to suggest that speech that falls outside of these categories is outside of the rules governing the conduct of lawyers and is not within the Society's jurisdiction to review.

1. Speech that could be considered imprudent, rash, rude, defamatory or even offensive, but does not cross the threshold into being discriminatory or harassing

The integrity rule in the *Code* provides that lawyers have "a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the

[1] The rules referenced are from the *Nova Scotia Barristers' Society Code of Professional Conduct*.
[2] *Doré v. Barreau du Québec*, 2012 SCC 12.
[3] *Groia v. Law Society of Upper Canada*, 2018 SCC 27.

profession honourably and with integrity."[4] The commentary to the rule provides that "a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety" ([2]). The regulation of the lawyer's conduct extends to not only their conduct in their professional life, but also their conduct in their private life.

The commentary provides,

> Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action ([3]).

This is tempered by the next paragraph in the commentary, which provides that

> Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity ([4]).

This rule and the commentary provide a challenge when evaluating a lawyer's speech in their private lives. The integrity rule is arguably of the broadest application, as it is written almost aspirationally, asking that lawyers conduct themselves in a way that "inspire[s] the confidence, respect and trust…of the community." There are many examples of online posting and private text messages written by lawyers that do not inspire in that way. The question is whether they should attract the scrutiny of the Society.

2. Speech that involves the justice system: encouraging respect for the administration of justice

On top of a lawyer's obligation to conduct themselves with integrity[5] and to avoid conduct unbecoming of a lawyer, lawyers are also obligated to "encourage public respect for and try to improve the administration of justice" (Rule 5.6-1) The commentary to this rule in the Code provides that "a lawyer's responsibilities are greater than those of a private citizen".[6] The rule requires that any criticism of the justice system must be bona fide and cautions the lawyer to be "particularly careful…because the mere fact of being a lawyer will lend weight and credibility to public statements".[7] On the other hand, the rule also states, "for the same reason, a lawyer should not hesitate to speak out against an injustice".[8]

The cases summarized below speak to a lawyer's obligations with respect to the justice system and the value of being given a wide berth for criticism of it, while also paying specific attention to their obligations to be civil when doing so.[9]

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[4] Rule 2.1
[5] The integrity rule (2.1).
[6] Commentary 1 to Rule 5.6-1.
[7] Ibid.
[8] Ibid.
[9] Rule 5.1-5 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealing.

3. Speech that is discriminatory or harassing

A limit on freedom of expression is the prohibition on speech that is discriminatory or harassing. The question that arises in this category, indeed in all of these categories, but is particularly pronounced in the category discussing speech that is discriminatory or harassing, is whether and to what extent should a professional regulator wade into the private life of its members?

The Code provides that

6.3-3 A lawyer must not sexually harass any person.

6.3-4 A lawyer must not engage in any other form of harassment of any person.

6.3-5 A lawyer must not discriminate against any person.

The commentary goes on to say that lawyers have "a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws."[10]

Purely private communications such as private text messages between a lawyer and a friend, partner, or family member are likely not something that should attract the scrutiny of the Society. On the other hand, if the speech of the member belies a discriminatory attitude and is observed repeatedly or is indicative of a pattern that is harassing, then it may be reasonable for the Society to evaluate it for a breach of the rule.

Conduct unbecoming

There are a number of sanctions/measures that the Society may impose, outside of formal discipline, for a breach of the rules listed above. Generally, however, in order for a complaint to result in formal "discipline" as defined by the Regulations (e.g. a Consent to Reprimand or charges being laid - both of these measures public) a member must be found to have breached the *Code* and the breach must amount to professional misconduct, conduct unbecoming or professional incompetence.[11]

"Conduct unbecoming" is conduct that

> tends to bring discredit upon the legal profession including one or more of the following:
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> (i) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or competence as a member of the Society
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> (ii) taking improper advantage of the youth, inexperience, lack of education, lack of sophistication, or ill health of any person;
>
> (iii) engaging in conduct involving dishonesty;[12]

It is obvious that there is conduct that may not fall into (i) through (iii) but could still bring into question a lawyer's professional integrity. For these types of situations, where the *Code* is

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[10] Commentary 1 to rule 6.3
[11] Regulation 9.4.3. See 1.1.1 (i) and (j) and 9.4.3(e) of the Regulations,
[12] Regulation 9.1.3.

breached but the conduct does not reach the threshold of 'conduct unbecoming', there remain a number of disciplinary tools that may be exercised by the Society. These disciplinary tools are not public, but where the member could benefit from professional guidance, they are provided with it, either through a caution, a counsel, a letter of advice or through a practice review or mentorship, etc.

Most law societies across the country have a broader scope when it comes to 'conduct unbecoming'. For instance, the enabling statute of the Law Society of British Columbia provides that

> "conduct unbecoming the profession" includes a matter, conduct or thing that is considered, in the judgment of the benchers, a panel or a review board,
>
> (a) to be contrary to the best interest of the public or of the legal profession, or
>
> (b) to harm the standing of the legal profession;[1]

It is similarly defined by the Law Society of Saskatchewan's enabling statute:

> (d) "conduct unbecoming" means any act or conduct, whether or not disgraceful or dishonourable, that:
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> (i) is inimical to the best interests of the public or the members; or
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> (ii) tends to harm the standing of the legal profession generally;[2]

The regulator's reach

In *Lawyers' Ethics and Professional Regulation*, the editors note that, at its narrowest, the ability to discipline a lawyer for conduct that occurs outside of their practice "ensures that a technical argument that the misconduct occurred outside of the lawyer's legal practice is unavailable to lawyers who have behaved unethically". At the broadest,

> much the power of the law societies to regulate for extra-professional misconduct extends further. It allows the law societies to discipline a lawyer for any behaviour which the law society believes constitutes "conduct unbecoming" a member of the law society. Canadian lawyers have been disciplined (albeit in some cases mildly) for "conduct unbecoming" as varied as public nudity, failing to care for animals at the lawyer's farm and writing a bad cheque to a landlord (p 676).

While the above seems to suggest that law societies are run rampant in lawyers' personal lives, the case law involving the most severe punishment – disbarment – belies a much higher threshold for when Societies will discipline a lawyer for their extra-professional conduct.

Supreme Court of Canada in Doré and Groia

<u>Doré</u>

The *Doré c. Barreau du Quebec* is instructive because it provides a framework for balancing between constitutional considerations with respect to freedom of speech and the obligations a lawyer undertakes upon becoming a member of the bar in exchange for the privilege of practicing law.

Mr. Doré was found by the Disciplinary Council to have breached Article 2.03, which provides: "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity."[13] The Court likened Article 2.03 to the Courtesy and Good Faith Rule[14] in the *Code*:

> a lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding.[15]

This case arose after Mr. Doré appeared before Justice Boilard on behalf of a client. Justice Boilard made a number of disparaging remarks in open court about Mr. Doré's arguments and aptitude as counsel. Afterwards, Mr. Doré wrote a strongly worded letter, condemning Justice Boilard's behaviour and disparaging his abilities as a judge. The Disciplinary Council of the Barreau du Québec

> [16] ... found that Mr. Doré's letter was [translation] "likely to offend and is rude and insulting" (2006 CanLII 53416, at para. 58). It concluded that his statements had little expressive value, as they were "merely opinions, perceptions and insults" (para. 62). The Disciplinary Council rejected Mr. Doré's submission that his letter was private, since it was written by him as a lawyer. It also concluded that Justice Boilard's conduct could not be relied on as justification for the letter.

It is important to note, as the court does in the passage above, that Mr. Doré's conduct that gave rise to discipline was in a professional context.

With respect to Mr. Dore's argument that Article 2.03 violated his freedom of expression guaranteed by s. 2(b) of the *Charter*,

> [17]…the Disciplinary Council found that
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> > [translation] [t]his is a limitation on freedom of expression that is entirely reasonable, even necessary, in the Canadian legal system, where lawyers and judges must work together in the interest of justice. [para. 88]
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> Moreover, it concluded that <u>Mr. Doré had willingly joined a profession that was subject to rules of discipline that he knew would limit his freedom of expression</u>. While the rules may [translation] "be seen as restrictions imposed on the members of the Barreau in comparison to the freedom that may be enjoyed by other Canadian citizens", they are made in exchange for "the privileges conferred on lawyers as members of an 'exclusive profession'" (paras. 109-10). On July 24, 2006, based on what it found to be the seriousness of Mr. Doré's conduct and on his failure to show remorse, the same panel suspended Mr. Doré's ability to practise law for 21 days (2006 CanLII 53436) [emphasis added].

The Disciplinary Council held that becoming a member of the Bar means joining a profession for which the ethical obligations limit the member's freedom of expression. This could be considered a first principle when considering the limits placed on lawyers' speech.

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[13] para 13.
[14] Rule 5.1-5 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealing.
[15] Para 63 of the decision, Rule 5.1-5 of the *Code*.

Another principle from the Court's decision in Doré is that

> [66] … Disciplinary bodies must … demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

The Court went on to determine that a reprimand was warranted in light of Mr. Dore's letter[16], in which he called the judge, "[translation] "loathsome", arrogant and "fundamentally unjust" and in which he accused Justice Boilard of

> "hid[ing] behind [his] status like a coward"; having a "chronic inability to master any social skills"; being "pedantic, aggressive and petty in [his] daily life"; having "obliterate[d] any humanity from [his] judicial position"; having "non-existent listening skills"; having a "propensity to use [his] court — where [he] lack[s] the courage to hear opinions contrary to [his] own — to launch ugly, vulgar, and mean personal attacks", which "not only confirms that [he is] as loathsome as suspected, but also casts shame on [him] as a judge"; and being "[un]able to face [his] detractors without hiding behind [his] judicial position".[17]

The Court held that the reprimand "cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives."[18]

Groia

The Supreme Court of Canada in Groia also discusses the balancing of lawyer's rights with the statutory objective of the Society. The statutory objective of the Society is to "protect the public interest in the practice of law."[19] The Court held that

> a particular professional misconduct finding that engages a lawyer's expressive freedom will only be reasonable if it reflects a proportionate balancing of the law society's statutory objective with the lawyer's expressive freedom.[20]

This could be considered a third principle in evaluating a lawyer's speech.

Each case is fact specific and proportionate balancing will involve

> Considering the unique circumstances…— such as what the lawyer said, the context in which he or she said it and the reason it was said —…to accurately gauge the value of the impugned speech. This…allows for a decision…that reflects a proportionate balancing of the lawyer's expressive rights and the Law Society's statutory mandate.[21]

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[16] Doré, para 71.
[17] Doré, para 70.
[18] Doré, para 71.
[19] *Legal Profession Act*, s. 4(1); see also Groia, para 114: "Under its statutory mandate, the Law Society has a duty to advance the public interest, the cause of justice and the rule of law by regulating the legal profession: *Law Society Act*, s. 4.2.
[20] Groia, para 113.
[21] Groia, para 118.

Considering the unique circumstances, or engaging in a contextual analysis, each time the Society is reviewing the speech of a member, is a fourth principle.

Conclusion

The purpose of these rules, indeed of all the rules in the Code, comes back to the purpose of the Nova Scotia Barristers' Society as the regulator: "to protect the public interest in the practice of law."[22] It is pursuant to this statutory authority that the Society shall "establish standards for the professional responsibility and competence of members in the Society" and "regulate the practice of law in the Province".[23] As the Court set out in Groia, the Society should only regulate the speech of its members in their private lives insofar as it is necessary to do so to "protect the public interest in the practice of law." We must also balance the fact that lawyers have willingly joined a profession that is subject to a *Code of Conduct* that constrains their speech with the fact that it is also in the public interest that lawyers be able to speak their minds.

While both of the above cases are helpful in the sense of providing some framework for balancing between expressive freedom and a lawyer's ethical obligations in their professional lives, we still do not have a framework for the value of a lawyer's expressive freedom in the context of their private life. Much of the Court's discussion in Doré and Groia has to do with the importance of lawyers being able to freely express themselves because of the role they play in the justice system.[24] These cases are less helpful in the two other categories, in which we discuss speech that may be harassing or discriminatory, or may be merely rude or offensive. A further analysis should be undertaken of both the balancing between freedom of speech and the rule with respect to civility, and the value of expressive freedom in private communication, as these were outside the scope of this overview.

Principles

First principle:

> A lawyer has "willingly joined a profession that was subject to rules of discipline that [they] knew would limit [their] freedom of expression".[25]

Second principle:

> We must take into consideration the importance of the expressive rights in each case, in light of
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> (a) the lawyer's right to expression and
> (b) the public's interest in open discussion.[26]

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[22] *Legal Profession Act*, s. 4(1).
[23] *Legal Profession Act*, s. 4(2)(b) and (c).
[24] Groia, para 115: "Allowing lawyers to freely express themselves serves an important function in our legal system." Doré, para 63: "the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the Charter, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular."
[25] Para 17. Dore.
[26] Para 66 Dore.

Third principle:

> The Society should only limit its members' freedom of expression in their private lives insofar as it is necessary to do so to "protect the public interest in the practice of law."[27]

Fourth principle:

> The Society must consider the unique circumstances in each case: such as what the lawyer said, the context in which they said it and the reason it was said.[28]

[27] Groia, para 113.
[28] Groia, para 118.