

Lawyers' Incivility in Family Law and the Question of Systems Abuse

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ABSTRACT

Family law has a reputation for incivility, which is curious given that ideas about civility are vague and imprecise. The legal profession experienced a civility movement, but concerns about lawyers' incivility have resurfaced following the COVID-19 pandemic. In this paper, I present the results of a case law review which does not support family law's reputation for incivility. Instead, however, the results show three significant problems. Incivility is not commonly reflected in law society disciplinary or family law decisions, but when it is, the misconduct is extreme or part of a cumulative pattern, suggesting a high threshold. Second, when incivility occurs in family law, it is often in cases where there are allegations of intimate partner violence ("IPV"), raising questions about lawyers' incivility as a tool of systems abuse. Finally, there are worrying cases of lawyers representing themselves in their own family law matters which also involve findings, allegations, or suggestions of IPV. These results demonstrate that civility, as a vague and imprecise concept, has the power to distract decision-makers and shift the focus from abuse to professionalism, contributing to the myriad ways the justice system fails survivors. I argue that, where there is IPV, lawyers' incivility on behalf of an abusive client (or themselves) amounts to systems abuse, which is something lawyers must not participate in because

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it is contrary to their duty to uphold the rule of law and violates lawyers' obligations to the administration of justice.

VI. INTRODUCTION

In 2020, after a motion for exclusive possession of a matrimonial home that involved “a rhetorical fierceness that one would expect of a mixed martial arts cage match”, Justice Kurz of the Ontario Superior Court of Justice offered “a few words of caution” to the “profession.”¹ He advised family lawyers to counsel their clients to lower “the rhetorical temperature” and not to throw flames, not to raise “their discord to Chernobyl levels of conflict.”² Similarly, in 2021 Justice Himel, of the same court, observed a “culture of unreasonableness that plagues the Court.”³ In the context of a motion for spousal support, she provided a list of examples of unreasonable conduct including “ignoring” spacing and font size to “comply” with page limitations, using court resources to “delay”, and seeking unreasonable costs and unrealistic non-child-centric relief.⁴ Justice Himel framed the issue as a civility problem:

It seems that, for some counsel, the days of valuing one's reputation over success in any particular file may be gone. Given the current state of rapid transformation of the Court, coupled with additional unspecified future changes, that is unfortunate. Civility inside and outside of the courtroom, and respect for colleagues and the Court, are vitally important to the successful functioning of the Family Justice system. Enough is enough.⁵

Both *Alsawwah v Afifi* and *Schieder v Gajewczyk* occurred after the COVID-19 pandemic began and before the 2021 *Divorce Act* amendments came into force.⁶ Courts were experiencing unprecedented challenges and judges were advocating for “more cooperation” and “less litigation”,⁷ suggesting that family law must be “pursued in a different way” during the pandemic.⁸

¹ *Alsawwah v Afifi*, 2020 ONSC 2883 at paras 2 & 103 [*Alsawwah*].

² *Alsawwah*, *ibid* at paras 104-108.

³ *Schieder v Gajewczyk*, 2021 ONSC 635 at para 11 [*Schieder*].

⁴ *Schieder*, *ibid* at para 11.

⁵ *Schieder*, *ibid* at paras 12-14.

⁶ *Divorce Act*, RSC 1985, c 3 (2nd Supp) (the amendments came into force on March 1, 2021) [*Divorce Act*].

⁷ *Ribeiro v Wright*, 2020 ONSC 1829 at para 27.

⁸ *Ukiri v Erskine*, 2020 ONSC 4294 at para 66 [*Ukiri*].

When I started researching this paper, I began with a question about how often family lawyers were uncivil. Were these comments by Justice Himel and Justice Kurz representative of what was happening in family courts? However, after conducting a case law review of family law decisions and family lawyers' disciplinary decisions, I could not find support for their observations, likely because of the various ways that incivility is discussed and disciplined. What is more concerning, however, is that many of the cases that were revealed included allegations of intimate partner violence ("IPV"), including cases where lawyers represented themselves.⁹ As a result, conducting this research left me with concerns about the usefulness of civility as a concept, and more importantly, concerns about a link between incivility and systems abuse.

Systems abuse is an extension of IPV, often coercive control, where the parties are engaged in a legal dispute and the abuser weaponizes the justice system against their former spouse.¹⁰ In family law, it is also known as "legal bullying", litigation harassment, "paper stalking, paper abuse",¹¹ "judicial terrorism", "procedural stalking", and "litigation abuse".¹² Systems abuse has been judicially recognized as a form of family violence.¹³ It has been described as a form of stalking, where the abuser uses the system to force

⁹ Throughout this paper I use the terms "victim" and "survivor" interchangeably. Some victims of IPV prefer to be called survivors, whereas others prefer the label victim, and some do not respond to either term. My inconsistency in terminology is to reflect variation in experiences and to avoid stereotypes.

¹⁰ See Rise Women's Legal Centre, Haley Hrymak & Kim Hawkins, "Why Can't Everyone Just Get Along?: How BC's Family Law System Puts Survivors in Danger" (January 2021) at 30-36 online (pdf): <womenslegalcentre.ca> [perma.cc/XBG5-79WG] [Rise Report]; Linda Neilson, "Responding to Domestic Violence in Family Law, Civil Protection and & Child Protection Cases, 2nd ed." (2020) 2017 CanLII Docs 2 at 7.4 online: <canlii.ca/t/ng> [perma.cc/HAV8-J8L6] [Neilson, Responding]; Heather Douglas, "Legal Systems Abuse and Coercive Control" (2018) 18(1) *Criminology & Criminal Justice* 84 [Douglas, Systems Abuse]; Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners" (2015) 32 *Windsor YB Access Just* 149 [Mosher, A2J].

¹¹ Mosher, A2J, *ibid* at 158.

¹² Lisa A. Tucker, "The [E]x Factor: Addressing Trauma from Post-Separation Domestic Violence as Judicial Terrorism" (2021) 99 *Wash U L Rev* 339 at 343.

¹³ See *LDB v ANH*, 2023 BCCA 480 at paras 110-117 [LDB]; *Hokhold v Gerbrandt*, 2014 BCSC 1875 at paras 30, 131-136; *aff'd* 2015 BCCA 268; *aff'd* 2016 BCCA 159; *T.M.H. v P.J.H.*, 2020 BCSC 804 at paras 236-240; Susan B. Boyd & Ruben Lindy, "Violence Against Women and the BC Family Law Act: Early Jurisprudence" (2016) 35 *CFLQ* 101 at 104.

contact and retain control (i.e., through court orders).¹⁴ Linda Neilson has identified thirty-six litigation tactics an abuser might use to maintain contact, domination, and control over a survivor.¹⁵ One challenge with identifying systems abuse is that the abuse may be overlooked by legal actors because the litigation may be wrongly justified as a “legitimate” exercise of legal rights.¹⁶ The conduct may be normalized as typical of contentious family law issues. Lawyers are rarely discussed as an extension of abuse, but when they leverage their knowledge of the legal system to facilitate their client’s abusive conduct, they participate in systems abuse.¹⁷ In this paper, I argue that where there is IPV, lawyers’ incivility on behalf of an abusive client amounts to systems abuse, which is something lawyers must not participate in because it is contrary to their duty to uphold the rule of law and violates lawyers’ obligations to the administration of justice.

In Part I, I provide an overview of civility and the profession’s concerns with incivility, before presenting the results of my case law review in Part II. The results show that incivility occurs when a lawyer is acting in a representative capacity, and when they are representing themselves. The results demonstrate that civility, as a vague and imprecise concept, has the power to distract decision-makers and shift the focus from abuse to professionalism, contributing to the myriad ways the justice system fails survivors. In Part III, I suggest that reframing civility to account for IPV is not the answer. Instead, I argue that when a client is abusive, the lawyers’ professional obligations to the administration of justice and rule of law prohibit facilitation of systems abuse.

VII. INCIVILITY AND THE CIVILITY MOVEMENT

A focus on civility is not new in the legal profession. The profession has historically used civility to describe ideal professional behaviour, and more recently the profession experienced a civility movement in response to increased incivility. The concern about lawyers’ incivility, generally, is the

¹⁴ Tucker, *supra* note 12 at 343.

¹⁵ See Linda C. Neilson, Centre for Research & Education on Violence Against Women & Children, “Failure to Protect: Social & Institutional Factors that Prevent Access to Justice in Family Violence / Family Law Cases” (June 2023) at 10-13 online (pdf): <unb.ca> [perma.cc/C64B-R896].

¹⁶ Susan L. Miller & Nicole L. Smolter, ““Paper Abuse”: When All Else Fails, Batterers Use Procedural Stalking” (2011) 17(5) *Violence Against Women* 637 at 641. See also Douglas, *Systems Abuse*, *supra* note 10 at 85.

¹⁷ See Douglas, *Systems Abuse*, *ibid* at 95.

problematic impact on procedural fairness and the administration of justice. In contrast, the concern with regulating civility is the risk of encroaching on the duty of resolute advocacy. Incivility is governed by the trial judge's oversight and law societies' disciplinary powers. There is no universal definition of civility and no bright line test to identify incivility, making it challenging to quantify and evaluate. I begin this section with a discussion of what civility and incivility are, before providing some background on the civility movement.

A. *What is Civility?*

Despite the importance of civility to the legal profession, there is no universal definition. Civility was intentionally not defined in *Groia v The Law Society of Upper Canada*, the Supreme Court of Canada decision that considered civility, in favour of a more contextual approach.¹⁸ The Oxford English dictionary defines civility as “behaviour or speech appropriate to civil interactions; politeness, courtesy, consideration”,¹⁹ and incivility as being “rude, uncivil or uncourteous behaviour towards others”, or “want of civility or politeness”.²⁰ In 2008, Alice Woolley suggested that the legal profession's use of the term civility encompassed two meanings: first, the “politeness and courtesy” with which lawyers “communicate with each other;” and second, the “conduct essential to ensure the proper functioning of the judicial process, with a specific focus on advocacy.”²¹

The Federation of Law Societies of Canada, *Model Code of Professional Conduct* (“*Model Code*”) does not include a civility rule; instead, there are several rules that encompass lawyers' duty of civility.²² The duty of “integrity” requires that lawyers “discharge” their duties “honourably”.²³ Lawyers must behave honestly with their clients and the tribunal.²⁴ Being “civil” is an “expected practice”.²⁵ Lawyers must be “courteous” and “civil”

¹⁸ *Groia v Law Society of Upper Canada*, 2018 SCC 27 at para 77 [*Groia*].

¹⁹ *Oxford English Dictionary*, (December 2024), sub verbo “civility”, online: <oed.com> [perma.cc/LN6P-AAZW].

²⁰ *Oxford English Dictionary*, (December 2024), sub verbo “incivility”, online: <oed.com> [perma.cc/NU6J-XPfZ].

²¹ See Alice Woolley, “Does Civility Matter?” (2008) 46:1 *Osgoode Hall L J* 175 at 177-179 [Woolley, Civility].

²² Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2024) [Model Code].

²³ Model Code, *ibid* at R 2.1-1.

²⁴ See Model Code, *ibid* at R 3.2-2, R 3.2-7, R 3.2-8, and R 5.1-2.

²⁵ Model Code, *ibid* at R 3.2-1[5](o).

in their service to clients, and with other lawyers and the public.²⁶ This obligation extends to the “tribunal”, requiring a lawyer to advocate in a way that treats the “tribunal with candour, fairness, courtesy, and respect.”²⁷ In October 2022, the *Model Code* was amended to require that lawyers not “harass a colleague, employee, client or any other person” including by conduct that might cause “humiliation, offence or intimidation” such as “bullying”.²⁸ Bullying is defined to include conduct that “might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property”.²⁹ These new provisions also apply to lawyers’ conduct beyond their “office or in legal practice.”³⁰ The duty of civility applies to lawyers’ engagement with opposing counsel and members of the public. A study of US civility codes found they had ten common themes, including, courteousness, communicating respectfully, being honest, and using the justice system efficiently.³¹ These themes reflect a Canadian understanding of civility as well.

Incivility also has no universal definition nor was it defined in *Groia*. The *Model Code* includes specific requirements, the violation of which, could be considered uncivil. For instance, communication must not be “abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.”³² Lawyers are not permitted to do anything “dishonest or dishonourable” or engage in “sharp practice”.³³ The Law Society of British Columbia (“LSBC”) has additional guidelines for family lawyers including avoiding “inflammatory language” and not “hindering, delaying, or bullying an opposing party.”³⁴ The LSBC is the only Canadian law society to create guidelines for family law.

What constitutes incivility seems to change over time as society evolves. For example, today vulgar language is common in pop culture whereas such

²⁶ See *Model Code*, *ibid* at R 3.2-1 and R 7.2-1.

²⁷ *Model Code*, *ibid* at R 5.1-1.

²⁸ *Model Code*, *ibid* at R 6.3-2. Although not every law society has followed, see e.g., Law Society of Ontario, *Rules of Professional Conduct* (Toronto: Law Society of Ontario, 2022).

²⁹ *Model Code*, *ibid* at R 6.3-2[3].

³⁰ *Model Code*, *ibid* at R 6.3-2[4], R 6.3-1[9], and R 6.3-3[4].

³¹ See Donald E. Campbell, “Raise your Right Hand and Swear to be Civil: Defining Civility as an Obligation of Professional Responsibility” (2011-2012) 47 *Gonz L R* 99 at 109.

³² *Model Code*, *supra* note 22 at R 7.2-4.

³³ *Model Code*, *ibid* at R 5.1-2(b) and R 7.2-2.

³⁴ Law Society of British Columbia, “Common-sense Guidelines for Family Law Lawyers” (1 May 2013), online: <lawsociety.bc.ca> [perma.cc/64TT-2LWG] [LSBC Guidelines].

language was once rare because of its offensiveness.³⁵ What is uncivil is also measured by the emotional reaction to it. The response to rudeness or discourteousness could be a range of emotions from antipathy to disinterest and so on.³⁶ In relation to IPV, survivors who suffer from trauma may experience incivility in ways that trigger fear because of a history of abuse, raising revictimization concerns.³⁷ This also suggests that what incivility is can vary depending on the context and person subjected to the misconduct.

Empirical studies have captured what some lawyers perceive to be uncivil conduct. In 2010, the Law Society of Ontario ("LSO") held a Civility Forum, where they gathered data on the types of incivility experienced.³⁸ Examples included "lateness", "rolling" eyes, "making faces", employing a "disrespectful tone of voice", "slamming down books", and "putting feet on the counsel table".³⁹ In 2023, the Toronto Lawyers Association conducted a survey on incivility ("TLA Report") and they found the six most common types of incivility were not responding "at all to correspondence", "excessive rigidity of positioning in a negotiation", "inappropriate interruption of others", "sarcasm or condescending attitude", "negotiating in bad faith or stretching the facts", and "aggressive, inflammatory, or rude texts or emails."⁴⁰

The concept of civility is further complicated by its historic normative baseline, that is, a version of professionalism that is white, male, protestant, and privileged.⁴¹ The version of civility that informs the *Model Code* and

³⁵ See Amy Mashburn, "Making Civility Democratic" (2011) 47 Hous L Rev 1147 at 1202-1203.

³⁶ Mashburn, *ibid* at 1196.

³⁷ See Negar Katirai, "Retraumatized in Court" (2020) 62 Ariz L Rev 81.

³⁸ See Lorne Wolfson & Adam Black, "Incivility and Sharp Practice in Family Law" (2012) 31 CFLQ 275 at 277-278 [Wolfson & Black].

³⁹ Wolfson & Black, *ibid* at 277-278.

⁴⁰ Toronto Lawyers' Association, "Report on Civility and Professionalism in the Legal Profession" (December 2023) at 24 [TLA].

⁴¹ See Constance Backhouse, "Gender and Race in the Construction of "Legal Professionalism": Historical Perspectives" in Adam Dodek & Alice Woolley *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver, BC: UBC Press, 2016) at 128 [Backhouse, Professionalism]; Amy Salzyzn, "John Rambo v. Atticus Finch: Gender, Diversity and the Civility Movement" (2013) 16(1) Leg Ethics 97 at 98-99 [Salzyzn, Civility]; W. Wesley Pue, "Becoming Ethical: Lawyers' Professional Ethics in Early Twentieth Century Canada" (1991) 20:1 Man LJ 227 [Pue, Becoming]; Jonnette Watson Hamilton, "Metaphors of Lawyers' Professionalism" (1995) 33:4 Alta L Rev 833 at 856-858; W. Wesley Pue, "Cowboy Jurists and the Making of Legal Professionalism" (2008) 45:5 Alta L Rev 29 at 43-46.

Groia is theoretically and conceptually wrapped up in a lawyer-statesman ideal. Early notions of professionalism were concerned with preserving and idealizing gentlemanliness – excluding some people from the profession, such as women.⁴² There was early resistance to introducing professional codes of conduct because lawyers thought it would be like “drawing up a Code of Etiquette to make a gentleman”.⁴³ In essence, concerns about civility were primarily attempts to isolate the profession – to exclude those who did not fit. The idea of civility that exists today is embedded in what Amy Salyzyn has called “two competing masculinities”: that of “Rambo lawyers” or the zealous advocate, and the other of the “gentlemanly Atticus Finch” or the gentlemanly professional.⁴⁴ Either way, “women and other outsider lawyers [are] largely invisible” to the dominant ideologies of the legal profession and its conceptualization of civility.⁴⁵ Thus, concerns about incivility are loaded with gendered and racialized assumptions about using civility to create a homogenized profession.

B. *The Civility Movement*

The Canadian legal profession experienced a “civility movement” which was reignited by the COVID-19 pandemic.⁴⁶ The first movement began in the late 1990’s. Following concerns about incivility, in 1999 the Law Society of Alberta launched a “Civility Initiative.”⁴⁷ One year later, the Advocate’s Society held a Symposium on Civility, which eventually led to their Principles of Civility, endorsed by the Canadian Bar Association.⁴⁸ The law societies of Alberta and British Columbia have also issued practice

⁴² See W. Wesley Pue, “Cultural Projects and Structural Transformation in the Canadian Legal Profession” in W. Wesley Pue and David Sugarman eds., *Lawyers and Vampires: Cultural Histories of Legal Professions* (London, UK: Hart Publishing, 2003); Pue, *Becoming*, *ibid*; Mary Jane Mossman, “Precedents, Patterns and Puzzles: Feminist Reflections on the First Women Lawyers” (2016) 5:4 *Laws* 1; Mary Jane Mossman, “Defining Moments for Women as Lawyers: Reflections on Numerical Gender Equality” (2005) 17:1 *CJWL* 15; Salyzyn, *Civility*, *ibid* at 98-99; Backhouse, *Professionalism*, *ibid*.

⁴³ Pue, *Becoming*, *ibid* at 249-259.

⁴⁴ Salyzyn, *Civility*, *supra* note 41 at 97-98.

⁴⁵ Salyzyn, *Civility*, *ibid* at 98.

⁴⁶ Salyzyn, *Civility*, *ibid* at 98.

⁴⁷ Salyzyn, *Civility*, *ibid* at 101.

⁴⁸ See The Advocates’ Society, “Principles of Civility and Professionalism for Advocates” (20 February 2020) at 2 online (pdf): <advocates.ca> [perma.cc/AU2J-QVUZ]; Salyzyn, *Civility*, *ibid* at 101.

advisories on civility.⁴⁹ Despite this momentum, complaints about lawyers' incivility not only continued, but in Ontario they increased.⁵⁰ After *Groia*, discussions within the profession about incivility cooled even though the problem was unresolved. However, the COVID-19 pandemic triggered new concerns about lawyers' incivility, and in December 2023 the TLA Report revealed that "uncivil and unprofessional conduct is commonly observed in the profession."⁵¹

In relation to family law, at the height of the first wave of the civility movement, Lorne Wolfson and Adam Black observed that "incivility is particularly problematic in family law."⁵² They suggested that incivility is caused by losing "objectivity", the "cycle" of fighting incivility with incivility, and burn-out making it easier to react "badly".⁵³ They argued that family lawyers have an "additional responsibility to conduct [themselves] with civility in order to promote the civil relationship that [needs to be encouraged] between the parties."⁵⁴ In 2022, a program offered by the Association of Family and Conciliation Courts incorporated Justice Kurz and Justice Himel's advice into a description of "professionalism", and they held a session on "what not to do" as counsel, emphasizing the importance of civility.⁵⁵

In relation to jurisprudential guidance, in 2018, the Supreme Court of Canada released *Groia*, a decision that was expected to emphasize the value of civility and inform an overdue "culture shift".⁵⁶ *Groia* followed an 18-year saga that should have been focused on the \$6 billion dollar Bre-X scandal, but was redirected to focus on the conduct of John Felderhof's lawyer, Joseph Groia.⁵⁷ Mr. Groia was found guilty of professional misconduct for

⁴⁹ See Salyzyn, Civility, *ibid* at 101; Susan Turner, "Raising the Bar: Maximizing Civility in Alberta Courtrooms" (2003) 41:2 Alta L Rev 547 at 551.

⁵⁰ See Wolfson & Black, *supra* note 38 at 281; Judy Van Rhijn, "LSUC Moves Forward with Civility Crusade" (24 May 2010) online: <lawtimesnews.com> [perma.cc/H5LD-7PA2].

⁵¹ TLA, *supra* note 40 at 5.

⁵² Wolfson & Black, *supra* note 38 at 276.

⁵³ Wolfson & Black, *ibid* at 286-287.

⁵⁴ Wolfson & Black, *ibid* at 293.

⁵⁵ J. K. Coats & J. Kurz, "Professionalism: A Judge's Perspective" (7 April 2022) AFCC - Ontario [unpublished]; J Andrea Himel & J. Marvin Kurz, "What Not to Do: Common Missteps and Oversteps to Avoid the Next Time you are in Court" (February 2022) AFCC - Ontario [unpublished].

⁵⁶ *Hryniak v Mauldin*, 2014 SCC 7 at para 2.

⁵⁷ See *Groia*, *supra* note 18 at paras 10-11.

incivility at every stage, but he was surprisingly vindicated by the Supreme Court in a split decision. In essence, the majority gave lawyers permission for incivility in the pursuit of resolute advocacy provided it is done in “good faith” with “sufficient factual foundation”.⁵⁸ Justice Karakatsanis, Justice Gascon, and Justice Rowe dissented, concerned that the majority’s decision would “validate improper conduct and threaten to undermine the administration of justice and the culture change that [the] Court [had] called for in recent years.”⁵⁹ The majority’s decision, penned by Justice Moldaver, had the effect of cooling the civility movement⁶⁰ and entrenching the status quo, until the global pandemic began.

Civility is important to the proper functioning of the justice system. As the majority said in *Groia*, the “duty to practice with civility has long been embodied in the legal profession’s collective conscience – and for good reason.”⁶¹ Incivility increases the cost and duration of litigation, while also fueling the access to justice crisis. The majority held that incivility can be damaging to “trial fairness and the administration of justice” in four ways.⁶² First, “incivility can prejudice a client’s cause” by leading the judge to view the case “unfavourably”, and causing a breakdown in the relationship between counsel, “eliminating any prospect of settlement”.⁶³ Second, “incivility is distracting;” it creates less focus on the legal issues in the case by the lawyers and judge.⁶⁴ Third, “incivility adversely impacts other justice system participants,” including by exacerbating “the already stressful task of testifying at trial”.⁶⁵ Lastly, “incivility can erode public confidence in the administration of justice.”⁶⁶ Thus, incivility has a negative impact on the resolution of matters and the access to justice crisis, and it harms the public’s confidence in the administration of justice. Despite *Groia*, or maybe because of the decision, the incivility problem continued, however. My question was the scope and parameters of the incivility crisis in family law. In the next part, I present the results of my case law review.

⁵⁸ *Groia*, *ibid* at para 132.

⁵⁹ See *Groia*, *ibid* at para 219.

⁶⁰ See Alice Woolley, “Did Joe Groia Kill the Civility Movement?” (2018) 21:2 Leg Ethics 159.

⁶¹ *Groia*, *supra* note 18 at para 63.

⁶² *Groia*, *ibid* at para 63.

⁶³ *Groia*, *ibid* at para 64.

⁶⁴ *Groia*, *ibid* at para 65.

⁶⁵ *Groia*, *ibid* at para 66.

⁶⁶ *Groia*, *ibid* at para 67.

VIII. CASE LAW REVIEW

To conduct a case law review, I searched family law and law society disciplinary decisions on CanLII and WestLaw. I focused on decisions from British Columbia and Ontario, including both federal and provincial family law legislation, because those provinces have different family law regimes. The British Columbia *Family Law Act* has emphasized settlement since it came into force in 2013, and the LSBC guidelines are in place in that province;⁶⁷ whereas Ontario legislation tends to be structured more adversarially and there are no guidelines for family lawyers.⁶⁸ Comparing both jurisdictions ideally provided a snapshot of Canadian family law culture. The search period was February 2019 - February 2022, capturing the post-Groia era of civility and inclusive of the COVID-19 pandemic. This period also captured the enactment of the 2021 *Divorce Act* amendments, which introduced family violence considerations related to parenting into federal divorce legislation for the first time.⁶⁹

There are drawbacks to focusing on case law to understand incivility. Incivility is regulated by the presiding judge and the lawyer's governing law society, capturing litigation, but not consensual dispute resolution processes ("CDR"). Another methodology is required to comprehensively evaluate incivility in CDR processes, where most family law matters are resolved. It is also not clear how often law societies are disciplining lawyers in relation to incivility because only decisions pursuant to public hearings are published, not the outcomes from complaints resolved before they reach the tribunal level.⁷⁰ However, despite these limitations, given that the comments made by Justice Himel and Justice Kurz were in reported family law decisions, I was curious to see whether their observations reflected a widespread problem.

⁶⁷ See *Family Law Act*, SBC 2011, c 25 [BC FLA]; Family Justice Reform Working Group, "A New Justice System for Families and Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force" (British Columbia: BC Justice Review Task Force, 2005), online: <2.gov.bc.ca> [perma.cc/2DB4-GE4Z] LSBC Guidelines, *supra* note 34.

⁶⁸ See *Family Law Act*, RSO 1990, c F 3 [ON FLA].

⁶⁹ *Divorce Act*, *supra* note 6, ss 2(1) and 16.

⁷⁰ See Law Society of British Columbia, "2021 Annual Report" (British Columbia: The Law Society of British Columbia, 2022); Law Society of Ontario, "2021 Annual Report" (Ontario: Law Society Tribunal, 2022), online: <lawsocietytribunal.ca> [perma.cc/ML7U-3742]; Amy Salzyn, "Law Society Complaints: What We Don't Know and Why This Is A Problem" (10 June 2015) online (blog): <slaw.ca> [perma.cc/VW28-VPTA].

The first search looked for cases with the word *civility*, *incivility* or *uncivil*, which resulted in 262 decisions. This number was basically unchanged from 269 in the 2015-2017 period. The lack of change indicates that both *Groia* and the COVID-19 pandemic did not have an impact on quantity. Once the results were narrowed to family law cases, and those that did not include a civility issue or involve family lawyers were removed, there were only seventeen decisions. In other words, less than 1% of the cases involved family lawyers. However, given the vagueness concerns about civility and having found so few cases, I conducted additional searches. I noted up *Groia*, searched family law cases using the words *aggressive* or *excessive*, and *integrity* or *unprofessional*. In total, there were twenty-seven civility cases, seventeen of which were law society decisions and ten were family law cases. The results are summarized in the table below.

	Number of Cases	Removed ⁷¹	Duplicates	Family Law	Discipline
Civility, incivility or uncivil	262	245	NA	2	15
Groia	55	45	8	2	0
Aggressive or excessive	188	177	7	4	0
Integrity or unprofessional	20	10	6	2	2

A. Summary of Findings

The findings suggest that incivility is not a problem in family law. In a three-year period, I only found twenty-seven civility cases involving family lawyers; and two of them involved claims by a self-represented litigant (not a lawyer) that opposing counsel was uncivil towards them, and both times the court disagreed. In the seventeen law society decisions, twelve different lawyers were involved (one was not guilty of incivility). If I had of focused strictly on cases with a civility analysis, the total number of cases would be lower – this was a generous reading of the meaning and scope of incivility. In addition to the limitations described above, the low number of cases is likely because some decision-makers are not dealing with incivility directly; courts may comment on lawyers’ behaviour without using the search terms; or the conduct may not be mentioned in the decision at all, resolved or condoned in the courtroom instead. Indeed, it is this latter category that is

⁷¹ The cases that were removed were either not family law, involved two self-represented litigants, or were not civility related.

likely where most incivility is identified and hopefully resolved, that is, through judicial admonishment in the courtroom without the behaviour being reflected in the reported decision. As a result, even though the findings suggest incivility is not a problem in family law, there are methodological limitations. What was revealed, however, was troubling.

Incivility was not only directed at opposing counsel. The cases revealed that lawyers' incivility targeted the following: members of the public,⁷² the client,⁷³ the client's new partner,⁷⁴ opposing counsel,⁷⁵ the opposing party (both represented and unrepresented),⁷⁶ the opposing party who was also the lawyer's former spouse,⁷⁷ the opposing party's new partner,⁷⁸ judges,⁷⁹ and counsel for the Director of Child and Family Services.⁸⁰ Most of the disciplinary decisions appear to involve male lawyers.⁸¹

The type of misconduct included language as well as excessively zealous litigation tactics. The case law review revealed: improper speech – oral and written (vulgar and offensive language);⁸² lies, exaggerations, and rhetorical excess in written documents;⁸³ emails between counsel bordering on

⁷² See *Re. Lang*, 2022 LSBC 4 [Lang].

⁷³ See *Law Society of Ontario v Rapoport*, 2021 ONLSTH 43, aff'd 2023 ONLSTA 2 [Rapoport 2021]; *Law Society of Ontario v Doupe*, 2020 ONLSTH 102 [Doupe]; *Law Society of Ontario v Tweyman*, 2021 ONLSTH 166 [Tweyman].

⁷⁴ See *Rapoport* 2021, *ibid*.

⁷⁵ See *Rapoport* 2021, *ibid*; *Re. Singh*, 2021 LSBC 12 [Singh 2021]; *NB v AB*, 2021 ONSC 3467 at para 36 [NB]; *Edwards (Re)*, 2020 LSBC 21 [Edwards 2020-1]; *Law Society of Ontario v Mazinani*, 2020 ONLSTH 123 [Mazinani]; *Lessing (Re)*, 2022 LSBC 6 [Lessing]; *Law Society of Ontario v Fuhgeh*, 2020 ONLSTH 75 [Fuhgeh 2020].

⁷⁶ See *Doupe*, *supra* note 73; *Singh (re.)*, 2020 LSBC 1 at para 70 [Singh 2020]; *NB*, *ibid*; *Gill v Gill*, 2021 ONSC 6803 [Gill].

⁷⁷ See *Edwards* 2020-1, *supra* note 75; *Fuhgeh* 2020, *supra* note 75.

⁷⁸ See *Gostautaitė v Menendez*, 2020 ONSC 4396 [Gostautaitė].

⁷⁹ See *Singh* 2020, *supra* note 76 at para 70; *Doupe*, *supra* note 73.

⁸⁰ See *Hittrich (re)*, 2019 LSBC 24 [Hittrich].

⁸¹ It is not always possible to accurately determine gender from a reported decision. The following cases appear to have involved men: *Tweyman*, *supra* note 73; *Lessing*, *supra* note 75; *Singh* 2020, *supra* note 76; *Fuhgeh* 2020, *supra* note 75; *McLeod (Re)*, 2020 LSBC 33; *Edwards* 2020-1, *supra* note 75; *Hittrich*, *ibid*; *Doupe*, *supra* note 73; whereas, two cases appear to have involved women: *Lang*, *supra* note 72; *Mazinani*, *supra* note 75.

⁸² See *Lang*, *ibid*; *Rapoport* 2021, *supra* note 73; *Singh* 2020, *ibid* at para 70; *Doupe*, *ibid*; *Edwards* 2020-1, *ibid*; *Fuhgeh* 2020, *ibid*; *Lessing*, *ibid*; *Gill*, *supra* note 76; *Gostautaitė*, *supra* note 78.

⁸³ See *Alsawwah*, *supra* note 1; *Ukiri*, *supra* note 8 at paras 60-69; *Lessing*, *ibid*; *Bassett v Magee*, 2020 BCSC 1994 [Bassett 2020].

“unprofessional”;⁸⁴ sexual harassment of a client;⁸⁵ threats;⁸⁶ suggesting mutual withdrawal of complaints;⁸⁷ leaving the courtroom while the judge was delivering their decision;⁸⁸ repeatedly interrupting proceedings, disregarding rules, and raising issues already decided or without merit;⁸⁹ and using the legal system for an improper purpose.⁹⁰

Incivility might be understood to include threats. Ten of the law society decisions, involving seven lawyers, included threats. Threats were made as an advocacy tactic. One lawyer threatened to reveal an alleged perjury by the Director of Child, Family and Community Services to pressure them into consenting to an adoption.⁹¹ Another lawyer threatened to report opposing counsel to the Law Society of Ontario if an offer was not accepted.⁹² Self-represented lawyers made threats to their former spouses; one lawyer threatened to file a professional discipline complaint against his former partner,⁹³ and another threatened to bring a civil claim against his former spouse’s new partner to pressure her into mediating “a reduction in his arrears”.⁹⁴ None of the threats were identified as uncivil even though they disrupted the proper functioning of the justice system. This was likely because the threats were prohibited by the professional rules governing lawyers and perhaps thought of as a separate issue.⁹⁵ Threats commonly employed in family law negotiations, such as parenting threats (i.e., custody threats), were not mentioned.⁹⁶

⁸⁴ NB, *supra* note 75 at para 36.

⁸⁵ See *Tweyman*, *supra* note 73.

⁸⁶ See *Edwards* 2020-1, *supra* note 75; *Fuhgeh* 2020, *supra* note 75; *Hittrich*, *supra* note 80.

⁸⁷ See *Mazinani*, *supra* note 75.

⁸⁸ See *Doupe*, *supra* note 73.

⁸⁹ See *Bandyopadhyay v Chakraborty*, 2021 ONSC 7706.

⁹⁰ See *Edwards* 2020-1, *supra* note 75; *Fuhgeh* 2020, *supra* note 75.

⁹¹ See *Hittrich*, *supra* note 80.

⁹² See *Mazinani*, *supra* note 75 at paras 220-228.

⁹³ See *Fuhgeh* 2020, *supra* note 75 at paras 282-283.

⁹⁴ *Edwards v Edwards*, 2017 BCSC 2514 at paras 22-24 and 52 [*Edwards* 2017]. See also *Edwards* 2020-1, *supra* note 75 at paras 152, 154 and 195-197.

⁹⁵ See Model Code, *supra* note 22 at R 3.2-5, R 3.2-6 and R 5.1-2[3].

⁹⁶ See Heather Douglas, *Women, Intimate Partner Violence and the Law* (Oxford: Oxford University, Press 2021) at 239 [Douglas, Women]; Karla O'Regan et al, Centre for Research & Education on Violence Against Women & Children, “Family Law Mediation in Family Violence Cases: Basics & Best Practices” (March 2022), at 5-6 online (pdf): <fvfl-vfdf.ca> [perma.cc/3R5K-B3M2].

The cases showed that lawyers' incivility contributed to victims' stress and increased their vulnerability. For example, a victim impact statement submitted after a lawyer had used vulgar and misogynistic language showed that the client had been "emotionally fragile as a result of her marriage breakdown" and the lawyer's language "distressed her and affected her self-esteem and self-worth as a woman."⁹⁷ Other victim impact statements by former clients were consistent in that their family law matters were the "worst time" of their lives, and the lawyer's conduct made their "stress" worse.⁹⁸ Similarly, one lawyer used sexually vulgar language towards his client, causing her to feel "demeaned", "violated" and "disheartened".⁹⁹

The results also showed that lawyers' incivility was rarely isolated. Incivility often presented alongside other misconduct; for instance, lawyers had also charged excessive and unreasonable fees,¹⁰⁰ facilitated unauthorized practice,¹⁰¹ breached confidentiality,¹⁰² and acted in a conflict of interest.¹⁰³

There were also a few cases to highlight. In one of the law society decisions a lawyer had a sexual relationship with a family law client, and sexually harassed another,¹⁰⁴ including with language that could be described as uncivil.¹⁰⁵ That client was also a victim of IPV who was in the process of leaving an abusive spouse.¹⁰⁶ The client said the lawyer made her feel "sexualized and objectified".¹⁰⁷ In *Wiafe v Afoakwa-Yeboah*, the lawyers for both sides alleged the professional misconduct of the other.¹⁰⁸ In addition, the mother's lawyer wrote a letter to the father's counsel which included statements that "your client is an abusive, predatory, deadbeat father", that "he should be in jail for his abusive behaviour", he is

⁹⁷ *Law Society of Upper Canada v Rapoport*, 2016 ONLSTH 47 at paras 5-6 [*Rapoport* 2016]. See also *Law Society of Ontario v Rapoport*, 2021 ONLSTH 116, aff'd 2022 ONLSTA 1, aff'd 2023 ONLSTA 2 [*Rapoport* 2022].

⁹⁸ *Rapoport* 2022, *ibid* at paras 14-18.

⁹⁹ *Tweyman*, *supra* note 73 at para 52.

¹⁰⁰ See *Rapoport* 2021, *supra* note 73.

¹⁰¹ See *Singh* 2021, *supra* note 75.

¹⁰² See *Lessing*, *supra* note 75; *Mazinani*, *supra* note 75.

¹⁰³ See *Tweyman*, *supra* note 73.

¹⁰⁴ See *Tweyman*, *ibid*.

¹⁰⁵ See *Tweyman*, *ibid*.

¹⁰⁶ See *Tweyman*, *ibid* at para 32.

¹⁰⁷ *Tweyman*, *ibid* at para 52.

¹⁰⁸ See *Wiafe v Afoakwa-Yeboah*, 2021 ONCJ 201 at para 18 [*Wiafe*].

“heartless” and “vile”, and his “actions will not go unpunished” – “justice will be done”.¹⁰⁹ In that case, Justice Sherr said in a footnote that it was “disheartening that a family lawyer would make these statements in a letter.”¹¹⁰ Similarly, in *Bassett v Magee*, a case involving allegations of IPV (which were found to be “a stretch” and “another example of the parties and their counsel needlessly ratcheting up the tension”)¹¹¹ incivility between counsel led to the British Columbia Court of Appeal admonishing both lawyers for their misconduct.¹¹²

In sum, the case law review did not support an incivility problem in family law; however, the cases that were revealed were extremely troubling. The results showed that when incivility does occur, it often involves either a pattern of misconduct, or behaviour that is so problematic that it tips the scales into something else. While not all the cases involved allegations of family violence, which could also be because of its limited legal relevance depending on the issues and timing of the case,¹¹³ where there was IPV incivility looked like systems abuse. There are also open questions about what type of incivility is disciplined judicially without appearing in reported decisions, what conduct is overlooked judicially, and what conduct is investigated by law societies without resulting in a reported decision.

B. Incivility and Lawyers’ Self-Representing

The most surprising finding were the cases that involved lawyers self-representing. Three lawyers in the disciplinary decisions represented themselves in their own family law matters, and in a fourth the lawyer was only represented because he was prohibited from self-representing. In three of those cases, *Lessing*,¹¹⁴ *Edwards (Re)*,¹¹⁵ and *Law Society of Ontario v Fuhgeh*,¹¹⁶ the lawyer was found to be uncivil in their own family law matter.

¹⁰⁹ *Wiafe*, *ibid* at para 215.

¹¹⁰ *Wiafe*, *ibid* at FN 24.

¹¹¹ *Bassett* 2020, *supra* note 83 at para 59 (claiming family violence was inflammatory and unnecessary; they had not sought a protection order; and a finding of family violence was unnecessary for a conduct order).

¹¹² See *Bassett v Magee*, 2015 BCCA 422; *Bassett v Magee*, 2016 BCCA 329.

¹¹³ The BC FLA, *supra* note 67, included family violence during the search period, but amendments to the Ontario *Family Law Act* were introduced in 2020. See Bill 207, *Moving Ontario Family Law Forward Act*, 2020, 1st Sess, 42nd Parl, 2020 (assented to 20 November 2020) SO 2020, c 25; ON FLA, *supra* note 68.

¹¹⁴ See *Lessing*, *supra* note 75.

¹¹⁵ See *Edwards* 2020-1, *supra* note 75.

¹¹⁶ See *Fuhgeh* 2020, *supra* note 75.

In the fourth, *Law Society of Ontario v Rapoport*, the lawyer's family law case seems to have fueled his incivility when acting in a representative capacity.¹¹⁷ In three of the cases, there was IPV or allegations thereof.¹¹⁸ These cases are especially concerning because self-representation can be a tactic of systems abuse.¹¹⁹

In the sections that follow, I provide a summary of the three disciplinary cases with self-representing lawyers, namely, *Fuhgeh*, *Edwards*, and *Rapoport*.

1. *Law Society of Ontario v Fuhgeh*

In *Law Society of Ontario v Fuhgeh*, the lawyer was a general practitioner (including family law) who represented himself in his own family law matter.¹²⁰ The misconduct seems to be the culmination of nine years of family law litigation against two of his former spouses.¹²¹ There were claims of family violence in both cases. His first partner, feared for the "safety" of their child.¹²² His second partner said the lawyer was abusive; he counter-claimed that she had alienated their child.¹²³ Both cases involved parenting

¹¹⁷ See *Rapoport* 2022, *supra* note 97.

¹¹⁸ See *Edwards v Edwards*, 2014 BCSC 1334 at paras 6-9 [Edwards 2014]; *Bernard v Fuhgeh*, 2017 ONSC 6953 at paras 26-33 [Bernard 2017-3]; *Rapoport v Rapoport*, 2011 ONSC 4456 at paras 4, 25, 131, 210, 347-350 and 382 [Rapoport 2011].

¹¹⁹ See Department of Justice, "HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisors" (January 2022) at 34-35 online (pdf): <justice.gc.ca> [perma.cc/325A-W9UT].

¹²⁰ See *Fuhgeh v Stewart*, 2014 ONSC 2912 [Fuhgeh 2014]; *Bernard v Fuhgeh*, 2017 ONSC 4727 [Bernard 2017-1]; *Bernard v Fuhgeh*, 2017 ONSC 7257; *Bernard v Fuhgeh*, 2017 ONSC 5432 [Bernard 2017-2]; *Stewart v Fuhgeh*, 2019 ONSC 4447 [Stewart 2019-1]; *Stewart v Fuhgeh*, 2019 ONSC 4126 [Stewart 2019-2]; *Bernard v Fuhgeh*, 2019 ONSC 7128 [Bernard 2019]; *Bernard v Fuhgeh*, 2020 ONCA 529 [Bernard ONCA]; *Stewart & Bernard v Fuhgeh et al*, 2020 ONSC 4850 [Stewart & Bernard 2020-1]; *Stewart & Bernard v Fuhgeh et al*, 2020 ONSC 3789 [Stewart & Bernard 2020-2].

¹²¹ See *Fuhgeh* 2014, *ibid*; *Bernard* 2017-1, *ibid*; *Bernard* 2017-2, *ibid*; *Bernard* 2017-3, *supra* note 118; *Stewart* 2019-1, *ibid*; *Stewart* 2019-2, *ibid*; *Fuhgeh v Bernard*, 2019 ONSC 183; *Bernard* 2019, *ibid*; *Bernard* ONCA, *ibid*; *Stewart & Bernard* 2020-1, *ibid*; *Stewart & Bernard* 2020-2, *ibid*; *Bernard v Fuhgeh*, 2020 ONCA 620; *Fuhgeh v Stewart*, 2021 ONSC 3053 [Fuhgeh 2021-1]; *Stewart v Fuhgeh*, 2021 ONCA 824 [Stewart ONCA]; *Fuhgeh v Stewart*, 2021 ONSC 3907 [Fuhgeh 2021-2]. See also *Director, Family Responsibility Office for the benefit of Kimberly Melissa Stewart v Fuhgeh*, 2019 ONSC 4390; *Director, Family Responsibility Office for the benefit of Edith Marie Marielle Bernard v Fuhgeh*, 2019 ONSC 4531.

¹²² *Stewart & Bernard* 2020-2, *ibid* at para 6.

¹²³ See *Bernard* 2017-3, *supra* note 118 at paras 31-33.

issues. The lawyer did not exercise the supervised access he was granted.¹²⁴ In one of the cases, Justice Sheard found the matter was “high conflict” and that the situation “had become volatile” and it could “escalate”.¹²⁵ The lawyer also tried to disqualify opposing counsel and questioned the impartiality of the judges.¹²⁶

The LSO proceeding involved five grounds of misconduct flowing from his family law matter and a second unrelated civil matter.¹²⁷ Just focusing on his family law conduct, the lawyer threatened to file a professional discipline complaint against his former spouse (with the College of Nurses of Ontario) if she did not withdraw her complaint to the law society against him (and he followed through).¹²⁸ He also filed an unfounded complaint with the Children’s Aid Society, sent her “threatening messages”, made allegations about her “mental health”, and wrote a letter to her church informing them that she was “malicious and dishonest”.¹²⁹ The threatening messages led to a restraining order being issued against him.¹³⁰ He was found guilty of professional misconduct and conduct unbecoming a lawyer,¹³¹ and his licence was revoked.¹³² The revocation occurred within days of him being labelled a vexatious litigant in both family law matters.¹³³

In *Fuhgeh*, the tribunal found the lawyer lacked “perspective” when dealing with his former spouse.¹³⁴ He “took extreme positions, often divorced from reality, and engaged in angry, bullying and intimidating

¹²⁴ See *Stewart* 2019-2, *supra* note 120 at paras 5, 20 and 25.

¹²⁵ *Bernard* 2017-3, *supra* note 118 at paras 27 and 31.

¹²⁶ See *Bernard* 2017-3, *ibid* at para 12; *Bernard* 2017-1, *supra* note 120 at para 18; *Stewart* 2019-1, *supra* note 120 at paras 12 and 31; *Stewart & Bernard* 2020-1, *supra* note 120 at paras 28-29; *Fuhgeh* 2021-1, *supra* note 121 paras 34-44; *Godbout et al v Fuhgeh et al*, 2023 ONSC 4185. See also *Law Society of Ontario v Fuhgeh*, 2021 ONLSTH 61, *aff’d* 2021 ONLSTA 24 [*Fuhgeh* LSO 2021]; *Law Society of Ontario v Fuhgeh*, 2023 ONLSTA 10; *Bernard et al v Fuhgeh*, 2023 ONSC 1745.

¹²⁷ See *Fuhgeh* 2020, *supra* note 75 at paras 1-3.

¹²⁸ See *Fuhgeh* 2020, *ibid* at paras 282-288.

¹²⁹ *Fuhgeh* 2020, *ibid* at paras 3 and 202-215, 227-230 and 289-291.

¹³⁰ See *Fuhgeh* 2020, *ibid* at para 230.

¹³¹ See *Fuhgeh* 2020, *ibid* at paras 288 & 296.

¹³² See *Fuhgeh* LSO 2021, *supra* note 126; *Law Society of Ontario v Fuhgeh*, 2022 ONLSTA 18 [*Fuhgeh* LSO 2022]; *Law Society of Ontario v Fuhgeh*, 2023 ONLSTA 10 [*Fuhgeh* LSO 2023].

¹³³ See *Fuhgeh* 2021-2, *supra* note 121; *Stewart* ONCA, *supra* note 121; *Fuhgeh* 2021-1, *supra* note 121.

¹³⁴ *Fuhgeh* 2020, *supra* note 75 at para 193.

behaviour to 'make his point'.¹³⁵ He engaged in a "steady stream of harassing conduct" designed to "malign [his former spouse] in the eyes of various institutional authorities, including the courts, the CAS, and the church."¹³⁶ The lawyer made an "unfounded" complaint to CAS, "written to harm [his former spouse] by taking away her child", and he made false allegations about her mental health.¹³⁷

The tribunal found the lawyer had "no sense of proportion; all tools and weapons were brought to bear by a lawyer in what would normally have been an acrimonious and frustrating exchange between two parents."¹³⁸ The tribunal recognized that "family law litigation can be emotional and difficult,"¹³⁹ including because it concerns "the best interests of an infant caught in the middle of familiar but unfortunate battles between his parents."¹⁴⁰ They suggested the conduct was designed to "tip the scales in [the lawyer's] favour in the ongoing conflict with [his former spouse];"¹⁴¹ that is, it was "calculated to exact an advantage in seemingly incessant litigation."¹⁴² The lawyer sought to "gain an advantage" and "benefit" in the "ongoing contest for authority over parenting issues."¹⁴³ In essence, the tribunal seemed to expect inappropriate conduct under the difficult circumstances (i.e., family law). This language was not repeated by the Law Society Tribunal Appeal Division.¹⁴⁴

2. *Edwards (Re)*

In *Edwards*, the lawyer practiced criminal law and motor vehicle injury, and he represented himself in his own family law matter.¹⁴⁵ In the *Edwards* family law decision, the relationship was described as "acrimonious" and there were indications of abuse.¹⁴⁶ For instance, during a "heated argument"

¹³⁵ *Fuhgeh* 2020, *ibid* at para 193.

¹³⁶ *Fuhgeh* 2020, *ibid* at para 291.

¹³⁷ *Fuhgeh* 2020, *ibid* at para 294. See also *Fuhgeh* LSO 2021, *supra* note 126 at para 17.

¹³⁸ *Fuhgeh* 2020, *ibid* at para 295.

¹³⁹ *Fuhgeh* 2020, *ibid* at para 192.

¹⁴⁰ *Fuhgeh* LSO 2021, *supra* note 126 at para 47.

¹⁴¹ *Fuhgeh* LSO 2021, *ibid* at para 48.

¹⁴² *Fuhgeh* LSO 2021, *ibid* at para 47.

¹⁴³ *Fuhgeh* 2020, *supra* note 75 at para 287.

¹⁴⁴ See *Fuhgeh* LSO 2022, *supra* note 132; *Fuhgeh* LSO 2023, *supra* note 132.

¹⁴⁵ See *Edwards* 2020-1, *supra* note 75 at paras 1 and 69; *Edwards* 2014, *supra* note 118; *Edwards* 2017, *supra* note 94 at paras 3-4.

¹⁴⁶ *Edwards* 2014, *ibid* at para 7.

about the children's school, the lawyer "pushed" his wife and "she fell."¹⁴⁷ The family law trial judge observed that the lawyer's "conduct throughout the litigation [had] been unacceptable" and that he had "added much unnecessary additional stress to the litigation."¹⁴⁸ Despite that, the lawyer continued to behave the same way, including by "yelling" at opposing counsel and making "baseless allegations of misconduct" against her.¹⁴⁹ He screamed "at her in open court" and made "personal" remarks by calling her a "liar".¹⁵⁰ He also commenced a civil claim with unfounded allegations of child abuse against his former spouse's new partner as a way to pressure her to negotiate on his child support arrears.¹⁵¹

The LSBC disciplinary proceeding against the lawyer involved five allegations of professional misconduct that all flowed from the way he handled his family law matter.¹⁵² The allegations included drafting a memo threatening to "drive up" his former spouse's legal fees, "threatening and instituting legal proceedings for an improper purpose", and using court processes as a "means of harassing and intimidating" his former spouse.¹⁵³ The "tone of his communications" was "discourteous and uncivil."¹⁵⁴ The lawyer was found guilty of professional misconduct, he was suspended from practice for two months, and he was ordered to pay costs.¹⁵⁵ There are no further family law decisions reported in this case, so it is unclear whether the disciplinary proceedings had any impact on the family law matter.

In *Edwards*, the lawyer's incivility was aimed at his former spouse, her new partner, and opposing counsel.¹⁵⁶ The lawyer had also failed to provide disclosure and pay child support, was shown to cause his former spouse "stress", and his children suffered a "detrimental effect".¹⁵⁷ The LSBC did

¹⁴⁷ *Edwards* 2014, *ibid* at para 8.

¹⁴⁸ *Edwards* 2014, *ibid* at para 60. See also *Edwards* 2020-1, *supra* note 75 at para 73.

¹⁴⁹ *Edwards* 2017, *supra* note 94 at para 60; *Edwards* 2020-1, *ibid* at paras 92, 147 and 152-153.

¹⁵⁰ *Edwards* 2020-1, *ibid* at para 159.

¹⁵¹ See *Edwards* 2020-1, *ibid* at paras 123, 127 and 195-198; *Edwards (Re.)*, 2020 LSBC 57 at paras 57-58 [*Edwards* 2020-2]; *Edwards* 2017, *supra* note 94 at paras 22-25.

¹⁵² See *Edwards* 2020-1, *ibid* at para 1.

¹⁵³ *Edwards* 2020-1, *ibid* at paras 1 and 194-198.

¹⁵⁴ *Edwards* 2020-1, *ibid* at para 159.

¹⁵⁵ See *Edwards* 2020-1, *ibid* at paras 190 and 198; *Edwards* 2020-2, *supra* note 151 at paras 1-2 and 122.

¹⁵⁶ See *Edwards* 2020-1, *ibid*.

¹⁵⁷ See *Edwards* 2020-2, *supra* note 151 at para 26 and 104; *Edwards* 2017, *supra* note 94; *Edwards* 2014, *supra* note 118; *Edwards* 2020-1, *supra* note 75 at para 161.

not acknowledge that failure to provide disclosure and pay child support contributes to the economic inequality and feminization of poverty that many women suffer post-separation,¹⁵⁸ conduct that can amount to family violence.¹⁵⁹

The BC Supreme Court and Law Society did, however, find that the lawyer had misused the justice system.¹⁶⁰ In doing so, the LSBC highlighted the importance of civility:

As a member of an ancient and respectable profession, the Respondent should have acted in a manner that maintained his own honour, as well as the honour of the legal profession. He failed in all aspects to adhere to the virtues of probity, integrity, honesty and dignity. While emotions can run high in family law litigation, as a lawyer, the Respondent had a duty to keep those emotions in check and to act with decorum and courtesy.¹⁶¹

Importantly, they also found the lawyer used “his legal expertise to bring improper pressure to bear” on his former spouse.¹⁶² The LSBC clearly stated that the lawyer “used the court process as a means of harassing and intimidating his former spouse” which importantly, acknowledged systems abuse.¹⁶³

3. *Law Society of Ontario v Rapoport*

In the third case, the disciplinary action flowed from the lawyer’s conduct representing family law clients. However, in this case the lawyer argued that his own family law matter had been his “personal hell” and was the reason for his uncivil conduct.¹⁶⁴ During his own family law trial, his wife said the lawyer was “extremely controlling” and had attacked “her verbally and emotionally at every opportunity”.¹⁶⁵ She was worried about the power imbalance she faced because he was a lawyer and they were both self-represented.¹⁶⁶ Justice Whalen found that the parties were “high

¹⁵⁸ See *Colucci v Colucci*, 2021 SCC 24 at paras 48-54 [*Colucci*]; *Michel v Graydon*, 2020 SCC 24 at paras 88-104 [*Michel*].

¹⁵⁹ See *J.C.P. v J.B.*, 2013 BCPC 297 at para 18.

¹⁶⁰ *Edwards* 2020-1, *supra* note 75 at paras 150 and 184.

¹⁶¹ *Edwards* 2020-2, *supra* note 151 at para 24.

¹⁶² *Edwards* 2020-1, *supra* note 75 at para 197.

¹⁶³ *Edwards* 2020-2, *supra* note 151 at para 32.

¹⁶⁴ *Rapoport* 2016, *supra* note 97 at paras 9 and 12.

¹⁶⁵ *Rapoport* 2011, *supra* note 118 at para 25.

¹⁶⁶ See *Rapoport* 2011, *ibid* at paras 23-25.

conflict” with a “communication” problem.¹⁶⁷ He accepted that the lawyer “could be controlling, domineering, demeaning and profane” and that he had engaged in “verbal abuse and that the wife was a victim.”¹⁶⁸

In this case, the lawyer’s professional misconduct began when his relationship was ending.¹⁶⁹ *Law Society of Ontario v Rapoport* involves seven law society decisions between 2015-2022, including one appeal.¹⁷⁰ In 2015, the lawyer was found guilty of incivility (among other things) towards a female family law client.¹⁷¹ More than once during meetings with her, he had “referred to his former wife as a bitch and a slut.”¹⁷² The tribunal found that those words were “not just profane and vulgar. They [were] highly misogynistic terms, reserved for the derogatory description of women. The lawyer’s language demeaned his former wife because of her sex, and by extension, they also demeaned his female client.”¹⁷³ The tribunal heard how he had been “consumed by a highly acrimonious and drawn out custody battle” which had affected his behaviour.¹⁷⁴ His practice at the time included 75% “women in vulnerable situations” and there was concern he would reoffend.¹⁷⁵ He was suspended and agreed to “participate in treatment”.¹⁷⁶

However, in 2021, the lawyer was accused of twenty-five additional grounds of misconduct related to six clients over a two-year period (he was found guilty on seventeen grounds, affirmed on appeal).¹⁷⁷ The lawyer had continued to use misogynistic language, for example, he said, women often act “dramatic” at court, and he used “derogatory, vulgar and offensive language to describe” his former wife, his client’s former wife, and “women

¹⁶⁷ *Rapoport* 2011, *ibid* at paras 4, 131, 210-218 and 222.

¹⁶⁸ *Rapoport* 2011, *ibid* at paras 131 and 347.

¹⁶⁹ See *Law Society of Upper Canada v Rapoport*, 2015 ONLSTH 124 [*Rapoport* 2015]; *Rapoport* 2016, *supra* note 97.

¹⁷⁰ See *Rapoport* 2015, *ibid*; *Law Society of Upper Canada v Rapoport*, 2015 ONLSTH 179; *Rapoport* 2016, *ibid*; *Rapoport* 2021, *supra* note 73; *Law Society of Ontario v Rapoport*, 2021 ONLSTH 100; *Law Society of Ontario v Rapoport*, 2021 ONLSTH 116; *Rapoport* 2022, *supra* note 97.

¹⁷¹ See *Rapoport* 2016, *ibid*.

¹⁷² *Rapoport* 2015, *supra* note 169 at paras 53 and 54.

¹⁷³ *Rapoport* 2015, *ibid* at para 65.

¹⁷⁴ *Rapoport* 2016, *supra* note 97 at para 31.

¹⁷⁵ *Rapoport* 2016, *ibid* at para 34.

¹⁷⁶ *Rapoport* 2016, *ibid* at para 40.

¹⁷⁷ See *Rapoport* 2021, *supra* note 73; *Law Society of Ontario v Rapoport*, 2023 ONLSTA 2.

generally.”¹⁷⁸ He continued to refer to women as “bitches” and “c—ts”.¹⁷⁹ The tribunal found his incivility amounted to professional misconduct and his licence was revoked.¹⁸⁰

The three examples of self-representing lawyers indicate a significant problem. These cases demonstrate that some survivors’ whose former spouses are lawyers experience an additional layer of disadvantage preventing them from accessing justice. This is similar to the problem of victims who struggle to turn to the police for protection because their former spouse is a police officer.¹⁸¹ Moreover, when decision-makers focus on professionalism or emotionality, civility concepts,¹⁸² instead of considering how the lawyers’ actions and language contributed to systems abuse, it compounds the problem. Not only has the victim been subjected to ongoing abuse, but the person who was meant to provide some version of justice, failed by recasting the abuse as something else – a form of institutional betrayal.

IX. INCIVILITY AND SYSTEMS ABUSE

Lawyers’ incivility, whether in a representative capacity or not, has the power to contribute to systems abuse, and that is something lawyers must not participate in given their obligations to the administration of justice and the rule of law. Discussions of incivility are not often linked to IPV. However, this case law review shows that these two areas need to intersect. The profession tends to normalize aggressive conduct through the adversarial system and assumptions about family law’s emotionality, thereby extending a false permission for excessive zeal. There can be a misguided belief that good advocacy means acting as a hired gun. The results of this case law review reveals the danger of those assumptions. Civility, as a vague and imprecise concept, has the power to distract decision-makers and shift the focus from abuse to professionalism, further contributing to the myriad ways the justice system fails survivors. In this part, I identify some of the

¹⁷⁸ *Rapoport* 2021, *ibid* at paras 166-167.

¹⁷⁹ *Rapoport* 2021, *ibid* at para 167.

¹⁸⁰ See *Rapoport* 2021, *ibid* at para 188; *Rapoport* 2022, *supra* note 97.

¹⁸¹ See Rise Report, *supra* note 10 at 39-40.

¹⁸² This is also true of family law concepts such as using the term “high conflict” or “acrimonious” instead of identifying IPV, see Mavis Morton, et al, “The Degendering of Male Perpetrated Intimate Partner Violence Against Female Partners in Ontario Family Law Courts” (2021) 43:2 J of Soc Welfare & Fam L 104.

abusive tactics and their effects on victims, before arguing that lawyers should not engage in systems abuse.

IPV is a type of family violence in which women are disproportionately victimized by their male partners, including through physical, psychological, financial, and sexual abuse.¹⁸³ Marginalized women, including girls and young women, Indigenous women, members of the LGBTQ2S+ community, disabled women, and those living in rural and remote communities are disproportionately abused.¹⁸⁴ Coercive control is a type of IPV, with no universal definition.¹⁸⁵ It has been described as “a pattern of abuse over time that maintains the power of one intimate partner over another through a variety of means such as threats, intimidation, and emotional, sexual, and financial abuse.”¹⁸⁶ Systems abuse is an extension of coercive control, whereby the abuser continues their pattern of harm through the justice system, and it can amount to a finding of family violence.¹⁸⁷ However, systems abuse has no singular pattern and can include different litigation tactics for different groups of survivors, including for example, the manipulation of parallel legal systems (e.g., abuse related to immigration status, and fabricated criminal charges).¹⁸⁸

When false allegations and threats occur, such as those in this case law review, they might be facilitated through a lawyer. Family court judges have found that making unwarranted calls to the authorities, such as CAS and

¹⁸³ See Statistics Canada, Shana Conroy, “Family Violence in Canada: A Statistical Profile, 2019” (2 March 2021) at 29, online (pdf): <statcan.gc.ca> [perma.cc/P4LV-U88E]; Statistics Canada, Shana Conroy, “Spousal Violence in Canada, 2019” (6 October 2021) at 7-10, online: <statcan.gc.ca> [perma.cc/ZJ8P-ENRF]; Michel, *supra* note 158 at para 95.

¹⁸⁴ See Statistics Canada, Adam Cotter, “Intimate Partner Violence in Canada, 2018: An Overview” (26 April 2021) at 8-9, online: <stat.can.gc.ca> [perma.cc/PE92-ZF9H].

¹⁸⁵ See Janet Mosher et al, “Submission to Justice Canada on the Criminalization of Coercive Control” (2023) Osgoode Legal Studies Research Paper No. 4619067 [Mosher et al].

¹⁸⁶ BC Ministry of the Attorney General, “Family Law Act Modernization Project: Care of and Time with Children & Protection from Family Violence Discussion Paper” (January 2024) at 5-9, online: <engage.gov.bc.ca> [perma.cc/B89A-3S8E].

¹⁸⁷ See Ellen Gutowski & Lisa Goodman, “Coercive Control in the Courtroom: the Legal Abuse Scale” (2022) 38 *Journal of Family Violence* 527 at 527-528; Tucker, *supra* note 12; LDB, *supra* note 13 at paras 110-117.

¹⁸⁸ See Janet E Mosher, “Domestic Violence, Precarious Immigration Status, and the Complex Interplay of Family Law and Immigration Law” (2023) 35:1 *Can J Fam L* 297; Mosher et al, *supra* note 185 at 11-16.

the police, can contribute to emotional and psychological harm.¹⁸⁹ Threats to harm a former spouse's professional reputation by having them disciplined by their governing body, has been held to be psychological and financial abuse.¹⁹⁰ Threatening to report a spouse's lawyer to their law society coupled with a pattern of "aggressive, demanding and threatening" communications designed to "destroy" the solicitor-client relationship has been found to be family violence.¹⁹¹ Making false allegations about mental health issues has also been held to be psychological abuse,¹⁹² and problematically relies on stereotypical reasoning.¹⁹³ When tactics do not achieve the control sought, abusers might target anyone who helped the survivor, including the survivor's lawyer and the judge through professional complaints and claims of judicial bias.¹⁹⁴ These tactics weaponize the law, and where there is IPV they are examples of systems abuse.

Systems abuse can feel to the victim as though their former spouse's lawyer has become complicit in the abuse.¹⁹⁵ A recent Australian study conducted by Jane Wangmann et al, showed that some lawyers representing abusers employ "antagonistic approaches to litigation" including "aggressive" communication, being "deliberately provocative", and writing "chest-beating letters that appear to be written more for one's own client than to communicate with the other side."¹⁹⁶ Research from the UK shows that lawyers will engage in punishing cross-examinations, including asking victims "humiliating and insulting questions", and compelling them "to

¹⁸⁹ See *Ammar v Smith*, 2021 ONSC 3204; *McIntosh v Baker*, 2022 ONSC 4235 at para 20 [McIntosh].

¹⁹⁰ *McIntosh*, *ibid* at paras 121-123.

¹⁹¹ See *Armstrong v. Coupland*, 2021 ONSC 8186 at paras 36 & 39.

¹⁹² See *McIntosh*, *supra* note 189 at paras 111 and 129.

¹⁹³ See Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35:1 Can J Fam L 33 at 44-45 [Koshan, Myths]; Jonnette Watson Hamilton, "The Use of Metaphor and Narrative to Construct Gendered Hysteria in the Courts" (2002) 1 JL & Equal 155; Suzanne Zaccour, "Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes" (2018) 31 Can J Fam L 57.

¹⁹⁴ See Neilson, Responding, *supra* note 10 at 7.4.28 and 7.4.31; Rise Report, *supra* note 10 at 34.

¹⁹⁵ See Douglas, Women, *supra* note 96 at 169.

¹⁹⁶ Jane Wangmann et al., "What is 'good' domestic violence lawyering?: views from specialist legal services in Australia" (2023) 00:0 International Journal of Law, Policy and the Family 1 at 9-10.

look at the abuser during cross-examination”.¹⁹⁷ Lawyers will also pressure survivors into settlements that increase their risk.¹⁹⁸ Australian research shows abusers’ lawyers engage in delay tactics (e.g., adjournments), refuse to provide disclosure, and serve documents late, contributing to economic abuse and the pressure to settle.¹⁹⁹ A Canadian study from the Rise Women’s Legal Centre has shown the harmful impact lawyers can have on victims, including draining their financial and emotional resources and causing them to give up their claims.²⁰⁰ It is well-established that some victims will relinquish lawful claims and agree to terms that increase their risk due to fear, economic and psychological exhaustion, and that some lawyers contribute to those pressures.²⁰¹ By employing these tactics, lawyers, as justice system actors, institutionalize the violence.²⁰² In essence, the justice system provides ways for abusers to continue coercing and controlling the victim through the system, through their lawyer, and my concern is that such conduct can be miscast as incivility instead of identified as systems abuse.

A. Reframing Civility to Account for Intimate Partner Violence is Not the Answer

The question is how to prevent lawyers from engaging in systems abuse. Should there be a higher or different duty of civility for family law? I do not suggest a modified version of civility is the answer, but it is worth examining.

A classic tension within discussions about civility is chilling zeal on one side, and conduct negatively impacting procedural fairness and the

¹⁹⁷ Rosemary Hunter, Mandy Burton & Liz Trinder, Ministry of Justice, “Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report” (2020) at 123-124, online: <kar.kent.ac.uk> [perma.cc/R6LD-S2NK].

¹⁹⁸ See Douglas, Women, *supra* note 96 at 170-172; Wangmann et al, *supra* note 196 at 6.

¹⁹⁹ Douglas, Women, *ibid* at 181.

²⁰⁰ See Rise Report, *supra* note 10 at 35.

²⁰¹ See Katherine Wright, “The Divorce Process: A View from the Other Side of the Desk” (2006) 18:1 CFLQ 93 at 100; Neilson, Responding, *supra* note 10 at 12.1; Anna Heenan, “Neoliberalism, family law, and the devaluation of care” (2021) 48 J L Soc 386 at 395-397; Katirai, *supra* note 37 at 85, 96-97; Leigh Goodmark, “Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases” (2009) 37:1 Fla St U L Rev 1 at 19-20.

²⁰² For an analogous argument about lawyers’ perpetuation of IPV myths and stereotypes impairing the administration of justice see Deanne Sowter & Jennifer Koshan, ““Weaponizing” the Tort of Family Violence? Myths, Stereotypes, Lawyers’ Ethics and Access to Justice” (2024) Windsor YB Access Just (*accepted*).

administration of justice on the other.²⁰³ If civility were strictly regulated, the worry is that lawyers will reign in partisan advocacy and infringe clients' legal entitlements out of fear of being reprimanded or facing negative consequences for incivility, particularly when professional discipline could turn on a subjective understanding of civility by regulators.²⁰⁴ *Groia* infamously begins with the statement that "trials are not – nor are they meant to be – tea parties," instantly signalling that "resolute advocacy" would not be "sacrificed at the altar of civility."²⁰⁵ The reference to "tea parties" seemed to dismiss a softer or feminine conception of civility in favour of the "Rambo lawyer".²⁰⁶ In essence, the majority was concerned about inadvertently chilling advocacy by elevating civility's importance within the lawyer's duties.²⁰⁷ Zeal won.

If concerns about lawyers' incivility were to be reframed for IPV, concern about incivility would include worry about a lawyer acting as a tool of abuse for their client and causing the survivor's revictimization. Concern with regulating civility would include concern about hindering lawyers who are representing victims, when a focus on civility might cause a self-imposed chilling effect on assertiveness. There are also questions about whether a lawyer's behaviour is more outrageous if the conduct contributes to revictimization; or less egregious if the lawyer is trying to protect a victim. If I were to assume the answer to both of those questions are 'yes', the problem is how to articulate and regulate such a deviation from the norm – it sounds like civility would have a sliding scale depending on the client. Why would a client agree to what might be perceived as a less zealous form of advocacy? And how could such a sliding scale be achieved without drastically changing the lawyer's role?

That said, in family law, chilling zeal might be the objective of a reframed conception of civility. Some family law policies suggest lawyers ought to minimize conflict and encourage settlement,²⁰⁸ which could

²⁰³ See Salyzyn, *Civility*, *supra* note 41 at 103; Campbell, *supra* note 31 at 107 and 145-146; Adam Owen Glist, "Enforcing Courtesy: Default Judgements and the Civility Movement" (2000) 69:2 *Fordham L Rev* 757 at 760.

²⁰⁴ See Salyzyn, *Civility*, *ibid* at 103-104; Campbell, *ibid* at 107 and 145-146.

²⁰⁵ *Groia*, *supra* note 18 at para 3.

²⁰⁶ Salyzyn, *Civility*, *supra* note 41 at 97-98.

²⁰⁷ See *Groia*, *supra* note 18 at para 76.

²⁰⁸ See *Divorce Act*, *supra* note 6, ss 7.3 and 7.7(2); Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words" (April 2013) at 3, online: <justicedevelopmentgoals.ca> [perma.cc/982Y-QA2D];

inform a family-law-specific idea of civility. Incivility increases conflict which, under the *Divorce Act*, parties are required to try to protect their children from,²⁰⁹ further supporting the idea of modified civility for family law. Moreover, where there is IPV, less zeal and more civility by lawyers on both sides might be an attempt to avoid systems abuse, or to avoid provoking a violent response. Incivility increases conflict, discourages consensual resolutions, and makes long-term cooperation less likely, all contrary to family law policy. A modified conception of civility could also be informed by feminist ideas of professionalism which may be less adversarial and more sensitive to clients' interests.²¹⁰

However, a different civility paradigm for family law is not the answer. A victim's lawyer is at risk of revictimizing their client if a different standard of civility gives the lawyer the power to be more aggressive because of the violence. Were a lawyer to unilaterally make the decision to use extra-zeal, they would be failing their obligation to enable the client's decision-making by substituting their own view instead.²¹¹ The same logic applies if they were to reduce their assertiveness. The survivor's autonomy would be impinged, and their ability to access the law jeopardized (if it leads to relinquishing legal entitlements). In my view the lawyer's power cannot be artificially inflated, even if the underlying motivation is altruistic in favor of survivors. It should not be assumed that a victim's autonomy has been so eroded by their abuser that paternalism is warranted. Moreover, victims often need trauma-informed lawyering and support exercising their autonomy, not lawyers assuming control and mirroring an abusive power dynamic.²¹² A unique version of civility also ignores the fact that systems abuse can leverage any area of law, which means consistent professional obligations are required.

Moreover, even if the victim consented, I am not convinced that a new conception of civility is the right answer. The concept of civility is not the

Federal Child Support Guidelines, (SOR/97-175), s 1. See also *Alsawah*, *supra* note 1 at paras 106-108.

²⁰⁹ See *Divorce Act*, *ibid*, s 7.2.

²¹⁰ See Deborah Rhode, "Feminist Perspectives on Legal Ethics" in Kim Economides ed. *Ethical Challenges to Legal Education and Conduct* (Oxford, UK: Hart Publishing, 1998); Karin Galldin, "Using the Master's Tools: Reflections on Feminist Lawyering and Process" (2020) 32:2 *Can J Women & L* 288.

²¹¹ See Alice Woolley, "Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations" (2015) 65:2 *UTLJ* 285 at 329-330.

²¹² See Karla O'Regan et al, Centre for Research & Education on Violence Against Women & Children, "Trauma-Informed Approaches to Family Violence in Family Law" (2021), online: <fvfl-vfddf.ca> [perma.cc/DS6S-TXE9].

right starting place. There is no definition of civility, but gentlemanliness is imported into ideas of professionalism and civility, bringing permission to perpetuate abuse. Recall that early ideas of gentlemanliness ignored the *unsavoury* topic of gender-based violence and were developed during a period in English history when the law provided little assistance to survivors who needed protection, including if they sought to escape a violent marriage.²¹³ As Constance Backhouse framed it, it was thought that wives did not need the law to protect them, because they had husbands to do that – even though it was their husbands that they needed protection from.²¹⁴ Relatedly, and more recently, the profession has a history of maltreatment towards women, including sexual harassment of female lawyers by their male colleagues.²¹⁵ This is some of the conduct and connotations imported into ideas of civility.

Focusing on civility blurs the actual problem: IPV. Alice Woolley argued that an “emphasis on civility tends to obscure the true nature of the ethical misconduct of lawyers subject to discipline for incivility.”²¹⁶ Focusing on civility, even by reframing it, obscures violence. Perhaps notions of civility ought to be done away with altogether since they seem unhelpful. When judicial admonishments cite incivility but are ignored by lawyers; and discipline for incivility is about IPV but the abuse is not identified; it seems as though citing incivility is distracting and carries little weight or deterrence. Indeed, for the lawyers in this case law review, their civility obligations did not deter. Reframing civility is not the answer. Instead, distinguishing between abuse and incivility is important for moving away from a system that is complicit.

B. A Lawyer Should Not Facilitate Systems Abuse

Pursuant to lawyers existing professional obligations, they must not facilitate systems abuse. The lawyer’s role is to facilitate access to the law for

²¹³ See Maeve E. Doggett, *Marriage, Wife-Beating and the Law in Victorian England* (Columbia, South Carolina: University of South Carolina Press, 1993) at 30-33; Constance Backhouse, “Pure Patriarchy: Nineteenth Century Canadian Marriage” (1986) 31:2 McGill LJ 264 [Backhouse, Patriarchy]; Deanne Sowter, “Tracing the Breakdown of Marriage: A Feminist Critique of Canadian Divorce Law” (2023) 35:4 Child and Family Law Quarterly 389.

²¹⁴ See Backhouse, Patriarchy, *ibid* at 303.

²¹⁵ Robert Cribb & Emma Jarratt, “Sexual harassment, discrimination forcing women lawyers to quit. Some say the profession needs its ‘Me Too’ movement”, *Toronto Star* (18 February 2024), online: <thestar.com> [perma.cc/46L3-HX9G].

²¹⁶ Woolley, Civility, *supra* note 21 at 185.

their client (not work around it), and to assist in the proper functioning of the justice system, so the client can accomplish whatever lawful thing they wish to accomplish.²¹⁷ Lawyers have obligations to the administration of justice and the rule of law. As Bradley Wendel said: if the role of law is to “secure the social goods of solidarity, peaceful coexistence, and planned, coordinated action, then the role of the legal profession should be to help the legal system perform its function.”²¹⁸ Lawyers have a responsibility to uphold the law rather than undermine its effective functioning.²¹⁹ Systems abuse has a negative impact on the administration of justice, is distracting and undermines the public’s confidence in the justice system,²²⁰ and it is therefore contrary to the lawyer’s role.

The *Model Code* also reflects the prohibition on systems abuse. A lawyer should not engage in “dishonourable or questionable” conduct that adversely affects the integrity of the profession and the administration of justice.²²¹ They should not bring a claim motivated by “malice”,²²² do anything to harass the other side,²²³ nor knowingly assist the client to do anything “dishonest or dishonourable”.²²⁴ A lawyer should not mislead the court by offering false evidence, misstating the facts, suppressing what ought to be disclosed, or asserting something is true if the evidence does not support it.²²⁵ Importantly, this imposes a requirement upon lawyers to know whether they may become complicit in systems abuse.

As I have argued elsewhere, the duty of competence, supported by the *Divorce Act* and the Supreme Court of Canada’s decision *Colucci v Colucci*,

²¹⁷ See Alice Woolley, *Understanding Lawyers’ Ethics in Canada*, 2nd ed. (Toronto, ON: LexisNexis, 2016) at 56-58 [Woolley, ULEC].

²¹⁸ Bradley Wendel, “The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations” (2017) 30 Can JL & Jur 443 at 449.

²¹⁹ See Bradley Wendel, “Civil Obedience” (2004) 104 Colum L Rev 363, 365-366; W. Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010) at 89 [Wendel, Fidelity].

²²⁰ See Groia, *supra* note 18 at paras 63-67.

²²¹ Model Code, *supra* note 22 at R 2.1-1[3].

²²² Model Code, *ibid* at R 5.1-2(a).

²²³ Model Code, *ibid* at R 5.1-1[8] and R 6.3-2.

²²⁴ Model Code, *ibid* at R 5.1-2(b) (there is no indication of what “dishonourable” means, and it is unusual to include because it imports moral reasoning into the lawyer’s decision-making).

²²⁵ Model Code, *ibid* at R 5.1-2(e) and R 5.1-2(g).

imposes an obligation on family lawyers to screen for family violence;²²⁶ therefore lawyers should have information to know or suspect that a client's instructions are maliciously intended. This does not impose a requirement on lawyers to establish the truth of whether there is IPV, as that is beyond the lawyer's role, practically challenging for a partisan advocate, and vulnerable to stereotypical reasoning. However, if a lawyer knows their client is abusive and wants to use the legal system to inflict harm on their former spouse, the lawyer must not facilitate that objective. Lawyers should try to distinguish between a client's legitimate legal entitlement and an abusive one. If abuse is identified, a lawyer must dissuade their client from such instructions, and failing that, they must withdraw.²²⁷ Lawyers have a duty of honesty to other people and to the court.²²⁸ Lawyers should not advise clients to lie, nor should they lie to others,²²⁹ and as noted above, they have duties of honour and integrity.²³⁰ A lawyer must also advise against any conduct that is not supported by legal entitlements.²³¹ This is not about a moral discomfort creating tension between the lawyer's role and ordinary morality. Knowledge of abuse triggers lawyers' obligations to the administration of justice. Lawyers are one of the few safeguards meant to ensure the proper functioning of the justice system and participating in systems abuse has the effect of undermining the public's confidence in it, contributing to the access to justice crisis for survivors.

Moreover, unlike criminal defence lawyers who may have a reason to stay uninformed as to their client's guilt,²³² family lawyers are often trying to assist their clients to restructure their post-separation lives – an objective that does not support intentional ignorance of their client's relationship dynamics and history. Indeed, if parenting is an issue, the *Divorce Act* elevates the “child's physical, emotional and psychological safety, security and well-being” when considering their best interests, and the legislation

²²⁶ See Model Code, *ibid* at R 3.1-2; *Divorce Act*, *supra* note 6, s 7.7(2)(a); Colucci, *supra* note 158 at para 69; Deanne Sowter, “If It Wasn't Required Before, It Is Now: All Family Lawyers Must Screen For Family Violence” (2 November 2021) online (blog): <slaw.ca> [perma.cc/23N4-N4FA].

²²⁷ Model Code, *supra* note 22 at R 3.7-7(b).

²²⁸ Model Code, *ibid* at R 3.2-7 and R 5.1-2(e).

²²⁹ See Alice Woolley & Amy Salzyn, *Understanding Lawyers' Ethics in Canada*, 3rd ed. (Toronto, ON: LexisNexis, 2023) at 401.

²³⁰ Model Code, *supra* note 22 at R 2.1-1.

²³¹ Wendel, Fidelity, *supra* note 219 at 189.

²³² For a discussion of criminal defence lawyers' professional obligations see Woolley, ULEC, *supra* note 217 at 445-452.

requires consideration of “family violence” and its impact, making that information legally relevant.²³³ Without parenting as the legal issue, the *Divorce Act* still requires that the lawyer consider whether there is IPV in order to provide legal advice on process.²³⁴

A lawyer facilitating systems abuse is also contrary to the lawyer’s duty to uphold the rule of law. Richard Moorhead, Steven Vaughan and Kenta Tsuda recently argued that facilitating a client’s wrongdoing is contrary to the lawyer’s commitment to the rule of law, using the examples of Harvey Weinstein’s lawyers (i.e., representing a serially abusive client and facilitating non-disclosure agreements), and the UK Post Office lawyers (i.e., “the earth is flat” approach to their litigation).²³⁵ A commitment to the rule of law also grounds the requirement to screen so lawyers have the knowledge to be competent,²³⁶ to provide legal advice on process and parenting. Upholding the rule of law also means the lawyer’s role is not to advise a client on how to manipulate the law to provide something it has not, including an abusive objective.

One challenge occurs when a lawyer does not know there is IPV, or is unsure, despite screening. Coercive control must be understood within the context of women’s social and systemic entrapment.²³⁷ If lawyers are uneducated about family violence and have not screened, patriarchal social norms can normalize abusive behaviour, particularly financial abuse.²³⁸ Tactics can also be easily confused with adversarialness consistent with assumed family law norms, mischaracterized as stereotypical of relationship

²³³ *Divorce Act*, *supra* note 6, s 16(2)(3) and (4). For a comparison of provincial and territorial family legislation on family violence, see Jennifer Koshan, Janet Mosher & Wanda Wiegers, *A Comparison of Gender-Based Violence Laws in Canada: A Report for the National Action Plan on Gender-Based Violence Working Group on Responsive Legal and Justice Systems* (1 August 2023) online: <ssrn.com/abstract=3995519> [perma.cc/EFB8-WU33].

²³⁴ *Divorce Act*, *ibid*, s 7.7(2)(a).

²³⁵ See Richard Moorhead, Steven Vaughan & Kenta Tsuda, *What Does it Mean for Lawyers to Uphold the Rule of Law? A Report for the Legal Services Board*, (Exeter: University of Exeter, 2023) at 26, online: <legalservicesboard.org.uk> [perma.cc/869B-GWQK].

²³⁶ *Model Code*, *supra* note 22 at R 3.1.

²³⁷ See Julia Tolmie, Rachel Smith & Denise Wilson, “Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework” (2024) 30(1) *Violence Against Women* 54.

²³⁸ See Lieran Docherty et al, *Hidden in the Everyday: Financial Abuse as a Form of Intimate Partner Violence in the Toronto Area*, at 24, online: <womanact.ca> [perma.cc/4KRT-G9SN].

breakdown. In essence, without knowing whether there is IPV, it may appear that a client seeks bad or aggressive lawyering – incivility.

Thus, although lawyers' professional obligations prohibit their participation in systems abuse, those obligations are also insufficient. There are questions about why some lawyers seem to overlook their obligations, prioritizing their duty to their client or themselves, instead of balancing those obligations with their duty to the administration of justice. A consistent recommendation by policymakers, feminist scholars, and anti-violence groups is education.²³⁹ In 2023 the federal *Judges Act* was amended to support judicial education in IPV, including coercive control and “social context”.²⁴⁰ In my view, lawyers, judges, and law society tribunal adjudicators ought to be explicitly required to have training in family violence. A critical step towards a holistic response to the gender-based violence epidemic is education.

X. CONCLUSION

There are already rules in the *Model Code* which, if followed, would have prevented most of the misconduct documented in this case law review. The *Model Code* is silent in relation to family violence, which I have previously critiqued, recommending reform, including an explicit obligation not to participate in systems abuse.²⁴¹ Ensuring the professional regulation of lawyers is responsive to IPV is essential to facilitating survivors' abilities to access the justice system, taking seriously the profession's self-regulation responsibilities.

However, the problem is also broader than lawyers. Gender-based violence is a deeply complex epidemic that is societally and systemically

²³⁹ See Koshan, Myths, *supra* note 193 at 77-80; Rise Women's Legal Centre, Zara Suleman, Haley Hrymak & Kim Hawkins, “Are We Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System” (May 2021) at 20-21, online: <womenslegalcentre.ca> [perma.cc/3NGY-NNDN]; Luke's Place Support and Resource Centre and National Association of Women and the Law, “Bill C-78: An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act” (2019) at 3 & 10 online: <nawl.ca> [perma.cc/V9RE-NED4].

²⁴⁰ *Judge's Act*, RSC 1985, c J-1, 60(2)(b).

²⁴¹ See Deanne Sowter, “Intimate Partner Violence and Ethical Lawyering: Not Just Special Rules for Family Law” (2024) 102:1 Can Bar Rev 130.

supported.²⁴² After conducting this research, I worry about lawyers self-representing to engage in systems abuse, and I worry about abusers who are not lawyers doing the same. Self-represented litigants do not have the same obligations to the administration of justice and the rule of law, raising concerns about abusive behaviour that occurs under the thresholds of abuse of process, vexatious litigation, and costs. These concerns further support the need for judges and decision-makers to focus on IPV and not civility.

Family lawyers still have a reputation for incivility.²⁴³ As this paper was nearing publication, Justice Kaufman of the Ontario Superior Court of Justice released *Naguib v Ibrahim et al*, where he queried whether steps taken in that case were “further evidence of a high conflict case or just a lack of civility”.²⁴⁴ Rather than focusing on civility, further research is required to quantify and comprehensively explain systems abuse and the ways that lawyers and the family justice system fail survivors. If lawyers’ participation in systems abuse is not understood and prevented, the justice system, through some lawyers’ words and actions, is complicit in maintaining the gender-based violence epidemic.

²⁴² See Joint Federal/Provincial Commission into the April 2020 Nova Social Mass Casualty, Mass Casualty Commission. “*Final Report – Turning the Tide Together: Vol. 3 - Violence*” (2023) online: <masscasualtycommission.ca> [perma.cc/2UQ3-WJDZ].

²⁴³ For a recent example see *Modabber v Kermanshahani*, 2024 ONSC 186 at para 16 (Justice Kaufman scolded family law counsel for wasting court resources over a minor issue, and stated that “lawyers should appreciate that it takes years to earn a solid reputation but mere moments to destroy it”, also reminding counsel that a lawyer’s reputation follows them “amongst the local Bar as well as the Bench.”).

²⁴⁴ *Naguib v Ibrahim et al*, 2024 CanLII 25609 (ON SC).