INTEGRITY AND HONOUR IN CRIMINAL LITIGATION: HOLLOW ASPIRATIONS OR ENFORCEABLE STANDARDS?

By

Justice Gary Trotter*

I. INTRODUCTION

In this Colloquium, we attempt to further our understanding of professionalism by focusing on practicing law with "honour and integrity." These are two very broad and amorphous concepts.[1] At the definitional level, "honour" is defined as, among other things: "high respect or public regard; adherence to what is right or an accepted standard of conduct; nobleness of mind."[2] The term "integrity" gels with some of the same concepts, including: "honesty; wholeness; soundness."[3]

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* The Hon. Mr. Justice Gary Trotter is a justice of the Ontario Court of Justice, Toronto Region. At the time that this paper was written and presented, he was the Associate Dean and an Associate Professor at the Faculty of Law, Queen's University.

[1] Both terms appear in the *Rules of Professional Conduct of the Law Society of Upper Canada* ("the Rules"). The terms are engaged in various contexts. In particular, see Rule 6.01(1), which provides: "A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession."

[2] *The Oxford Dictionary of Current English* (Oxford: University Press, 1990).

[3] *Ibid.*

"Integrity" and "honour" cover some common ground. No one would quarrel with the idea that they should be guideposts in the practice of law, especially in the courts. But what does it actually mean to say that barristers should conduct themselves with "honour" and "integrity"? How do we measure "honour" and "integrity" and how can we enforce these norms? Do they involve anything more than being merely honest and courteous?

These broad terms are not self-applying and cannot be defined in the abstract. They may take on concrete meaning in different contexts, as we shall see in this Fifth Colloquium. It is therefore important to take account of the context in which the attributes of "honour" and "integrity" must operate in the criminal process.

Several characteristics of the criminal process are instructive. First, it is trite to say that the criminal law engages our most serious conflicts. Our criminal law is underwritten by the intertwining themes of public protection and the vindication of core moral values.[4] The process often results in official censure,

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[4] Compare H.L.A. Hart, *Law, Liberty and Morality (1963)* and Sir Richard Devlin, *The Enforcement of Morals* (1965), in which this debate is played out. While the modern approach in Canada to justifying criminal legislation focuses on the principle of harm, morality is not completelyremoved from the equation. For instance, in *Regina v. Butler* (1992), 70 C.C.C. (3d) 129 (S.C.C.), Justice Sopinka held:

> As the respondent and many of the interveners have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is

and in many cases, significant deprivations of liberty (including imprisonment). Thus, a great deal is at stake for both the accused individual and the State itself. For these reasons, criminal trials can be emotional events, especially given the adversarial nature of the proceedings, an important hallmark of the criminal justice process.

Another important contextual feature of the criminal process is the system's self-reflecting concern about miscarriages of justice. This has long been a concern in England and the United States. In Canada, the evidence is mounting, such that it cannot be denied that our criminal justice system at times misfires and can yield erroneous results that are devastating to the accused and to the community.

For these reasons, and others, the public is very interested in what goes on in our criminal courts. This interest is fed by an increasingly better- educated core of journalists who cover what transpires in the criminal courts. This makes the criminal process a very public one, which is an important constitutional

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> grounded in morality does not automatically render it illegitimate. In this regard, criminalization the proliferation of materials which undermine another basic Charter right may indeed be a legitimate objective.

See Brenda Cossman, "Bad Attitudes on Trial: Pornography, Feminism and the Butler Decision", in D. Dyzenhaus and A. Ripstein, eds, *Law and Morality: Readings in Legal Philosophy*, 2nd ed. (Toronto: University of Toronto Press, 2001).

value in Canadian criminal law.[5] Journalists are generally focused on the factual content of criminal cases, as well as on some of the legal issues that are argued. But they are also interested in, and report on, the conduct of counsel in the discharge of their duties, both inside and outside of the courtroom.[6] Because criminal cases (as opposed to other types of cases) attract a disproportionate amount of interest in the public and coverage by the media, in the eyes of many, criminal lawyers (prosecutors and defence counsel alike) become society's examples professionalism and civility in the legal profession. This reality puts a premium on the importance of professionalism for criminal practitioners.

II. ELEMENTS OF INTEGRITY IN CRIMINAL CASES

A consideration of the elemental components of integrity and honour in the criminal process is the focus of this paper. This part attempts to move beyond the broad and abstract ideas engendered by the terms "honour" and "integrity" and seeks to identify some concrete elements of these concepts for criminal lawyers. This is followed by a discussion as to how they might be vindicated and enforced. For the purposes of this paper, I have selected those aspects of professional conduct that are most visible, those that can be observed

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[5] See *Dagenais v. C.B.C.* (1994), 94 C.C.C. (3d) 289 (S.C.C.) and *Regina v. Mentuck* (2001), 158 C.C.C. (3d) 449 (S.C.C.).

[6] For example, see Tracey Tyler, "Sylvester 's Lawyer's Comments – Brilliant or Risky?, *Toronto Star*, September 23, 2005, p.A.01, in which the out-of-court comments of a lawyer representing a man charged in the well publicized disappearance and murder of a Toronto woman (Alicia Ross) were held up to close scrutiny.

in the courtroom. Competence of counsel, proper prosecutorial conduct and civility at the bar all engage the criminal lawyer in a transparent light.[7]

(a) Competence

Modern discussions of professionalism invariably focus on issues of civility and conduct between counsel. The proper function of counsel, in terms of competent representation, sometimes gets lost in mix. However, definitions of integrity and honor, including those cited above, impel a concern for competence and high standards on the part of the advocate. To act with integrity and honour requires, at a minimum, that counsel discharge his/her duties with the requisite degree of skill and competence. Rule 2 of the Rules of Professional Conduct of the Law Society of Upper Canada (the "Rules") both defines and mandates competence on behalf of lawyers in Ontario.[8] The individual charged with a criminal offence is entitled to competent representation. The public is equally entitled to prosecutors who discharge their duties with vigour and skill, subject to the qualifications that come with acting as a public prosecutor in Canada.[9]

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[7] There are of course many other aspects of integrity and honour in the practice of criminal law. The complex and myriad components of confidentiality (Rule 4) are also of great importance, but beyond the scope of this paper.

[8] R.2.01 provides a detailed definition of what competence entails. Rule 2.02 provides: "A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer." Rule 4 is also important in the context in defining the requirements of a advocate. Rule 4.01 provides: "When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect."

[9] See R.4.01(3): "When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect." The limits placed on a prosecutor's obligation to serve the administration of justice "resolutely" are discussed below.

Competence is an important normative aspiration in the criminal justice system. As mentioned above, Canada is developing its own sad history of miscarriages of justice in the criminal justice system. Experience and research point to many contributors to miscarriages of justice, including faulty eyewitness identifications, false confessions, as well as negligent and corrupt police practices. The performance of counsel is also identified as a contributor to this problem. Discussion of this issue has generally tended to focus upon the failings of Crown counsel. The Commissioner into the Proceedings Concerning Guy Paul Morin[10] ruled that the conduct of defence counsel would not be a focus of that important and influential inquiry. Elsewhere, however, commentators and investigators have not been reticent to confront the fact that incompetence of defence counsel may also contribute to wrongful convictions.[11]

Concerns regarding the competence of counsel find a voice in the criminal appeal process. Canadian appellate courts have recognized a constitutional right to the effective assistance of counsel.[12] This line of cases is derived from the U.S.

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[10] Hon. Fred Kaufman, C.M., Q.C., *The Commission on Proceedings Involving Guy Paul Morin* (1998).

[11] See Kent Roach, "Inquiring into Wrongful Convictions" (1999), 35 Crim. L. Bulletin 152, Clive Walker, "Miscarriages of Justice in Principle and Practice", in C. Walker and K. Starmer, *Miscarriages of Justice – A Review of Justice in Error* (1999), at p.54, Huff, Rattner and Sagarin, Convicted But Innocent: Wrongful Conviction and Public Policy (1996), p.55, and David Bazelon, "The Defective Assistance of Defence Counsel" (1973), 42 Cincinnati Law Rev. 1.

[12] This is characterized as aspect of fundamental justice under s.7 of the *Charter*. For instance, see *Regina v. Garafoli* (1988), 41 C.C.C. (3d) 97 (Ont. C.A.), *Regina v. Joanisse* (1995), 102 C.C.C. (3d) 35 (Ont. C.A.); *Regina v. L.C.B.* (1996), 101 C.C.C. (3d) 353 (Ont. C.A.), *Regina v. W.(W.)* (1995), 100 C.C.C. (3d) 225 (Ont. C.A.) and *Regina v. P.(T.)* (2002), 165 C.C.C. (3d) 281 (Ont. C.A.).

case of *Strickland v. Washington*,[13] which has been adopted by the Supreme Court of Canada in *Regina v. B.(G.D.)*.[14] To succeed on this basis, an appellant must demonstrate that (i) counsel's conduct fell below the range of reasonable professional assistance and (ii) the accused person was prejudiced by this shortcoming.[15] Under this approach, a successful claim of ineffective assistance of counsel is difficult to establish. The effectiveness of this check on competence is muted by the Court's insistence on a "strong presumption" that counsel's conduct met professional standards.[16] It is further limited by the Court's observation of the limited role of this type of claim:

> The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self-governing body. It is appropriate to dispose of an ineffectiveness claim on the ground of no prejudice having occurred, that is the course to follow.[17]

The recognition of a constitutional right to effective assistance of counsel has really not surpassed more than symbolic status in Canada. Very few cases succeed on this basis. The test is so exacting that only the most egregious mistakes, those that lead to real prejudice, are remedied. Only at the outer limits are the values of integrity and honour addressed, the Court shifting the

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[13] 466 U.S. 668 (1984).
[14] (2000), 143 C.C.C. (3d) 289 (S.C.C.).
[15] *Ibid*., at p.144. Indeed, the Court suggests that it is better to first determine whether the accused has suffered any prejudice before engaging in the performance component of the analysis.
[16] *Ibid*..
[17] *Ibid*..

responsibility to professional governing bodies to enforce minimal standards.[18] Yet, as we will see below, professional bodies have yet to demonstrate any real leadership in redressing claims of incompetence in the disciplinary context.

Ensuring competence on the prosecutorial side of the equation is even more difficult. This is in part due to the complex role that we have cast for prosecutors in the Canadian context, whereby technical proficiency plays a secondary role, behind the prosecutor's duty of fairness to the accused and to society.[19] Moreover, it is not a value that can be vindicated within the confines of the criminal justice process. There is no such thing as an appeal from acquittal based on an allegation of incompetence on the part of Crown counsel. It is impossible to determine whether there has been "prejudice" (as considered in *R. v. G. (B.D.)*) given the presumption of innocence in Canadian law enshrined in s.11(d) of the *Charter*.[20] Thus, claims of ineffectiveness in the prosecution of criminal cases is incapable of being corrected or remedied within the confines of the criminal process. Prosecutorial incompetence, in terms of lack of skill, is a matter that is more likely to be addressed internally, as an aspect of the employment relationship with the Attorney General who employs the prosecutor.

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[18] See Michel Proulx and David Layton, *Ethics in Canadian Criminal Law* (Toronto: Irwin Law, 2002), at p.144.

[19] See *Boucher v. The Queen*, [1955] S.C.R. 16, discussed in the following section.

[20] Given this reality, an acquittal can never be formally attacked as unreasonable on an appeal: see *Regina v. Schuldt* (1985), 23 C.C.C. (3d) 225 (S.C.C.).

(b) The Special Role of the Crown

While enforcing standards of competence of prosecutors is problematic, other important aspects of the prosecutor's role in the criminal process have been identified and vindicated within the system. Standards of honour and integrity, which in some contexts ring hollow as mere aspirations in criminal law, find concrete application in this context. This stems from the recognition of the special role of the Crown in Canadian criminal law.

The duty was formally recognized in the famous and often-quoted words of Mr. Justice Rand in *R. v. Boucher*:[21]

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with great personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[22]

The role of the prosecutor is also expressed in Rule 4.01(3) , which provides:

> **4.01 (3)** When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

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[21] *Supra*, note 19.
[22] *Ibid.*, pp.23-34.

The Commentary to this rule picks up on the themes addressed in *Boucher*:

> When engaged as a prosecutor, *the lawyer's prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits*. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence. [emphasis added]

This vision of the prosecutor as Minister of Justice is usually tested in the context of specific instances of alleged misconduct.[23] This has typically arisen in cases where concern has been expressed about the conduct of the Crown in context of interviewing witnesses,[24] disclosure,[25] jury selection[26] and addressing the jury in an inflammatory manner.[27] Improper cross-examination of witnesses (the accused as a witness, in particular), sometimes accompanied with inflammatory addresses to the jury, has resulted in a number of new trials being ordered by the appellate courts, particularly in Ontario.[28]

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[23] See generally Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law, 2001), especially Chapter 12 – The Prosecutor. For an interesting and entertaining account of this duty in practice, see Robert J. Frater, "The Seven Deadly Prosecutorial Sins" (2004), 7 Can Crim. L.R. 210.

[24] See *Regina v. Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.). See also Michael Code, "Crown Counsel's Obligations When Advising the Police at the Pre-Charge Stage" (1998), 40 C.L.Q. 326.

[25] See *Regina v. Stinchcombe* (1991), 68 C.C.C. (3d) 1 (S.C.C.).

[26] See *Regina v. Bain* (1992), 69 C.C.C. (3d) 381 (S.C.C.).

[27] See *Regina v. Munroe* (1995), 96 C.C.C. (3d) 431 (Ont. C.A.) and *Regina v. Pitt* (1996), 109 C.C.C. (3d) 488 (N.B.C.A.).

[28] See Peter Brauti, "Improper Cross-Examination" (1998), 40 C.L.Q. 69. See also the very helpful and comprehensive paper by Kenneth L. Campbell, "Limits on the Scope of Cross-Examination" (January 21, 2001) [unpublished], which provides specific commentary on the common pitfalls of

The law places very stringent demands on our prosecutors in Canada. The cases reveal increasing vigilance by the courts, ensuring that prosecutors conduct themselves within the bounds of propriety, which are very much captured in the values of honour and integrity. However, restricting the proper boundaries of prosecutorial behaviour should not be exaggerated. As discussed below in the context of a discussion on civility, it is easy to get carried away with the implications of the Supreme Court's decision in *Boucher*. It has given birth to the aphorism that the prosecutor never "wins" or "loses"; he or she is merely required to see that justice is achieved in individual cases. However, this is somewhat over-simplified in modern prosecutions. It is naïve to assert that a prosecutor does not win or lose or that it is wrong for a prosecutor to attempt to "win" by securing a conviction. Charges are laid and cases are prosecuted based on a reasonable belief of guilt on the part of the accused. In Ontario, prosecutors are permitted to take cases to trial only if there is a "reasonable prospect of conviction" and the prosecution is otherwise in the public interest.[29] Cases are selected to go forward because of the prospect of a conviction. This becomes the primary purpose of the prosecution. As discussed in the next section, the Ontario Courts have recognized that a prosecutor does not act improperly in attempting to secure a conviction, *so long as it is done within the appropriate limits of fairness*. The leading Canadian text on this issue by Michel Proulx and David

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cross-examination by prosecutors. For an oft-cited example, see *Regina v. S.(F.)* (2000), 144 C.C.C. (3d) 466 (Ont. C.A.).

[29] Ministry of the Attorney General (Ontario), *Crown Policy Manual* (2005) – *Charge Screening*.

Layton, *Ethics and Canadian Criminal Law*, *supra*, suggests as much when the authors say: "A prosecutor can seek a conviction but must all the while strive to ensure that the defendant has a fair trial."[30] It is time to stop referring to the outdated and confusing aphorism of the prosecutor as neither "winning nor losing," and focus more clearly on a qualitative evaluation of prosecutorial conduct.

(c) Civility: Lessons from *Felderhof*

In modern discussions of professional responsibility, lack of civility on the part of counsel has consumed a great deal of attention. The judgment of the Court of Appeal for Ontario in *Regina v. Felderhof*[31] is a study of honour and integrity in the criminal trial process. It is instructive on the proper role of both defence and Crown counsel and is an authoritative reference for the criminal bar. The case arose from charges under the *Securities Act*[32] arising from the *Bre-X Minerals* affair. After 70 days of evidence, counsel for the Ontario Securities Commission brought an application for prohibition and *certiorari*, seeking to halt the prosecution, quash rulings made by the trial judge and have the trial recommence before another trial judge. The application was based on the contention that the trial judge had made erroneous rulings on the admissibility of evidence and had failed to curb the uncivil conduct of defence counsel. The application was dismissed in a lengthy ruling written by Justice Archie Campbell

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[30] *Supra*, note 18, at p.644.
[31] (2004), 180 C.C.C. (3d) 498 (Ont. C.A.).
[32] R.S. 1990, c. S-5.

of the Ontario Superior Court of Justice.[33] The appeal was dismissed by the Court of Appeal.

Writing for the Court of Appeal, Justice Rosenberg described in some detail a proceeding that was, from the outset, derailed by acrimony. Early in the trial, defence counsel made the "serious allegation"[34] that the Crown was attempting to "win at any cost." The prosecution countered with what Justice Rosenberg characterized as an abusive day and half cross-examination of a junior lawyer for the defence who had filed an affidavit to which pieces of correspondence were attached. The trial quickly degenerated into an atmosphere of rancour and name-calling, especially by defence counsel, who continually made allegations of prosecutorial misconduct.[35] The Court of Appeal concluded that, while the rhetorical excess and sarcasm was "unseemly and unhelpful", Justice Campbell was correct to conclude that the trial judge's failure to act did not deprive the prosecution of a fair trial.[36]

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[33] O.J. No. 4103 (S.C.J.).

[34] *Ibid*., note 31, at p.505.

[35] Justice Rosenberg described some of the more egregious conduct at p.507: "[Defence counsel] frequently resorted to sarcasm. He belittled the efforts of the prosecutor to prepare their case and accused them of laziness. He suggested that the prosecutors had breached their promises and misled the judge. The trial judge rarely intervened to restrain counsel. On the other hand, counsel for the prosecution accused the defence of filing a misleading affidavit and wasting the court's time with its abuse of process motion." Justice Campbell was equally, if not more critical in his characterization of defence counsel's conduct, variously referring to it as "unrestrained invective", "excessive rhetoric", "submissions…descended from legal argument to legal irony to sarcasm to petulant invective", "theatrical excess" and "resembles guerilla theatre than advocacy in court" (quoted at pp.533-534 of the judgment of the Court of Appeal).

[36] *Supra*, note 31, at p.508.

In criticizing the conduct of defence counsel, Justice Rosenberg held that defence counsel was mistaken in his understanding of what constituted prosecutorial misconduct. Quoting the application judge, Rosenberg J.A. held:

> [I]t is inappropriate to attack a prosecutor for seeking a conviction. To do so demonstrates a misunderstanding of the vital distinction between a prosecutor who improperly seeks nothing but a conviction and a prosecutor who properly seeks a conviction within the appropriate limits of fairness.[37]

As discussed in the previous section, this is a subtle, yet important gloss on the common understanding of the role of the Crown as a someone who neither wins or loses.[38]

One of the most important parts of Justice Rosenberg's judgment, especially for the purposes of this Colloquium, is found in his more general statements on the standard of conduct expected of counsel. Relying on the Court's earlier judgment in *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham*,[39] Rosenberg J.A. held:

> It is important that everyone, including the courts, encourage civility both inside and outside the courtroom. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context. Morden J.A. of this court expressed the matter in this way in a 2001 address of the Call to the Bar: "Civility is not just a nice, desirable adornment to accompany the way lawyers conduct themselves, but is a duty which is integral to the way lawyers do their work." Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their

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[37] *Ibid.*, p.534 (quoting from para. 33 of the reasons of Justice Campbell).
[38] See *Boucher v. The Queen*, *supra*, note 19.
[39] (2000), 51 O.R. (3d) 97 (C.A.).

> clients….Unfair and demeaning comments by counsel in the course of submissions to a court do not simply impact on the other counsel. Such conduct diminishes the public's respect for the court and for the administration of criminal justice and thereby undermines the legitimacy of the results of the adjudication….
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> Counsel have a responsibility to the administration of justice, and as officers of the court, they have a duty to act with integrity, a duty that requires civil conduct.[40]

In making this statement, the Court was careful to point out that this *requirement* of civility was not meant to be inconsistent with, or undermine, the duty of counsel to fearlessly advance the client's interests, which is also required by the Rules of Professional Conduct. Justice Rosenberg's point was that civility, courtesy and respect for counsel and the court are elements of this overarching duty that is at the heart of our adversarial system of criminal justice.

In concluding the part of his judgment concerning civility issues, Justice Rosenberg distanced himself from Justice Campbell's remarks that a criminal prosecution is not a "tea party" and that prosecutors are expected to display a degree of toughness in the face of criticism.[41] This comment was made in response to defence counsel's continued allegations of bad faith, impropriety and

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[40] *Supra,* note 31, at pp.535-536. Justice Rosenberg cites a very helpful article by Kara Anne Nagorney, "A Noble Profession? A Discussion of Civility Among Lawyers" (1999), 12 Georgetown Journal of Legal Ethics 815, in which the author links the civility of the legal system with the goals of promoting a just society.

[41] *Ibid*. At para. 275 of his reasons, Justice Campbell had said: "To be the target of professional vilification may not be easy. But a hard fought trial is not a tea party. Prosecutors need thick skins. It is open to counsel, faced with an accusation that contains a nasty personal edge, to ignore it in the view that demeans the accusing counsel more than it demeans the counsel accused."

abuse of process on the part of the Crown. Justice Rosenberg took a different view of the matter:

> It is a very serious matter to make allegations of improper motives or bad faith against counsel. Such allegations must only be made where there is some foundation for them and they are not to be made simply as part of the normal discourse of submissions over the admissibility of evince or the conduct of the trial. To persist in making these submissions does not simply hurt the feelings of a thin-skinned opponent. Those types of submissions are disruptive to the orderly running of the trial….No prosecutor, no matter how thick-skinned, is obliged to hear the kind of allegations made by [defence counsel] in this case, until there was some prospect that these allegations would be provide and lead to a remedy.[42]

Justice Rosenberg said that the trial judge ought to have intervened to stop this type of abuse. This theme is returned to below in the discussion of enforcing integrity as a duty in the criminal trial process.

III. FOSTERING HONOUR AND INTEGRITY – MAKING THE NORMATIVE MARKERS REAL

This part of the paper addresses how we might foster and enforce our commitment to honour and integrity in criminal prosecutions, in terms of the features of these obligations discussed above.

(a) Education

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[42] *Ibid.*, at p.539.

In terms of creating a culture of professionalism, that which exemplifies the qualities of honour and integrity, the place to start is in our law schools. Indeed, many law schools deliver education on legal ethics and professionalism, whether as part of resource programming[43] or in terms of substantive courses covering the area. Perhaps even more effective is the integration of professionalism considerations into substantive discussions of different areas of law. This has been the experience with criminal law teaching in Canada, both at the substantive and procedural level. Criminal law casebooks widely in use in Canadian law schools contain discussions of the proper role of defence counsel and the prosecutor.[44] Indeed, legal writing in general has expanded in this area, making the discussion of professional responsibility issues more relevant and accessible. The comprehensive and thoughtful text by Michel Proulx and David Layton, *Ethics and Canadian Criminal Law*,[45] is an important contribution to the legal literature on this issue and will go a long way to fostering a culture of professionalism in the practice of criminal law.

(b) Criminal Prosecutions

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[43] As an example, at the Faculty of Law of Queen's University, the First Year Resource Program is designed to orient new law students to the study of law and the profession. Themes pursued through this program include legal ethics and professional responsibility. The program also introduces new law students to lawyers and judges and members of the law society.

[44] See Kent Roach, Patrick Healy and Gary Trotter, *Criminal law and Procedure: Cases and Materials*, 8th ed. (Toronto: Emond-Montgomery, 2004), Don Stuart and Ronald Delisle, *Learning Canadian Criminal Law*, 9th ed. (Scarb., Ont.: Carswell, 2004) and Don Stuart, Ronald Delisle and Gary Trotter, *Learning Canadian Criminal Procedure*, 8th ed (Scarb., Ont.: Carswell, 2005).

[45] *Supra*, note 18. See also *Defending a Criminal Case* (Special Lectures of the Law Society of Upper Canada, 1969), an important volume, which contains reportage on a famous panel discussion concerning ethical issues and criminal practice.

Criminal prosecution for certain rule violations is another way of enforcing ethical standards in criminal prosecutions. Prosecution is not feasible in the context of some of the themes pursued above, such as competence and civility. Prosecution seems more suitable to defalcations involving dishonesty or breaches of other duties.

There are recent examples of lawyers being prosecuted for criminal offences involving alleged compromises of professional standards. The most notorious recent case concerned the failed obstruction of justice prosecution of lawyer Kenneth Murray, for his role in the defence of Paul Bernardo.[46] Similarly, in *Regina v. Kirkham*,[47] a Crown prosecutor was acquitted of obstructing justice for his alleged role in authorizing the police, prior to the jury selection process, to contact potential jurors in the case against Robert Latimer.

Both of these cases demonstrate that the criminal law may not always be the most efficient means of addressing ethical problems. First, the law relating to the offence of obstruction of justice has proven to be surprisingly complicated and not directly adaptable to the professional discipline context.[48] It is not clear why this is the case. It may reflect a failure on the part of the legal profession to

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[46] (2000), 144 C.C.C. (3d) 289 (Ont. S.C.J.).

[47] (1998), 126 C.C.C. (3d) 397 (Sask. Q.B.). See also *Regina v. Davies* (July 4, 2005), (Ont. C.A.) [unreported], in which a prosecutor was convicted of fraud and breach of trust charges related to his position as a Crown Attorney.

[48] See Don Stuart, Annotation to *Regina v. Murray* (2000), 34 C.R. (5th) 290.

articulate workable professional standards, rather than with the shortcomings of the substantive offence of obstructing justice.[49] There may also be a reluctance on the part of those involved in the criminal process to view infringements of the Rules of Professional Conduct as truly criminal in nature, deserving of official censure and the arsenal of sanctions that accompany a criminal conviction. In *Kirkham*, Justice Baynton remarked: "[T]here is no legal precedent for the criminalization of inappropriate or unprofessional conduct of the nature charged in the case before me. I suspect that this is so because there is a more appropriate means of addressing such conduct than by laying a dubious but serious criminal charge."[50] Justice Baynton was clearly alluding to professional discipline. A similar refrain was echoed by the Supreme Court in *Regina v. G.B.*.[51] However, as discussed next, it is unclear whether this judicial reliance on the efficacy of the professional discipline process is well-placed.

(c) Professional Discipline

Professional standards, including infringements of those Rules that bear upon the aspects of honour and integrity above, ought to be enforced through the professional discipline bodies. There has never been a doubt that

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[49] In *Murray*, *supra*, note 46, Justice Gravely referred to Rule 10 of the *Ontario Rules of Professional Conduct* (the rule relevant to the issue in that case) and said at pp.320-321: "It is of small help either to counsel or to clients who may believe that both their secrets and their evidence are safe with their lawyers."

[50] *Ibid.*, p.411.

[51] *Supra*, note 14.

professional discipline proceedings apply to defence counsel in criminal cases. Myriad rules apply to various aspects of the criminal defence lawyer's practice. Surprisingly, there has been some controversy over whether Crown prosecutors are also subject to professional discipline. In *Krieger v. The Law Society of Alberta*,[52] the Supreme Court confirmed that Crown prosecutors are properly the subject of professional discipline proceedings, except with respect to matters related to the exercise of prosecutorial discretion. Justices Iacobucci and Major wrote:

> However, we do not agree that the Law Society lacks the jurisdiction to review an allegation that a Crown prosecutor in bad faith failed to disclose relevant information. As a consequence of its exclusive jurisdiction over property and civil rights in the province, under s.92(13) of the *Constitution Act, 1867*, the Legislature of Alberta has the power to regulate the legal profession, which it has duly conferred upon the Law Society under the *Legal Profession Act*. Because Crown prosecutors must be members of the Law Society, it thereby follows Crown prosecutors are subject to the Law Society's code of professional conduct. *All conduct that is not protected by the doctrine of prosecutorial discretion is subject to the conduct review process.*[53] [emphasis added]

The Court held that certain prosecutorial decisions, relating to the nature and extent of the prosecution, are not subject professional discipline, whereas "decisions that govern a Crown prosecutor's *tactics or conduct before the court*" do fall within the scope of disciplinary proceedings.[54] On the particular facts of

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[52] (2002), 168 C.C.C. (3d) 97 (S.C.C.).

[53] *Ibid.*, p.102.

[54] *Ibid.*, pp.114-115. In terms of what is not covered by professional discipline, the Court said (at pp.114-115):

> Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by the police; (b) the discretion to enter a stay of proceedings in either a

Krieger, the Court held that the failure to disclose relevant exculpatory evidence did not fall within prosecutorial discretion and was, therefore, the proper subject of professional discipline.[55]

There is a further avenue available to enforce professional standards as they relate to prosecutors. As illustrated in *Krieger*, these matters may be addressed internally, through the prosecutor's employer, the Attorney General. Thus, it becomes a matter for the Attorney General to deal with, both as an employer, but also in his/her role as the chief law officer of the Crown. Of course, different considerations may well apply in the determination of whether certain actions by the prosecutor infringed prosecutorial guidelines as opposed to standards set for the profession as a whole. As discussed above, claims of incompetence or ineffectiveness, are probably more amenable to being addressed internally, rather than through formal professional discipline.

Having established that there is a potentially important role for professional discipline with respect to defence counsel and prosecutors, there is little evidence that, in Ontario at least, it has been invoked in anything but the most egregious cases. Claims of incompetence are made to the Law Society, but

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> private or public prosecution, as codified in the *Criminal Code*, ss.579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether; and (e) the discretion to take control of a private prosecution….While there are other discretionary decisions, these are the *core of the delegated sovereign authority* peculiar to the office of the Attorney General. [emphasis added]

[55] *Ibid*, p.118.

few have resulted in formal disciplinary action. Thus far in Ontario, claims against prosecutors have been all but non-existent. Complaints of incivility by members of the Bar are addressed more frequently, but usually by quiet reprimand before Convocation. The possibility of censure in a more formal and open setting ought to be explored as a means of enforcing civility and demonstrating to the public at large that these are important values.

(d) The Role of the Bench

Our courts have an important role to play in fostering a culture of professionalism, especially in terms of and civility. Ultimately, it is our judges who are responsible for what takes place inside the courtrooms in this country. On those occasions when judges conduct themselves in a manner that is rude and discourteous to litigants, witnesses, court staff, jurors or counsel, the perception of the administration of justice suffers in the eyes of the public. This perception also suffers when counsel engage in this type of misconduct themselves. When a judge fails to intervene to establish civility and professional standards in the courtroom, he/she risks becoming implicated in the misconduct. Again, public perception of how justice is carried out is compromised. The courtroom is supposed to be a place where citizens take their disputes to be resolved in a calm, detached atmosphere of respect and dignity. When this is permitted to lapse, the judge has failed to discharge an important aspect of his/her office.

In *Felderhof*, *supra*, Justice Rosenberg was critical of the trial judge's failure to intervene to put an end to the unacceptable conduct of counsel, even though this failure did not amount to jurisdictional error. However, the Court held that a judge could lose jurisdiction "in circumstances falling short of actual or reasonable apprehension of bias on the part of the trial judge where the failure of the trial judge to intervene would prevent a fair trial."[56] The message is clear – judges are responsible for the manner and tone of proceedings in the courtroom and must not remain idle in the face of misconduct.

As part of the Second Colloquium on Professionalism in October 2003, the Honourable John Morden prepared a paper entitled, "The Good Judge."[57] Mr. Morden picked up on the theme pursued in *Felderhof* and asserted that judges have a duty to enforce decorum and courtesy "by the familiar duo of precept (which includes by order, direction and admonishment) and example."[58] Mr. Morden expressed his preference for the latter – the judge leading the way by example.[59] One would be hard-pressed to find a judge who better exemplified the values of decorum, courtesy and respect than John Morden, who served with

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[56] *Supra*, note 31, at p.541.
[57] Papers from all of the Colloquia may be found on the website of the Law Society of Upper Canada: http://www.lsuc.on.ca/news/a/hottopics/committee-on-professionalism.
[58] "The Good Judge", p.5-14.
[59] Mr. Morden cites Rule 69 of the Advocates' Society's *Principles of Civility for Advocates*, which provides that "Counsel are entitled to expect Judges to treat everyone before the Courts with appropriate courtesy."

great distinction for many years on the Ontario Supreme Court and then on the Court of Appeal for Ontario.

In terms of the other themes explored in this paper – competence and specialized Crown obligations and standards – these are difficult matters for a trial judge to address while in court. Interventions made in the interests of assisting a foundering counsel, or attempting to defuse an apparent mismatch in competence, is risky business for judges. It may well be tempting, especially given our increasing concern for miscarriages of justice. However, the judge who intervenes to address these sorts of matters risks displaying the appearance of bias, if not bias in fact.[60] While there may be more latitude for a judge to act when the accused person is unrepresented, addressing a professional lack of incompetence is something that should usually take place outside of the courtroom, in the disciplinary context.

IV. CONCLUSION

The aspects of professionalism discussed in this paper, competence, appropriate prosecutorial conduct and civility, are important values in litigation,

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[60] One of the important ideals of our adversarial system is the notion that, if two evenly-matched lawyers each puts his/her best case forward with skill and vigour before an impartial and competent judge, the chances of achieving a just result are significantly enhanced. When one counsel is significantly weaker than the other, this model breaks down. Rather than restoring the model, when a trial judge attempts to compensate for the weaker counsel, matters are made worse in that now two of the three key figures in the process have stepped out of their assigned roles.

especially in the realm of criminal law. They are also form an important part of what it means to practice in the area, with both honour and integrity. Insisting on professional competence of all lawyers and ensuring that prosecutors act within the guidelines of fairness are values that extend beyond what it means to practice with honour and integrity. They have a tangible effect on outcomes. Civility is required to preserve public respect for this important and delicate process.

Important as they are, the way the system goes about enforcing these values is inadequate. Competence of defence counsel is amenable to some measure of enforcement through the ineffective assistance of counsel cases, but only in the most egregious of circumstances. The courts would prefer that professional bodies took care of "their own" in the circumstances. The criminal law itself is available to redress professional defalcations, but the courts have difficulty translating nebulous professional standards into the Byzantine language of certain *Criminal Code* provisions. Again, the courts would prefer that the professional bodies take care of this unpleasant business. Professional bodies are well-equipped to deal with these aspects of professionalism, yet there is little evidence that claims of incompetence, prosecutorial misconduct or civility are dealt with in any great frequency or in a manner that catches the attention of the profession. For now at least, we must rely on the occasional, well-placed rebuke by judges in the criminal process to draw the line between acceptable and

unacceptable conduct. The rest is left to the collective self-reflection of criminal practitioners.