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Lawyers regulating lawyers (redux)?

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Cases Considered:

Law Society of Upper Canada Complaint, Case No. 2012-105128

Introduction

On November 3, 2011 I wrote a blog on the Law Society of British Columbia's decision to discipline Gerry Laarakker for unethical conduct (here). Laarakker had written rude things about (and to) a lawyer, M, who had sent a demand letter to Laarakker's client. The demand letter claimed recovery of $521.97 on the basis that Laarakker's client's daughter had shoplifted from M's client. In my earlier blog I suggested that directing regulatory attention at Laarakker's incivility was a poor use of the Law Society's regulatory resources. My argument was that lawyers who send demand letters without a legal basis for the claim made in the letter, and with no intention to pursue the claim in court, act unethically. Law societies do not, however, appear to discipline lawyers for sending improper demand letters. The only real sanction for those lawyers is social shaming and shunning. Disciplining lawyers who are uncivil in response to arguably unethical conduct takes away the only sanction on that behaviour, and may encourage it. Such discipline is, for that reason, problematic.

Since I wrote that Blog, a complaint was made to the Law Society of Upper Canada with respect to a lawyer writing demand letters to shoplifters and/or their parents. The complaint stated that the letters sent by the lawyer were sent to young people who had stolen "something small, such as a lipstick, a candy bar, or a razor" or to their parents, demanding payment. The young people had not been criminally charged and the goods were recovered. (Complaint summarized in letter from Law Society dated May 28, 2012). The complainant suggested that the demand letters were "designed to intimidate an unsophisticated public where the parents or the young person will pay up in embarrassment" (ibid.).

The Law Society declined to investigate the complaint. In a brief three paragraph letter sent to the complainant, the Law Society summarized the complaint and then stated that it was closing the complaint for the following reasons:

> Please be advised that the Law Society has previously addressed the issue of the specific wording of these types of civil recovery letters and we are satisfied that this version of the civil recovery letter does not breach the *Rules of Professional Conduct*. The amount of civil recovery to which Mr. [name]'s client may or may not be entitled is a legal issue that falls outside of the Law Society's jurisdiction. Consequently, this file has been closed (ibid).

In this blog I want to explore what the Law Society may have meant by these reasons, and to suggest that on any of the interpretations that offer themselves, the Law Society's approach is unfortunate, and reinforces the opinion set out in my earlier blog. It is important that when lawyers see other lawyers taking steps that undermine the legal profession's essential duties of loyalty to our clients, and fidelity to law, they make their disapproval of that behaviour clear. An ethical profession requires an ethical community of legal professionals, communicating and reinforcing community standards of ethical behaviour, and informally sanctioning lawyers who violate them.

Comment

The brevity of the Law Society's response renders the true basis for their decision opaque. In my view, and after discussion with some colleagues through the Legal Ethics Listserv, there appear to be three reasonable interpretations of the Law Society's letter, all of which are problematic, although for different reasons.

The first possible interpretation is that the Law Society has reviewed the claim made in these types of civil recovery letters, determined that there is a non-frivolous basis for the claim being made, and thus concluded that the letter does not breach the *Rules of Professional Conduct*. The comment about the amount of civil recovery available goes to the precise quantum of damages the lawyer's client could claim, which of course is not relevant to, or within, the Law Society's jurisdiction.

If correct, this interpretation has the advantage of not involving the Law Society in condoning lawyers writing demand letters without legal foundation. The problem with it is that, based on the case law, the legitimacy of these letters seems doubtful where they are written to the parents of shoplifters, or to shoplifters who are not habitual criminals, and who have taken only small items. As was stated by the Manitoba Court in *DCB v Zellers Inc.*, [1996] MJ No 362 (QB) (leave to appeal denied: (1996) 131 WAC 198),

> Whatever legal opinion or opinions Zellers might have had regarding their claims generally, ***I cannot believe that they seriously thought that this claim could succeed or that they seriously intended to pursue it to court if it was not paid***. Mr. Arkin was not called as a witness at the trial and so we do not have the benefit of what his opinion of the claim was. But I assume that as a competent and responsible lawyer, he knew or ought to have known that the claim had no prospect whatsoever of succeeding in court and that it would be futile to pursue it [emphasis added] (para 18).

In searching Quicklaw for cases in this area for the prior blog, and for this one, I was unable to find support for the argument that these demand letters rest on a legitimate cause of action absent exceptional circumstances. As I noted in that earlier blog, I did not exhaustively research the point, but I did note up the two lead cases in the area (*Zellers* and *Hudson's Bay Co. v White* (1997), 32 CCLT (2d) 163 (Ont Gen Div)) and doing so did not reveal any authority for the position that the sort of letters described in the complaint to the Law Society have a legal basis. In fact, my research did not reveal much authority at all on civil recovery for shoplifting. That absence of authority may support the presumption that the lawyers who write these letters do not pursue them in court (and do not intend to do so), a fact that does not bolster faith in the letters' legal legitimacy. It should also be noted that the Law Society's letter to the complainant did not provide any information about where it had previously addressed the issue, nor as to how its

prior decision could be publicly accessed. My own Internet searches of the Law Society website and CanLii did not reveal the relevant document.

As a result, this first interpretation of the Law Society's position seems problematic. It may be a reasonable interpretation of what the Law Society says they are doing, but it does not seem a reasonable thing for the Law Society *to* be doing. The case law suggests that the claims made in these demand letters are legally doubtful much (if not most) of the time, and if the Law Society is satisfied that they are legally meritorious, it needs to provide more information to support that assertion.

The second possible interpretation is that the Law Society believes that it is not a breach of the *Rules of Professional Conduct* to send a demand letter where the claim in the demand letter is illegitimate or frivolous, provided that the demand letter uses appropriate wording – e.g., is polite. The advantage of this interpretation is that it is fair to say that the *Rules of Professional Conduct* never specifically prohibit sending demand letters based on illegitimate claims. The disadvantage is that several provisions of the *Rules* could be interpreted so as to cover this sort of behaviour and, as I set out in my prior blog, there are strong reasons to assert that sending out illegitimate demand letters with no intention of pursuing the claim in court is fundamentally inconsistent with the lawyer's role.

Imagine, for example, a situation posited by a fellow professor: a client (C) approaches a lawyer and says that he does not like the colour that his neighbour (N) has painted his (the neighbour's) house. C asks the lawyer to send a demand letter to N seeking damages. The lawyer advises C that there is no cause of action for ugly paint, but C says that N doesn't know that, and he wants the lawyer to send the letter anyhow. The lawyer does so, N takes the letter to another lawyer, who complains to the Law Society.

Surely in a case like that the Law Society would be prepared to say that sending the letter was improper. Such a letter seems wholly inconsistent with a lawyer's role of helping people to access the entitlements and rights that the law provides. It involves the lawyer not in helping a client to access the law, but rather in helping a client to undermine the law, and to seek money to which the client has no legal entitlement. Further, it seems inconsistent with a number of the provisions of the *Rules*. Rule 6.01(1) requires that a lawyer "conduct himself or herself in such a way as to maintain the integrity of the profession". Rule 6.02(1) requires that a lawyer be "courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice". Rule 2.02(5)(a) prohibits a lawyer from knowingly assisting in or encouraging "any dishonesty, fraud, crime, or illegal conduct". And, finally, Rule 1.01(1)(a) requires the *Rules* to be interpreted consistently with the fact that "a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public, and other legal practitioners honourably and with integrity."

If, therefore, there are any circumstances in which demand letters are being sent to shoplifters or their parents by lawyers who know that on the facts the claim they are asserting is not legally valid, and that their client has no intention of pursuing that claim in Court – a situation suggested by the Court to have arisen in *Zellers*, for example – it seems hard to see how the Law Society could say that they are "satisfied" that the letters do not violate the *Rules of Professional Conduct*. Or, to put it slightly differently, that is not something that the Law Society *should* be saying. It should instead be actively concerned when demand letters are sent without legal basis, and without any intention to pursue the claim in court (as I noted in my prior blog, a lawyer may ethically bring a novel or unmeritorious claim to court).

The third, and related, interpretation is that the Law Society is saying that the Law Society does not have jurisdiction to assess the legal validity of claims made in a demand letter. As a consequence, the Law Society may only assess the tone and language of a demand letter for compliance with the *Rules of Professional Conduct*. It has done that for these sorts of letters, and is satisfied that the language they use complies with the rules. The virtue of this interpretation is to prevent a slippery slope in which the Law Society becomes a *de facto* adjudicator of substantive legal claims. If the Law Society takes on the task of adjudicating the legitimacy of the legal basis of demand letters, it may be asked to do so for a myriad of legal claims, with lawyers and their clients inundating the Law Society with complaints that lawyers are acting unethically because acting without legal basis in family law cases, civil claims, as creditors or even in criminal cases. The Law Society could not take on that sort of jurisdiction, either pragmatically or in principle; the function of legal adjudication lies with the courts.

The difficulty with this interpretation is that the jurisdictional authority being requested from the Law Society should be narrow and defined enough to prevent sliding down the slippery slope. First, whenever a matter is before the courts the Law Society can legitimately decline to consider its merits. Second, in any case where the matter could have some merit, the Law Society does not have to act. The only oversight sought from the Law Society is that when lawyers send demand letters *without merit and with no intention of pursuing the claims in court* that the Law Society take steps to stop such letters from being sent.

Further, if the Law Society refuses to ever exercise this jurisdiction then lawyers can send letters based on ugly paint "claims" or anything at all, and provided the recipient does not know better, the lawyer's client may benefit. The only thing standing between the lawyer and that course of action will be the lawyer's good conscience. And while a good conscience might be enough for the vast majority of lawyers, it is not enough to protect the public from those without it.

Ultimately, none of these interpretations provide me with much reason to believe that the Law Society is making a good or justifiable regulatory choice here. I hasten to emphasize that there may be more to their decision, and that it is difficult to assess the virtues of the Law Society's approach based only on this brief and opaque paragraph, and without seeing the document where they "previously addressed" the compliance of these letters with the *Rules of Professional Conduct*.

Having said that, as I noted in my previous blog, sanctioning illegitimate demand letters does not fit within the general pattern of law society discipline, which tends to focus on cases with patterns of misconduct that are more egregious/less ambiguous. It is not a type of discipline that law societies appear in general to want to pursue, or that they have ever pursued in fact. Moreover, whatever the basis for the Law Society's approach, the fact that they do not want to proceed on these cases means that discouraging lawyers from writing demand letters which are unmeritorious will require some other regulatory mechanism. That could involve the courts – e.g., through recognition of causes of action against lawyers who send such letters – or it could involve informal mechanisms of social shunning and shaming by other lawyers. The difficulty with the former is that there is no case law to support that sort of action, and likely considerable reluctance on courts to impose that liability on lawyers. The difficulty with the latter is that, as I noted in my prior blog, the approach of the law societies to civility, and the particular emphasis in the civility cases on preventing lawyers from criticizing other lawyers unless the criticism is both polite and well founded, discourages the operation of such informal mechanisms.

At this point I start to feel gloomy about the sending of these letters being prevented. But perhaps those who disagree with me on my criticisms of civility are correct, and it is not hard to be ardent and civil, and lawyers will not be chilled in their speech by law society discipline of lawyers who are rude. I hope that my critics are right. Regardless, I encourage lawyers to continue to speak out and to reassert as a community the importance of lawyers ensuring that in their dealings with clients, and with the public, they remember both of their central obligations: their duty of loyalty to their client but also of fidelity to law. As Tim Dare has said, the role of the lawyer is to help their clients access what the law provides, not what it can be made to give (Tim Dare, *The Counsel of Rogues: A Defence of the Standard Conception of the Lawyer's Role* (London: Ashgate, 2009)).