

4th Annual Civility in the Criminal Bar Event

*“Do as adversaries do in law, strive mightily,
and eat and drink as friends”*

– Wm. Shakespeare

December 7, 2022



Introduction

Welcome

Purpose

Agenda

Introduction

- Gerri-Lyn Nelson, BCPS & Laura McPheeters, defence counsel

Part 1 : Benchers' Thoughts on Civility

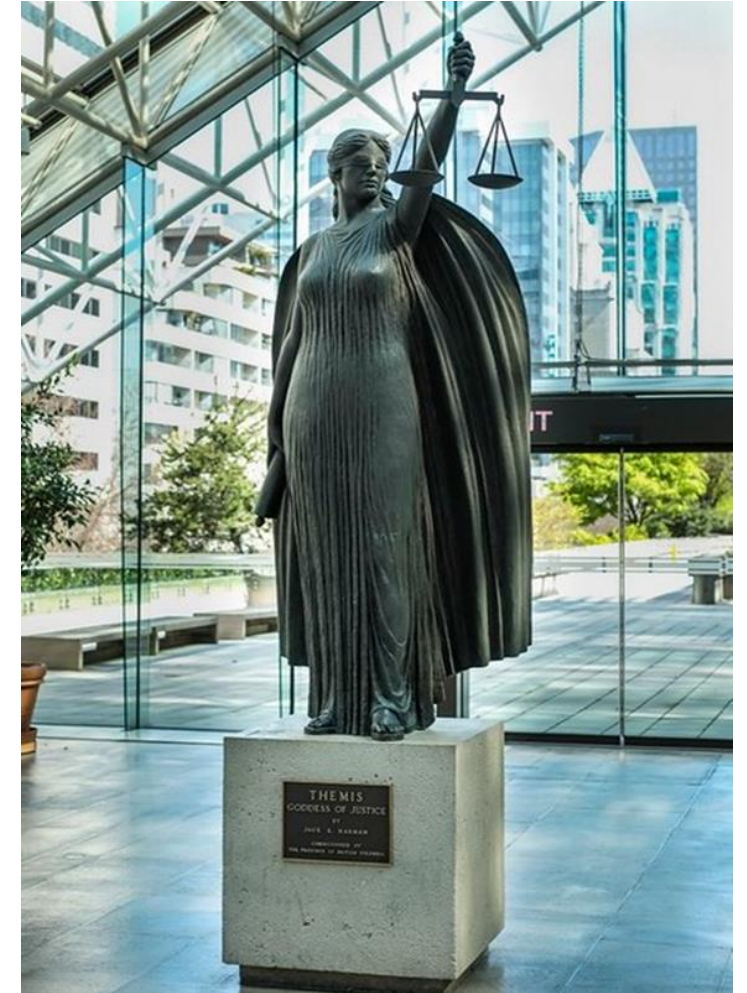
- Phil Riddell, KC (Life Bencher) & Lisa Dumbrell

Part 2: Civility Discussion Scenarios

- Honourable Justice Jennifer Duncan, BCSC
- Honourable Judge David St. Pierre. BCPC
- Daniel Song, KC, defence counsel
- Alix Rice, PPSC (Federal Crown)
- Paul Pearson, BCPS (Provincial Crown)

Part 3: Q&A

Closing Remarks & Trivia





Benchers' Thoughts on Civility

- MS Teams etiquette-seriously
- Articled students and principals
- Dust off your Member's Manual... highlights of the Code
- Sexism and Civility
- How are you doing?
- Zealous advocacy in court vs. out of court?
- Before you send that letter or email...



Code of Professional Conduct- highlights

- Chapter 2: legal ethics, and obligations
- Chapter 3- relationship to clients: competence, honesty & candor, prohibition against inducement for withdrawal of criminal or regulatory proceedings (consent of crown required), conflicts, withdrawal from representation for non-payment of fees, withdrawal generally and timing
- Chapter 5: lawyer as advocate, Undertakings, duty of prosecutors, duty of courtesy
- Chapter 6: harassment and discrimination
- Chapter 7: relationship to the Society and other lawyers- Undertakings, courtesy and Good faith, communications, maintaining professional integrity and judgment

- Trust Accounting: return of cash retainers over \$7500
- Client ID and Verification
- Breach can amount to professional misconduct
 - Johnson v. LSBC 2018 BCCA 40
 - Foo v. LSBC 2017 BCCA 151
- Ultimately, do you want to be in this position? Time, stress and money...civility may also just mean shaking your head and walking away.

You should wait and think about it before sending the letter

WITHOUT PREJUDICE OR ADMISSION

Sir,

I have just left the Court. Just a few minutes ago, as you hid behind your status like a coward, you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal.

Because you ducked out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions.

If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills (to use an expression in English, that language you love so much), which has caused you to become pedantic, aggressive and petty in your daily life, makes no difference to me; after all, it seems to suit you well.

Your deliberate expression of these character traits while exercising your judicial functions, however, and your having made them your trademark concern me a great deal, and I feel that it is appropriate to tell you.

**Doré v. Barreau
du Québec, 2012 SCC 12**

Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court — where you lack the courage to hear opinions contrary to your own — to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you.

I would have very much liked to say this to your face, but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.

Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change.

**Sincerely,
Gilles Doré**

P.S. As this letter is purely personal, I see no need to distribute it.

Part 2 - Discussion Scenarios



Scenario #1 – Distraught Counsel

You attend at court for trial (or other big hearing) and it is clear that opposing counsel is distressed or otherwise unwell.

You are the Crown – what can you do?

You are the Defence – what can you do?

(does it matter whether your client is in custody or out?)

You are the Judge – what do you do?

Scenario #2 – Junior Crown

You are junior Crown. Opposing counsel has suggested a resolution that seems a little too sweet, outside the case law range and possibly contrary to policy. You are not comfortable with it, feel that defence was oppressive or patronizing; you get defensive, say “no” and press on to a trial that probably did not need to occur.

How could you deal with this differently?

What if the roles were reversed?

Obiter

Defining the Challenge.
Civility vs Collegiality

Scenario #3 – Junior Defence Counsel

You are junior defence counsel. You are running your first serious trial and your client will go to jail for a long time if she is convicted. The Crown is very senior and almost too nice - you wonder if you are being lead astray or being manipulated. To counter this, you get defensive and snarky and decide to dispute everything just to ensure that you are not being taken advantage of. The trial becomes very long and nasty, and quite uncivil or everyone. How could this go differently?

Scenario #4 – “Sort it out”

You are in a trial that has become tense between counsel. You will only speak to your friend in Court and on the record. There is an issue that needs to be sorted out before the proceedings can continue. The Judge tells counsel to “sort it out and come back”.

What do you do?

How do you prevent it?

What if you are in a small community and have to work together every day – does this change things?

Orbiter

A Proposed Definition

Scenario #5 - Frenemies

You have a trial coming up with an opposing lawyer you dislike: their MO is persistent late notice about new issues or applications, and every date there is some new demand that makes you want to scream. The trial has not even begun yet.

What can you do to keep things civil in advance and during the trial?

What if you are trying to keep things civil and the other party is not heeding your lead?

Scenario #6 –When “My Friend” is also my neighbour

There is an opposing lawyer in your local community with whom you do not get along. It has descended to the level of yelling in court and making personal comments on the record. Not being on the same file in the future is not an option. It is unpleasant for each of you and for the court (for everyone around you actually!)

Obiter

Elements of Civility

Scenario #7 – “Card laid is a card played”

Defence counsel inadvertently, due to momentary distraction, does not object to an exhibit being admitted at trial. The issue is raised with the Court immediately thereafter, but Crown Counsel insists that once the exhibit is admitted into evidence it is “in”.

Is this (in)civility?

What if the roles were reversed (e.g. due to oversight, the Crown fails to prove jurisdiction before closing its case)?

Scenario #8 – Uniquely Challenging

What are some unique characteristics of sexual assault trials that present particular challenges to maintaining civility in the Courtroom?

Are there different challenges for defence counsel and Crown Counsel?

Obiter

The Roots of Incivility

Scenario #9 – Persistent Late *Charter* Notice

Defence counsel provides you with late *Charter* notice shortly before a scheduled *voir dire*. You work day and night in the week leading up to the *voir dire* in order to ensure that you are prepared to deal with all of the issues. On the first day of trial, the defence counsel raises an additional *Charter* issue.

As Crown counsel, what do you do? Is the provision of late notice an acceptable strategic practice for defence counsel? Is that civil?

Scenario #10 – Misleading the Court

In the evening, following a long day in court, you receive an email from opposing counsel accusing you of misleading the court on a particular issue.

How do you respond?

Obiter

Ways to Maintain Civility & Get it Back

Q & A





In Closing

“Is it true?

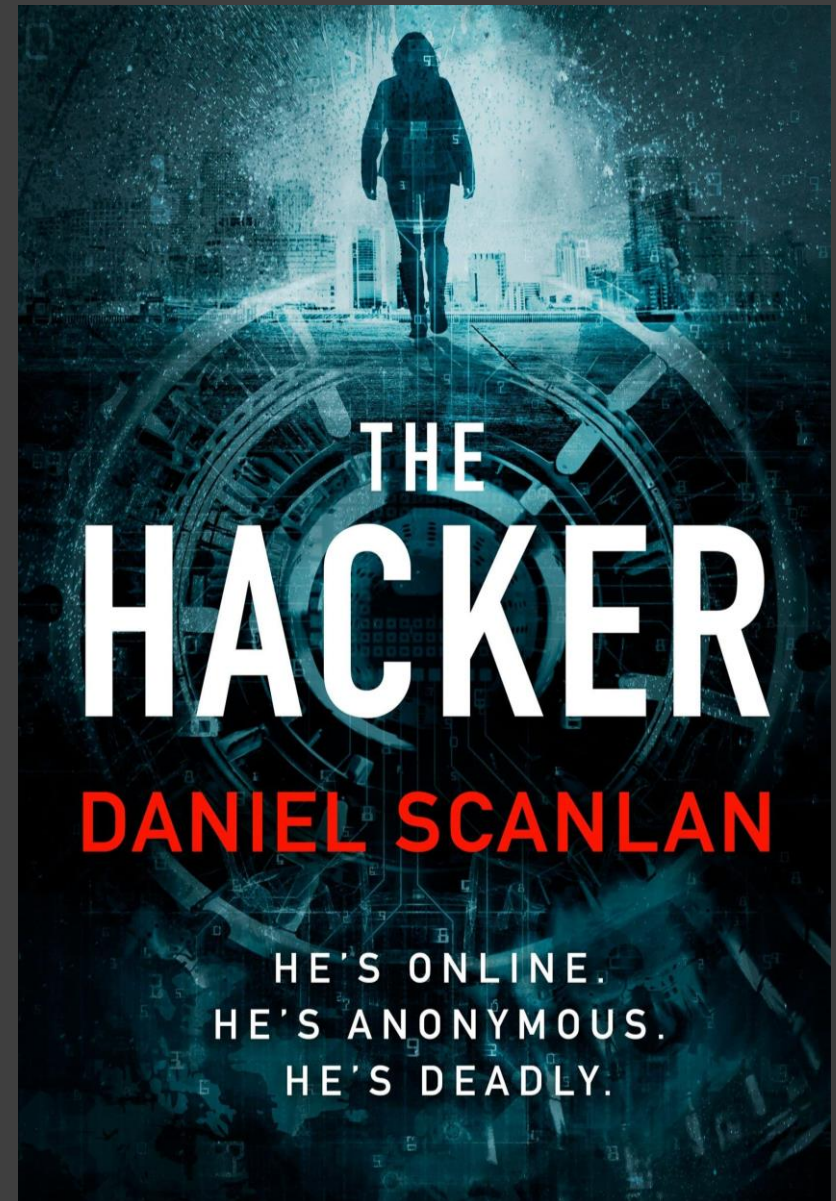
Is it kind

Does it need to be said?”

-Chief Inspector Armand Gamache
in “A Better Man”

Trivia Question

First two correct answers will receive an autographed hard copy delivered to your office.





CPD Credit

2 hours ethics/PM credit

“Courthouse Libraries BC: Civility in the Criminal Bar: 4th Annual Lunch & Learn”