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Ethical Lawyering in a (Post) Pandemic World

May 31, 2022

Roadmap

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- Part 1:
  - What does it mean to be an ethical lawyer?
- Part 2:
  - Challenges for the Virtual Advocate
    - Communication challenges
    - Technological competence
    - Self-represented litigants
- Part 3:
  - Diversity, Equity and Inclusion

Questions/Comments/Feedback

PART ONE: WHAT DOES IT MEAN TO BE AN ETHICAL LAWYER?

What does it mean to be an "ethical lawyer"?

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- Sources of ethics:
  - Rules of Professional Conduct
  - Case Law
  - Legislation
  - Law Society Disciplinary Decisions
  - Principles and norms

What does it mean to be an "ethical lawyer"?

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Ethical Lawyer

vs.

Ethical Lawyering

What does it mean to be an "ethical lawyer"?

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2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession **honourably** and with **integrity**.

2.1-2 A lawyer has a duty to **uphold the standards and reputation** of the legal profession and to **assist in the advancement** of its goals, organizations and institutions.

-Ontario's *Rules of Professional Conduct;* British Colombia's *Code of Professional Conduct for British Colombia*; Alberta's *Code of Conduct*; and Nova Scotia's *Code of Professional Conduct*

What does it mean to be an "ethical lawyer"?

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- Acting honourably and with integrity?
- Maintaining public confidence in the administration of justice and the legal profession?
- Protecting the dignity of others?

What does it mean to be an "ethical lawyer"?

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"As professionals, the moral obligations of lawyers are seen to extend beyond concern with their own individual actions and to encompass a responsibility to monitor the actions of other lawyers and contribute to the moral heath of the profession as a whole. In this way, ***professional responsibility is as much a collective as a personal undertaking;*** *lawyers have the privilege and the duty to regulate the ethical activities and professional practices of other lawyers."*

-Alan Hutchinson, Legal Ethics and Professional Responsibility

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PART TWO: CHALLENGES FOR THE ONLINE ADVOCATE

Challenges for the Online Advocate – Communication

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a) Communication Challenges

Challenges for the Online Advocate – Communication – Confidentiality

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3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

(a) expressly or impliedly authorized by the client;

(b) required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society; or

(d) otherwise permitted by rules 3.3-2 to 3.3-6.

-Ontario's *Rules of Professional Conduct;* British Colombia's *Code of Professional Conduct for British Colombia*; Alberta's *Code of Conduct*; and Nova Scotia's *Code of Professional Conduct*

Challenges for the Online Advocate – Communication

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Some important considerations...

- Adjusting to the hybrid-model of work
- Disclosure of confidential information on virtual platforms
- Communication with clients during virtual examinations or hearings

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Virtual Proceedings and Mischief

***Kaushal v. Vasudeva et al.,* 2021 ONSC 440**

- In this case, the Applicant discovered the Respondent's wife and son were in the room when the virtual examination was taking place as the Respondent left his video and microphone on after the examination ended. The Applicant recorded the exchange and alleged the wife and son assisted the Respondent during his examination via hand and facial gestures. When confronted, the Respondent denied this occurred.
- The Court ultimately struck the evidence of the Respondent on the basis of misconduct during his virtual examination due to abuse of process.
- At paragraphs 55-56, the Court noted "[i]t is clear the use of virtual examinations will continue by this Court and will become the norm for the foreseeable future...Given the inevitable future of virtual examinations in the legal system, it is up to the judiciary, as its gatekeepers, to ensure that this tool is not abused nor seen to undermine our globally admired legal system".

Virtual Proceedings and Mischief

***Kaushal v. Vasudeva et al.*, 2021 ONSC 440**

The Court also stated:

[54] The risk of mischief on a virtual examination is an area which has yet to be fully explored, although the possibility has been adverted to. Myers, J. in *Arconti et al. v. Smith et al*, 2020 ONSC 2782, did not disallow the use of a virtual examination just because of the risk of mischief, but was certainly aware of the possibility when he said, at para. 25:

> *I do not dismiss the concern for abuse of the technology by a party who might be so inclined. It would not be difficult, for example, to put a person or another computer screen outside the field of view of the camera that could enable improper prompting of the witness. I suppose with current Bluetooth technology, even where parties are in the same room, a witness can wear a hearing device and readily receive improper prompting. People can also send hand signals to witnesses in court as well.*

Challenges for the Online Advocate – Communication

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Virtual Proceedings and Mischief

***Dimakos v. Dimakos*, 2021 ONSC 3248**

- During his cross-examination, the Plaintiff spoke to his lawyer over Zoom with other participants present. The Court emphasized that speaking to your client during evidence is contrary to the rules of cross-examination and professional conduct and worthy of sanction.
- Although no specific action was taken, the Court was highly critical of the conduct. At paragraph 23, the Court stated "the onus is on all participants to ensure that the integrity of the proceeding is maintained. This will require extra vigilance and caution as we go forward."

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3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

- Ontario's *Rules of Professional Conduct;* British Colombia's *Code of Professional Conduct for British Colombia*; Alberta's *Code of Conduct*; and Nova Scotia's *Code of Professional Conduct*

Challenges for the Online Advocate – Communication – Managing Expectations

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The commentary associated with this rule in the Ontario context states:

[8.1] What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

...

[12] The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.

Challenges for the Online Advocate – Technology

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b) Technological Competence

Challenges for the Online Advocate – Technology

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Federation of Law Societies, Model Code of Professional Conduct – Competence:

- 3.1-2 – A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Challenges for the Online Advocate – Technology

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Federation of Law Societies, Model Code of Professional Conduct – Competence:

Commentary

- [4A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

Challenges for the Online Advocate – Technology

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Federation of Law Societies, Model Code of Professional Conduct – Competence:

Commentary

- [4B] The required level of technological competence will depend on whether the use of understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including: (a) The lawyer's or law firm's practice areas; (b) The geographic locations of the lawyer's or firm's practice; and 17 (c) The requirements of clients.

Challenges for the Online Advocate – Technology

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To date, the following provinces and territories have adopted this language into their respective codes of conduct:

- Alberta
- Manitoba
- Newfoundland and Labrador
- Northwest Territories
- Nova Scotia
- Saskatchewan
- Yukon

Challenges for the Online Advocate – Technology

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LSO Competence Task Force – May 26, 2022

In its report, the Competence Task Force made three recommendations:

1. The Law Society should adopt the Federation of Law Societies of Canada Model Code commentary.
2. The Law Society should update the Law Society Technology Guideline.
3. The Law Society should provide more resources to help licensees maintain and enhance their technological competence.

Challenges for the Online Advocate – Technology

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LSO Technology Practice Management Guideline:

- Provides a framework to assist lawyers with complying with their professional responsibilities and adhering to best practices.
- Provides an overview of the use of technologies to support client service expectations and practice management systems, security, disaster management, and technological obsolescence.

Challenges for the Online Advocate – Technology

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LSO Competence Task Force recommends that the Guideline be updated to:

- Align with the technology competence commentary and recent case law;
- Describing current technology opportunities, threats, and best practices; and
- Revising and expanding the Guideline to reflect the rapidly evolving ways in which lawyers have been using technology during the pandemic.

Challenges for the Online Advocate – Technology – Tips

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Tips to consider:

- Consider receiving training for particular technology prior to a virtual examination or hearing
- Collaborate on an electronic Joint Book of Documents and hyperlink where possible
- Create an outline for navigating CaseLines or create a separate PDF of documents you intend to refer to

See also: *The Advocates Society – Best Practices for Remote Hearings*

Challenges for the Online Advocate – Technology – Tips

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Tips to consider:

- Remain muted when not speaking, especially if taking notes, and attempt to control facial expressions
- Avoid speaking over others and ensure to look directly at the webcam, not the screen
- Plan for the unexpected (i.e., sudden disconnection, a party falling ill, extreme weather)

See also: *The Advocates Society – Best Practices for Remote Hearings*

Challenges for the Online Advocate – Technology – Tips

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Tips to consider:

- Understand that the virtual process allows for creativity (i.e., using PowerPoint during submissions or Zoom annotation tools)

See also: *The Advocates Society – Best Practices for Remote Hearings*

c) Self-Represented Litigants

Challenges for the Online Advocate – Self-Represented Litigants

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Four key principles are important to keep in mind, particularly when dealing with self-represented litigants:

- Civility
- Cooperation
- Collaboration
- Accommodation

Challenges for the Online Advocate – Self-Represented Litigants

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Canadian Standards Association v P.S Knight Co. Ltd., 2022 ONSC 1518

- In this case, the Plaintiff sued Mr. Knight and the corporate defendant for defamation. Mr. Knight was a self-represented defendant who believed the Court's inability to schedule the trial was due to deliberate collusion.
- Mr. Knight then sent over 20,000 emails with 50 letters enclosed demanding the scheduling of the trial date. The trial was ultimately scheduled.
- Mr. Knight then alleged that the Court refused to give him access to CaseLines.

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Canadian Standards Association v P.S Knight Co. Ltd., 2022 ONSC 1518

[9] Caselines however, is not the court file. Court filing is done through the Civil Submissions Online portal. Caselines is a convenience for presenting electronic material to a judge during a hearing. There are two distinct and parallel systems. They are not connected. Materials need to be separately filed in each. While having two different systems is not very efficient, for now it is what is available. Having an online filing system and Caselines for hearings is distinctly more user-friendly and helpful than the processes that existed at the beginning of the pandemic.

Challenges for the Online Advocate – Self-Represented Litigants

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Canadian Standards Association v P.S Knight Co. Ltd., 2022 ONSC 1518

[19] If the defendants need help with Caselines or distinguishing Caselines from the court file, I direct them to the following very useful resources:

Supplementary Notice to the Profession and Litigants in Civil and Family Matters Regarding the Caselines Pilot, E-Filing, and Fee Payment, at **https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/supplementary- notice-september-2-2020/**

Answers to Frequently Asked Questions about CaseLines are available at **https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/supplementary- notice-september-2-2020/faq-caselines/**

CaseLines Tips for Counsel and Self-Represented Parties are available at **https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/supplementary- notice-september-2-2020/caseline-tips/**

Challenges for the Online Advocate – Self-Represented Litigants

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Canadian Standards Association v P.S Knight Co. Ltd., 2022 ONSC 1518

[20] If the defendants wish to upload further documents to Caselines during the trial and find themselves unable to do so, they may approach the trial judge. The court will be quick to assist self-represented litigants to navigate its technical systems for appropriate purposes.

Challenges for the Online Advocate – Self-Represented Litigants

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The Advocates Society – Best Practices for Remote Hearings

(i) not take advantage of a self-represented litigant's unfamiliarity with rules of practice and procedure, and, if practicable, point them to sources of information and advice to help them understand their obligations, including duty counsel services, where available;

(ii) where possible, consider providing other assistance (including technical assistance) to a self-represented litigant when doing so will not prejudice or conflict with their client obligations, will move the case forward, and will not result in significant costs; and

(iii) be alert to the potential for self-represented litigants to be "left behind" during a remote hearing, and take reasonable steps to ensure that self-represented litigants are following the proceeding.

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PART THREE: DIVERSITY, EQUITY AND INCLUSION

Challenges for the Online Advocate – Diversity, Equity and Inclusion

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Ontario's Rules of Professional Conduct state:

- **6.3.1-1** A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

- [1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.
- [2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.
- [3] Rule 6.3.1-1 will be interpreted according to the provisions of the Human Rights Code (Ontario) and related case law.

See also: British Colombia's Code of Professional Conduct for British Colombia, Rule 6.3[1]; Alberta's (Code of Conduct, Rule 6.3[1]; and Nova Scotia's Code of Professional Conduct, Rule 6.3[1].

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EQUITY

vs.

EQUALITY

Challenges for the Online Advocate – Diversity, Equity and Inclusion

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DIVERSITY

vs.

INCLUSION

Challenges for the Online Advocate – Diversity, Equity and Inclusion

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- There are different levels of racism:
  - **Institutional racism**
    - "Neutral" organizational practices and policies that limit equal access to opportunity
  - **Interpersonal racism**
    - Individual interactions where conscious and unconscious prejudice/bias present themselves
  - **Structural racism**
    - Larger cultural or societal values that are often seen as the "way things are"

Challenges for the Online Advocate – Diversity, Equity and Inclusion

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The COVID-19 pandemic has had an impact on the delivery of legal services for our colleagues and clients, opposing counsel, self-represented litigants, and court staff.

It is important to recognize the ways those around us may need to be accommodated:

- Space and place
  - The hybrid working environment
  - Access to quiet or separate space
- Wearing multiple hats
  - Childcare and eldercare
- Mental health and burnout
  - Lack of separation between personal life and work
  - Zoom fatigue

Challenges for the Online Advocate – Diversity, Equity and Inclusion – Scenarios

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A colleague at your office has recently moved back home with their family due to financial concerns resulting from the COVID-19 pandemic. They work from home four days per week. Their workspace at home is also their bedroom.

Challenges for the Online Advocate – Diversity, Equity and Inclusion – Scenarios

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You are involved in a matter with a self-represented litigant. The self-represented litigant does not have access to stable internet connection, has difficulty communicating with you, and cannot navigate e-mail or Zoom very well.

Challenges for the Online Advocate – Diversity, Equity and Inclusion – Scenarios

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You are in an examination and opposing counsel is attending from their home as their young children are unwell. There is no one else at home to assist with childcare. There are clear disruptions as a result of the children being home and unwell.

Challenges for the Online Advocate – Diversity, Equity and Inclusion

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The virtual environment presents opportunities and challenges for all individuals engaging with the legal system and it is clear there is no one-size-fits all approach.

Opportunity	Challenge
Increased access for some individuals living with disabilities and those with caregiving responsibilities	Limited access for other individuals living with disabilities, those with limited at-home work space, or those who do not have comfort with virtual platforms
Flexible working hours and schedules for work-life balance	Lack of separation between work and personal life
Cost-savings (i.e., transportation, maintenance, food)	Possible communication gaps and lack of socialization
The advancement of online tools for the delivery of legal services	Security concerns due to increased scam and phishing attempts

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QUESTIONS? COMMENTS? FEEDBACK?


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