

**MENTAL ILLNESS AND PROFESSIONAL REGULATION:  
THE DUTY TO REPORT A FELLOW LAWYER  
TO THE LAW SOCIETY**

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*Lawyers have a largely overlooked duty to report other lawyers to the law society in a range of circumstances. This duty contemplates mental illness, explicitly or implicitly, as a reportable condition and thus engages issues of stigma and discrimination. This article analyzes this reporting duty with a focus on its implications for lawyers with disabilities. The article begins by examining the history and text of the rule and considering several legal problems it presents. It then canvasses law societies’ duties to their members with disabilities under human rights law and analyzes how the duty to report interacts with human rights law. It concludes by making recommendations for law societies, including amendments to the rule containing the reporting duty.*

**TABLE OF CONTENTS**

I. INTRODUCTION . . . . . 659

II. TEXT AND HISTORY OF RULE 7.1-3 . . . . . 661

    A. THE CURRENT RULE . . . . . 661

    B. HISTORY OF THE RULE . . . . . 663

    C. UNCERTAINTY AND GAPS IN THE RULE . . . . . 665

    D. APPLICATION OF THE RULE . . . . . 667

    E. LITERATURE ON THE RULE . . . . . 668

III. RULE 7.1-3 AND HUMAN RIGHTS LAW . . . . . 672

    A. THE LEGAL TESTS . . . . . 674

    B. A PRECEDENT: BAR ADMISSIONS QUESTIONS . . . . . 675

    C. RULE 7.1-3 . . . . . 678

IV. RULE 7.1-3 AND THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* . . . . . 681

V. RECOMMENDATIONS . . . . . 683

    A. AMENDMENTS TO RULE 7.1-3 . . . . . 684

    B. OTHER RECOMMENDATIONS . . . . . 684

VI. CONCLUSION . . . . . 685

**I. INTRODUCTION**

As members of a self-regulating profession, Canadian lawyers have duties not only to the client but also to the administration of justice, the profession, and the law society as the regulator. One of these is the duty to report other lawyers to the law society in a range of circumstances. The rule encapsulating this duty is sometimes derisively referred to as a

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“snitch” rule.<sup>1</sup> Nonetheless, the reportable information captured by this rule appears to be essential to fulfilling the law society’s statutory mandate to regulate the profession in the public interest.<sup>2</sup> Unfortunately, this reporting duty is poorly understood and largely absent from the Canadian legal literature and case law.<sup>3</sup> This near-absence is problematic because these rules deal explicitly or implicitly with, among other things, mental illness — engaging issues of stigma and discrimination.

Indeed, there is now a broad consensus that lawyers are at a disproportionate risk for mental illness and that the actual and perceived risk of stigma and discrimination deters lawyers from disclosing that illness and seeking treatment.<sup>4</sup> Likewise, there is recognition that law societies as regulators must continue to re-examine their approaches to mental illness within the profession.<sup>5</sup>

In this article, I provide an analysis of this reporting duty with a focus on its implications for lawyers with disabilities. In Part II, I examine the history and text of the rule and consider several legal problems it presents. I draw on the case law and literature to identify several areas for improvement. In Part III, I assess the compliance of the rule with human rights law. I emphasize that undue hardship for regulators of self-governing professions constitutes harm to the public interest and demonstrate that human rights considerations created a duty to accommodate in the investigatory, capacity, and disciplinary processes. I explain that, while the rule prior to 2016 amendments breached human rights law, the amended version is compliant. Then in Part IV, I consider the rule’s compliance with the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> Although the *Charter* analysis and human rights analysis are distinct, I similarly conclude that, while the previous rule unjustifiably infringed section 15 of the *Charter*, the current rule is *Charter*-compliant. Finally, in Part V, I make recommendations for law societies, including amendments to the rule containing the reporting duty.

<sup>1</sup> See e.g. Richard Devlin, Jocelyn Downie & Sheila Wildeman, “Self-Regulation, Professional Responsibility and the Duty to Report” (2016) 35:2 Society Record 20, noting (but not endorsing) criticism of the rule.

<sup>2</sup> See e.g. *Law Society Act*, RSO 1990, c L.8, s 4.2, para 3: “The Society has a duty to protect the public interest”; Devlin, Downie & Wildeman, *ibid*.

<sup>3</sup> I will discuss these articles and cases below.

<sup>4</sup> See e.g. Law Society of British Columbia, Mental Health Task Force, *First Interim Report of the Mental Health Task Force* (Chair: Brook Greenberg) at paras 10–18 (incidence), 19–25 (stigma), online: <[www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/MentalHealthTaskForceInterimReport2018.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/MentalHealthTaskForceInterimReport2018.pdf)> [*Interim Greenberg Report*]; Law Society of Upper Canada, Mental Health Strategy Task Force, *Final Report to Convocation* (Chair: Will McDowell) at 2, online: <[lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/c/convocation-april-2016-mental-health.pdf](http://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/c/convocation-april-2016-mental-health.pdf)> [*McDowell Report*]; Megan Seto, “Killing Ourselves: Depression as an Institutional, Workplace and Professionalism Problem” (2012) 2:2 Western J Leg Studies at 3–8; Stephanie Nemeth, “Addressing the Elephant in the Legal Profession: The Lawyer’s Struggle with Mental Health,” online: *Saskatchewan Law Review Comments* <[sasklawreview.ca/comment/addressing-the-elephant-in-the-legal-profession-the-lawyers-struggle-with-mental-health-.php](http://sasklawreview.ca/comment/addressing-the-elephant-in-the-legal-profession-the-lawyers-struggle-with-mental-health-.php)>; Darena Muça, “Elevated Incidence of Mental Illness in the Legal Profession,” online: *McGill Journal of Law and Health Blog* <[mjhl.mcgill.ca/2019/11/28/elevated-incidence-of-mental-illness-in-the-legal-profession/](http://mjhl.mcgill.ca/2019/11/28/elevated-incidence-of-mental-illness-in-the-legal-profession/)>; Jim Middlemiss, “Mental Health’s Toll” *Canadian Lawyer* (20 May 2019), online: <[www.canadianlawyer.com/news/opinion/mental-healths-toll/276099](http://www.canadianlawyer.com/news/opinion/mental-healths-toll/276099)>.

<sup>5</sup> See e.g. *McDowell Report*, *ibid* at 2: “Regulators must reflect on the relevance and importance of mental health to the ability of individuals to meet their professional responsibilities and to serve the public.” See also *Interim Greenberg Report*, *ibid* at paras 33–48.

<sup>6</sup> Sections 1, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

While I ultimately conclude that 2016 amendments to the rule are sufficient to comply with human rights law, I argue that there are further steps that law societies should take to meet the spirit of human rights legislation. I also argue that there remain more fundamental flaws in the rule itself which detract from its ability to effectively fulfill its potential as a tool for the law societies' regulation of the legal profession in the public interest.

At the outset, I note that my focus in this article is the iteration of this reporting rule that is included in the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada.<sup>7</sup> This model rule binds lawyers only to the extent it is incorporated into provincial and territorial rules of professional conduct. As I will demonstrate next, however, this model rule is followed closely in all Canadian jurisdictions with little variation (with the partial exception of Quebec) and indeed validates the unifying aspirations of the *Model Code* itself.

It is also important at the outset to identify a meaning for the term “mental illness.” The United Nations *Convention on the Rights of Persons with Disabilities* states that “[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>8</sup> Similarly, the Public Health Agency of Canada describes mental illnesses as “characterized by alterations in thinking, mood or behaviour — or some combination thereof — associated with significant distress and impaired functioning ... including mood disorders, schizophrenia, anxiety disorders, personality disorders, eating disorders and addictions.”<sup>9</sup> The inclusion of alcoholism and other addictions is recognized in Canadian law.<sup>10</sup>

## II. TEXT AND HISTORY OF RULE 7.1-3

In this part, I set out the text and history of the rule on the duty to report, identify the key features, and provide several critiques. This material provides essential background for my analysis in the remainder of the article.

### A. THE CURRENT RULE

Rule 7.1-3 of the FLSC *Model Code* requires lawyers to report other lawyers to the law society in a range of circumstances, under the heading “Duty to Report”:

Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

- (a) the misappropriation or misapplication of trust monies;

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<sup>7</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: Federation of Law Societies of Canada, 2009), last amended 2019, r 7.1-3, online: <[www.flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf](http://www.flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf)> [FLSC *Model Code*].

<sup>8</sup> 13 December 2006, 2515 UNTS 3, art 1 (entered into force 3 May 2008).

<sup>9</sup> Public Health Agency of Canada, *The Human Face of Mental Health and Mental Illness in Canada, 2006* (Ottawa: Public Health Agency of Canada, 2006) at 2, online: <[www.publications.gc.ca/site/eng/9.688719/publication.html](http://www.publications.gc.ca/site/eng/9.688719/publication.html)>.

<sup>10</sup> See e.g. *Canadian Human Rights Act*, RSC 1985, c H-6, s 25: “disability means any previous or existing mental or physical disability and includes disfigurement and previous or existing *dependence on alcohol or a drug*” [emphasis added].

- (b) the abandonment of a law practice;
- (c) participation in criminal activity related to a lawyer's practice;
- (d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer;
- (e) conduct that raises a substantial question about the lawyer's capacity to provide professional services; and
- (f) any situation in which a lawyer's clients are likely to be materially prejudiced.<sup>11</sup>

Among other things, the commentary specifies that “the report must be made without malice or ulterior motive” and that “[n]othing in this rule is meant to interfere with the lawyer-client relationship.”<sup>12</sup> The commentary also emphasizes the importance of early intervention.<sup>13</sup>

Every law society in common-law Canada has adopted some form of rule 7.1-3, with minor variation. The Law Society of British Columbia is stricter in two respects.<sup>14</sup> First, its rule 7.1-3(a) refers to “a shortage of trust monies,”<sup>15</sup> not merely “the misappropriation or misapplication of trust monies.”<sup>16</sup> Second, it adds a seventh category, “(a.1) a breach of undertaking or trust condition that has not been consented to or waived.”<sup>17</sup> Conversely, the Law Society of Ontario is less strict. Its rule 7.1-3(c) refers not to participation in any criminal activity related to a lawyer's practice, but only to “participation in *serious* criminal activity related to a licensee's practice.”<sup>18</sup> Likewise, its rule 7.1-3(f) refers not to the likelihood of clients being “materially prejudiced,” but only “severely prejudiced.”<sup>19</sup> However, neither law society varies rule 7.1-3(e), which will be the focus of my analysis.

Quebec's analogous provision is found in the *Code of Professional Conduct of Lawyers*:

Subject to the lawyer's duty of confidentiality to a client, the lawyer must inform the syndic of the Barreau about the occurrence of any of the following situations involving another lawyer:

- (1) the unlawful custody or use of monies or other property held in trust;
- (2) the termination of the practice of the profession;

<sup>11</sup> FLSC *Model Code*, *supra* note 7, r 7.1-3.

<sup>12</sup> *Ibid*, r 7.1-3, commentaries 1–2.

<sup>13</sup> *Ibid*, r 7.1-3, commentary 1:

Unless a lawyer who departs from proper professional conduct or competence is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future.

<sup>14</sup> As I will discuss below, British Columbia is the one jurisdiction that omits what is FLSC *Model Code* r 7.1-3(e), “conduct that raises a substantial question about the lawyer's capacity to provide professional services.”

<sup>15</sup> The Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (Vancouver: Law Society of British Columbia, 2013), last amended December 2019, online: <[www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/](http://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/)>.

<sup>16</sup> FLSC *Model Code*, *supra* note 7, r 7.1-3(a).

<sup>17</sup> As noted by Jean-Michel Montbriand, “L'obligation des membres d'un ordre professionnel de dénoncer le comportement dérogatoire d'un autre membre” (2019) 458 Barreau du Québec Service de la formation continue 175 at 227, 235–36.

<sup>18</sup> Law Society of Ontario, *Rules of Professional Conduct* (Toronto: Law Society of Ontario, 2000), last amended 2019, online: <[iso.ca/about-iso/legislation-rules/rules-of-professional-conduct](http://iso.ca/about-iso/legislation-rules/rules-of-professional-conduct)> [emphasis added]. See John Chapman, “Am I My Partner's Keeper? The Duty to Report a Colleague” (2013) 92:3 Can Bar Rev 611 at 628.

<sup>19</sup> Chapman, *ibid* at 628, n 57.

- (3) the inability to practise the profession;
- (4) participation in an unlawful act when practising the profession;
- (5) a health condition that could materially prejudice a client;
- (6) conduct that raises a doubt as to his honesty, loyalty or competence; or
- (7) the performance of any act whose nature or seriousness is such that it could adversely affect the honour, dignity or reputation of the profession or the public's confidence in the profession.<sup>20</sup>

Notably, the Quebec provision refers both to “the inability to practice the profession” and to “a health condition that could materially prejudice a client.”<sup>21</sup> Jean-Michel Montbriand argues that paragraph 7 is very different from 7.1-3(f) and much broader than the FLSC *Model Code* rule.<sup>22</sup>

This rule is not unique among common-law jurisdictions. For example, rule 8.3(a) of the *Model Rules of Professional Conduct* of the American Bar Association provides that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”<sup>23</sup> Similar rules apply to barristers and solicitors in England and Wales.<sup>24</sup>

## B. HISTORY OF THE RULE

Like most of the rules of professional conduct, the history of what is now FLSC *Model Code* rule 7.1-3 can be split into two periods: before and after the adoption of the FLSC *Model Code*. Before the *Model Code*, which was intended to promote consistency among law society rules across Canadian provinces and territories, I focus on the history of the Ontario version of the rule by the Law Society of Upper Canada (LSUC) (as the Law Society of Ontario was then known). This is because the current Canadian rule appears to originate in

<sup>20</sup> CQLR c B-1, r 3.1, s 134 [*Quebec Code*].

<sup>21</sup> *Ibid.*

<sup>22</sup> Montbriand, *supra* note 17 at 226.

<sup>23</sup> American Bar Association, “Rule 8.3: Reporting Professional Misconduct,” online: <[www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_8\\_3\\_reporting\\_professional\\_misconduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_3_reporting_professional_misconduct.html)> [ABA *Model Rules*]; Chapman, *supra* note 18 at 627. See also Montbriand, *supra* note 17 at 190–91, noting the similarity of the ABA rule.

<sup>24</sup> Outcome 10.4 of the *Code of Conduct* of the Solicitors’ Regulatory Authority requires: “you report to the SRA promptly, serious misconduct by any person or firm authorised by the SRA, or any employee, manager or owner of any such firm (taking into account, where necessary, your duty of confidentiality to your client).” (Solicitors Regulatory Authority, *SRA Code of Conduct 2011*, version 21, online: <[www.sra.org.uk/solicitors/handbook/code/content.page](http://www.sra.org.uk/solicitors/handbook/code/content.page)>. Chapman, *supra* note 18 at 627 refers to an earlier version). Similarly, rule C66 of the *Code of Conduct* of the United Kingdom Bar Standards Board provides that “you must report to the Bar Standards Board if you have reasonable grounds to believe that there has been serious misconduct by a barrister or a registered European lawyer, a BSB entity, manager of a BSB entity or an authorised (non-BSB) individual who is working as a manager or an employee of a BSB entity.” (Bar Standards Board, *Bar Standards Board Code of Conduct*, 9th ed, being Part II of the *Bar Standards Board Handbook*, 4th ed, online: <[www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/](http://www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook/)> [BSB *Code of Conduct*]). See also rule C67: “You must never make, or threaten to make, a report under Rule rC66 without a genuine and reasonably held belief that Rule rC66 applies.” And rule C69: “You must not victimise anyone for making in good faith a report under Rule C66.” John Chapman has noted that these rules are similar to FLSC rule 7.1-3: Chapman, *supra* note 18 at 627–28.

a 1965 ruling of the LSUC Professional Conduct Committee, first published in the LSUC *Professional Conduct Handbook* of 1973:

Unless it be privileged or otherwise unlawful it is proper for any member to bring to the attention of the Society any instance involving or appearing to involve professional misconduct or conduct unbecoming a barrister, solicitor or student-at-law or reflecting on the honour of the Bar and the duty of every member to bring such instances to the Society's attention when they involve shortage of trust funds.<sup>25</sup>

Note that the ruling differentiated between two categories of reporting. Reporting was “proper,” in other words discretionary, where there was “any instance involving or appearing to involve professional misconduct or conduct unbecoming a barrister, solicitor or student-at-law or reflecting on the honour of the Bar.”<sup>26</sup> In contrast, reporting was a “duty,” in other words mandatory, only where the situation “involve[d] shortage of trust funds.”<sup>27</sup>

In 1978, the Ontario reporting provision became a commentary to a rule, the rule itself being simply that “[t]he lawyer should assist in maintaining the integrity of the profession and should participate in its activities.”<sup>28</sup> Reporting was mandatory not only where there was a shortage of trust funds but also in any instance “[w]here ... there is a reasonable likelihood that someone will suffer serious damage as a consequence of an apparent breach,” with a trust shortage being the example given.<sup>29</sup> This was also the first appearance of the qualification that “[i]n all cases the report must be made bona fide without malice or ulterior motive.”<sup>30</sup>

In 1998, the Ontario rule was amended to specify that it was not to change the solicitor-client relationship and to add several more examples that would trigger the reporting duty: “misappropriation or misapplication of trust monies; the abandonment of a law practice;

<sup>25</sup> Law Society of Upper Canada, *Professional Conduct Handbook* (1 January 1973) at 73, Ruling 33 [1973 *Handbook*]; Darryl Robinson, “Ethical Evolution: The Development of the Professional Conduct Handbook of the Law Society of Upper Canada” (1995) XXIX *Law Society of Upper Canada Gazette* 162 at 186. Montbriand dates the corresponding Quebec rule back to 1967: Montbriand, *supra* note 17 at 183.

<sup>26</sup> 1973 *Handbook*, *ibid.*

<sup>27</sup> *Ibid.* See e.g. Chapman, *supra* note 18 at 625: these provisions “historically contained a dividing line: subject to the issue of possibly breaching client confidences, it was mandatory for a lawyer to report misconduct by a fellow lawyer in certain limited circumstances but in the vast majority of instances reporting was discretionary. This division also continues under the Model Code.” See also Montbriand, *supra* note 17 at 202: “Cela dit, il faut d’abord rappeler que ces différentes normes ne visent qu’à tenter de déterminer quand un professionnel est *obligé* d’en dénoncer un autre. Mais, peu importe la norme, tout professionnel peut en tout temps *volontairement* procéder à une telle dénonciation” [emphasis in original] [“That said, it should first be remembered that these different standards are only intended to try to determine when one professional must report another. But, regardless of the standard, any professional can voluntarily make such a report at any time.” – translated by author].

<sup>28</sup> Law Society of Upper Canada, *Professional Conduct Handbook* (December 1978) at 45, r 14, commentary 1.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* See also Montbriand, *supra* note 17 at 260: “Bien que la dénonciation d’un acte dérogatoire sera très souvent perçue par le professionnel dénoncé comme ayant été faite dans le but de nuire, ce sentiment ne sera évidemment pas en soi suffisant pour qualifier ladite dénonciation de représailles” [citation omitted] [“Although the reporting of a derogatory act will very often be perceived by the professional reported as having been made with the aim of causing harm, this feeling will obviously not in itself be sufficient to qualify the said reporting as retaliation.” – translated by author]. Montbriand at 261–62 quotes from and discusses *Avocats c Oberman*, 2016 QCCDBQ 40 at paras 27–28, 30; see para 27: “il est important que les membres du Barreau comprennent qu’il est inacceptable de menacer un confrère ou une consœur de plainte disciplinaire.” [“it is important that members of the Bar understand that it is unacceptable to threaten a colleague with a disciplinary complaint.” – translated by author].

participation in serious criminal activity related to the lawyer's practice; and the mental instability of a lawyer of such a serious nature that this lawyer's clients are likely to be severely prejudiced."<sup>31</sup> As I will discuss below, this new language of "mental instability" was problematic.

The reporting provision became a freestanding rule in the 2000 LSUC *Rules of Professional Conduct*,<sup>32</sup> and did not substantively change before being largely incorporated into rule 7.1-3 of the FLSC *Model Code* in 2014 (with the two differences mentioned above — "serious" criminal activity and "severely" prejudiced).<sup>33</sup>

The only major amendment to the *Model Code*'s rule 7.1-3 since the adoption of the FLSC *Model Code* occurred in March 2016. This amendment replaced "the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced"<sup>34</sup> with "conduct that raises a substantial question about the lawyer's capacity to provide professional services."<sup>35</sup> It also rewrote the heading from "Duty to Report Misconduct" to its current "Duty to Report."<sup>36</sup>

### C. UNCERTAINTY AND GAPS IN THE RULE

The text of the provision creates uncertainty in at least two respects. One is that the provision does not indicate what threshold of certainty — for instance, suspicion or belief or knowledge — subjective or objective — triggers the duty to report.<sup>37</sup> Contrast this silence with FLSC *Model Code* rule 5.6-3 on the security of court facilities: "[a] lawyer who has *reasonable grounds for believing* that a dangerous situation *is likely to develop* at a court facility must inform the persons having responsibility for security at the facility and give particulars."<sup>38</sup> Contrast also with American Bar Association (ABA) Model rule 8.3, which both specifies knowledge ("a lawyer who knows") and gives a threshold ("raises a substantial question").<sup>39</sup> Rule 7.1-3 appears to use a screening model, in which lawyers report the possibility and the law society investigates to make a determination. Mandatory reporting laws, such as those on children in need of protection, use this type of screening model, which typically involves something less than knowledge or certainty, such as a reasonable suspicion

<sup>31</sup> Law Society of Upper Canada, *Professional Conduct Handbook* (26 June 1998), 2nd ed, r 13, commentary 1.

<sup>32</sup> Law Society of Upper Canada, *Rules of Professional Conduct* (1 November 2000).

<sup>33</sup> See above notes 18–19 and accompanying text.

<sup>34</sup> FLSC *Model Code*, *supra* note 7, October 2014 [on file with author].

<sup>35</sup> *Ibid.*, March 2016 [on file with author]. British Columbia is the one jurisdiction that omits what is FLSC *Model Code*, r 7.1-3(e), "conduct that raises a substantial question about the lawyer's capacity to provide professional services."

<sup>36</sup> *Ibid.*, October 2014.

<sup>37</sup> See e.g. Chapman, *supra* note 18 at 630. See also Montbriand, *supra* note 17 at 218–19: "Pour que la survenance d'une situation constitue l'élément déclencheur du devoir de dénonciation, il faut en avoir un certain niveau de connaissance, mais, dès la première lecture de l'article 134, on note tout de suite l'absence apparente de termes qualifiant le degré de connaissance requis pour l'avocat dénonciateur." ["For the occurrence of a situation to constitute the trigger for the duty to report, it is necessary to have a certain level of knowledge, but, from the first reading of section 134, we immediately note the apparent absence of terms qualifying the degree of knowledge required for the reporting lawyer." — translated by author] For a comparison among Quebec professions, see Montbriand, *supra* note 17 at 202–18.

<sup>38</sup> FLSC *Model Code*, *supra* note 7, r 5.6-3 [emphasis added].

<sup>39</sup> ABA *Model Rules*, *supra* note 23. Contrast also the rule for barristers in England and Wales, which specifies reasonable belief ("reasonable grounds to believe"): BSB *Code of Conduct*, *supra* note 24, r C66.

or a reasonable belief.<sup>40</sup> As with mandatory reporting laws, this threshold is a policy decision about the desired level of false positives and false negatives.<sup>41</sup>

The provision also leaves uncertainty about how quickly the report must be made. Montbriand argues that the Quebec rule “laisse croire, sans le préciser, à une exigence, d’agir avec une certaine célérité” [“suggests, without specifying it, a requirement, to act with a certain speed”]<sup>42</sup> — although he notes that “[d]’ailleurs, l’absence de critères spécifiques quant au délai pour dénoncer ne devrait pas être perçue comme permettant de passer outre à ce devoir sans conséquence aucune” [“moreover, the absence of specific criteria as to the deadline for reporting should not be seen as allowing this duty to be ignored without any consequences”].<sup>43</sup> In contrast, mandatory reporting laws in Ontario use terms such as “as soon as possible,” “immediately,” and “promptly,” and some indicate a specific time period, such as within seven days or thirty days.<sup>44</sup>

An arguable gap in the rule is that it does not contain an anti-retaliation or anti-reprisal provision. For example, the corresponding rule for barristers in England and Wales provides that “[y]ou must not victimise anyone for making in good faith a report.”<sup>45</sup> Similarly, the Ontario *Human Rights Code* provides that “[e]very person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing.”<sup>46</sup> While the law societies would be unable to create an offence for retaliation (but would be able to lobby the legislatures for such measures), they could specify in their rules of professional conduct that retaliation constitutes professional misconduct.

In contrast, the Quebec provision is accompanied by a general non-reprisal provision.<sup>47</sup> Interestingly, Montbriand has suggested that reprisal or a threat of reprisal would constitute misconduct even absent an express provision to that effect, given the importance of the reporting duty.<sup>48</sup> With respect to Montbriand, I would argue that an explicit rule against reprisal, even if legally unnecessary, has value as a signalling mechanism both as a reassurance to reporting lawyers and as a deterrent to those who might engage in reprisal.

<sup>40</sup> See e.g. Andrew Flavelle Martin, *The Future of Mandatory Reporting Laws: Developing a Legal and Policy Framework for Determining What Reporting Obligations to Impose on Professionals* (SJD Thesis, University of Toronto, 2017) at 11–12, 13–17, Table 1. Reasonable suspicion: see e.g. *Child, Youth and Family Services Act, 2017*, SO 2017, Sch 1, c 14, s 125. Reasonable belief: see e.g. *Health Professions Procedural Code (Regulated Health Professions Act, SO 1991, Sch 2, c 18, s 85.1)* (sexual abuse by a health professional).

<sup>41</sup> Martin, *ibid* at 11–12.

<sup>42</sup> Montbriand, *supra* note 17 at 241 [translated by author].

<sup>43</sup> *Ibid* [translated by author].

<sup>44</sup> Martin, *supra* note 40 at 13–17, Table 1.

<sup>45</sup> *BSB Code of Conduct*, *supra* note 24, r C69.

<sup>46</sup> *RSO 1990*, c H.19, s 8.

<sup>47</sup> *Quebec Code*, *supra* note 20, s 136, quoted by Montbriand, *supra* note 17 at 264:

A lawyer who has been informed of an inquiry or a complaint regarding him must not communicate, directly or indirectly, with the person who is the source of the inquiry or who filed the complaint, unless he has the prior written permission of a syndic of the Barreau.

Moreover, he must not intimidate a person or retaliate or threaten to retaliate against the person because the person participated or cooperated or intends to participate or cooperate in such an inquiry or complaint, reported or intends to report conduct contrary to this code, or availed himself of a right or recourse set forth in a regulation adopted under the Professional Code (chapter C-26) or the Act respecting the Barreau du Québec (chapter B-1).

<sup>48</sup> Montbriand, *supra* note 17 at 199.



#### D. APPLICATION OF THE RULE

There are few reported decisions applying the provincial and territorial provisions corresponding to rule 7.1-3, and these decisions provide little guidance.<sup>49</sup> The earliest, and most illuminating, is the decision of the LSUC Discipline Committee in *Lang Michener (Re)*, what became known as the “Lang Michener Affair.”<sup>50</sup> Five partners in the firm, members of the firm’s executive committee, were found to have committed professional misconduct by failing to inform the law society that another partner, Martin Pilzmaker, may have assisted his clients in immigration fraud.<sup>51</sup> Critically, the discipline committee held that the duty to report was triggered by serious suspicion alone and did not require certainty or knowledge:

When the respondents became aware of circumstances which at least raised serious questions and suspicions about Pilzmaker’s professional conduct, they had an overriding duty to do something about it.... [I]t is not always necessary that a lawyer *be convinced* that there has been illegal professional activity or other professional misconduct before that lawyer has a duty to inform the Society.<sup>52</sup>

The committee emphasized that reporting was necessary short of conclusive evidence: “where there is substantial even though not conclusive evidence of serious unethical behaviour.”<sup>53</sup> While the panel focused on “whether or not the disclosure was timely, which is to say was it made promptly,”<sup>54</sup> it did not give an interpretation of what timely or promptly means, concentrating on when the lawyers had learned enough to be required to report, not how long passed between that time and the time the report was made.<sup>55</sup>

Following *Lang Michener (Re)*, there are only two reported common-law decisions involving a breach of the mandatory reporting duty. The first, *Law Society of Prince Edward Island v. Aylward*,<sup>56</sup> involved a lawyer who failed to report that his partner had misappropriated trust funds.<sup>57</sup> While the panel cited *Lang Michener (Re)* for the proposition that the reporting duty was triggered by mere suspicion, as opposed to certainty,<sup>58</sup> the facts

<sup>49</sup> But see *Law Society of Upper Canada v Farant*, 2005 ONLSPH 31 at paras 89–90, emphasizing the importance of this rule:

Mr. Farant’s failures were ameliorated by his former partners and associates, his colleagues at the successor law firm and the Law Society investigation team. Collectively, they reported or investigated concerns about Mr. Farant’s conduct in a timely manner so that in the end, no client’s monies were lost.... All of the lawyers and members of the Law Society who fulfilled their duties to report and investigate Mr. Farant’s wrongful conduct, are to be commended. Their timely reporting and investigation protected the public from existing harm and prevented Mr. Farant from potential future difficulties.

<sup>50</sup> *Lang Michener (Re)* (9 January 1990) [on file with author]. For a discussion see e.g. Christopher Moore, *The Law Society of Upper Canada and Ontario’s Lawyers, 1797-1997* (Toronto: University of Toronto Press, 1997) at 326–29; Stephen E Traviss, ed, *Ontario Discipline Summaries, 1972-1992* (Toronto: Law Society of Upper Canada, 1997) at 246–48.

<sup>51</sup> *Lang Michener (Re)*, *ibid* at 5–6.

<sup>52</sup> *Ibid* at 12 [emphasis added].

<sup>53</sup> *Ibid* at 15.

<sup>54</sup> *Ibid* at 13.

<sup>55</sup> But see Chapman, *supra* note 18 at 615, n 12: “The specific wording of the then commentary of the Ontario Rules did not make it clear reporting was required but nevertheless a finding of professional misconduct was made.”

<sup>56</sup> [2001] LSDD No 48 (PEI Discipline Committee) [*Aylward*].

<sup>57</sup> *Ibid* at para 1.

<sup>58</sup> *Ibid* at para 99.

were that the lawyer was certain of the misappropriation within 24 hours of his bookkeeper raising her concerns.<sup>59</sup>

The other reported common-law decision is *Law Society of Alberta v. Chhoker*.<sup>60</sup> The lawyer in *Chhoker* not only failed to inform the law society when another lawyer in the firm asked him to modify documents relevant to an action against the firm by a former client, but also he later failed to inform the law society when he learned that another lawyer had made the modifications.<sup>61</sup> The panel held that “[h]is duty to report was a continuing obligation, and his failure to do so was a continuing breach of that obligation.”<sup>62</sup> The threshold triggering the duty, and the timeliness of the duty, was not at issue in *Chhoker* because the lawyer knew immediately that the modifications were problematic.<sup>63</sup> As the lawyer admitted this citation, and had actual knowledge, there was understandably no discussion of the triggering threshold or timeliness.

The Quebec case of *Barreau du Québec (syndic adjoint) c. Boudreau*<sup>64</sup> is somewhat similar to *Chhoker*. The lawyer in *Boudreau* was disciplined for misleading investigators about his signature on a record (which signature had actually been falsified by his associate), and for failing to report his associate for using the record to obtain a judgment.<sup>65</sup> There is little analysis, as the lawyer conceded his failure to report the misconduct.<sup>66</sup>

## E. LITERATURE ON THE RULE

The rule has been largely ignored in the Canadian legal literature. The leading treatises on Canadian legal ethics do little more than mention this duty.<sup>67</sup> Other than a brief article by Richard Devlin, Jocelyn Downie, and Sheila Wildeman, which focuses on the mental health dimension, the only articles with any level of detail are by John Chapman and Jean-Michel Montbriand.<sup>68</sup>

<sup>59</sup> *Ibid* at para 7. Aylward was also complicit by concealing the partner’s misappropriation: see Montbriand, *supra* note 17 at 233–34.

<sup>60</sup> 2017 ABLS 4, penalty reported at 2017 ALBS 16 [*Chhoker*].

<sup>61</sup> *Ibid* at paras 17–18.

<sup>62</sup> *Ibid* at para 18, as noted by Montbriand, *supra* note 17 at 199–200.

<sup>63</sup> *Chhoker*, *ibid* at paras 17–18. See also Montbriand, *ibid* at 230: “Une demande par un collègue pour altérer des documents est, à l’évidence, un acte dérogatoire et, au surplus, illégal.” [“A request by a colleague to alter documents is clearly a derogatory act and, moreover, illegal.” – translated by author] 2015 QCCDBQ 071 (merits) [*Boudreau*]; 2016 QCCDBQ 050 (penalty), discussed in Montbriand, *supra* note 17 at 193, 198, 231, 232, 240.

<sup>64</sup> *Boudreau*, *ibid* at para 1.

<sup>65</sup> *Ibid* at para 2.

<sup>66</sup> See e.g. Gavin MacKenzie, *Lawyers & Ethics: Professional Responsibility and Discipline* (Toronto: Thomson Reuters Canada, 2020) (loose-leaf release 2020-5), 25.7 Responsibility to the Profession at 25-18 to 25-20; Mark M Orkin, *Legal Ethics*, 2d ed (Toronto: Thomson Reuters Canada, 2011) at 127; Brent Olthuis, “Prosecutorial Conduct,” in Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century* (Toronto: LexisNexis Canada, 2009) (loose-leaf updated 2020, release 75) ch 3 at paras 3.237– 3.239.

<sup>67</sup> Devlin, Downie & Wildeman, *supra* note 1; Chapman, *supra* note 18; Montbriand, *supra* note 17. There is one other article in a Canadian journal, but it focuses on a US case: Archie J Rabinowitz & Eric K Gillespie, “‘Blowing the Whistle’ and the Lawyer’s Duty to Report” (1994) 7:2 Can JL & Jur 349, case comment on *Wieder v Skala*, 609 NE (2d) 105 (NY 1992) at 351–52. Some other articles mention the duty in passing: David Littlefield, “*Silvini*: Divided Loyalty” (1992) 9 CR (4th) 250 at 254; Jonnette Watson Hamilton, “Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan” (1999) 24 Queen’s LJ 561 at 639–40; Margaret Ann Wilkinson, Christa Walker & Peter Mercer, “Do Codes of Ethics Actually Shape Legal Practice?” (2000) 45:3 McGill LJ 645 at 659, n 59; Alice Woolley, “Integrity in Zealotry: Comparing the Standard Conceptions of the Canadian and American Lawyer” (1996) 9:1 Can JL & Jur 61 at 73 (on ABA r 8.3); Richard Haigh & Peter Bowal,

Chapman focuses on the firm context, and particularly the duty of lawyers within a firm to report a partner or associate, arguing that this context raises different considerations than reporting any other lawyer.<sup>69</sup> He suggests that “in the context of reporting a lawyer who is not at the firm, if there is uncertainty on the obligation, the safe approach of reporting may tend to be followed given that there will normally be little personal downside to reporting.”<sup>70</sup> Chapman emphasizes that, in contrast, reporting a lawyer within the firm has personal and financial implications.<sup>71</sup> Indeed, he argues that the duty to report a colleague is more important for deterrence than the duty to report any other lawyer.<sup>72</sup>

Montbriand considered the rule as part of a comprehensive examination of the duty of professionals to report misconduct (“comportement dérogatoire”) by their colleagues.<sup>73</sup> He notes that reporting is important because clients are poorly situated to identify wrongdoing<sup>74</sup> and is necessary in order to protect the public and promote public confidence in, and the public image of, the profession.<sup>75</sup> He emphasizes that the duty to report is a corollary of self-regulation.<sup>76</sup> He also emphasizes that the duty to report lies on the individual lawyer and cannot be delegated or transferred to another lawyer,<sup>77</sup> makes the important point that a superior cannot release a lawyer from his or her obligation to report,<sup>78</sup> and indeed notes that in Quebec senior lawyers have a positive obligation to ensure that their junior colleagues comply with their professional obligations.<sup>79</sup> More specifically, he notes that the duty applies even if it risks making the reporting lawyer a witness in her client’s matter.<sup>80</sup>

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“Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis” (2012) 35:1 Dal LJ 89 at n 52; Ryan Rempel, “1995 Survey of Decisions of the Saskatchewan Court of Appeal” (1996) 60 Sask L Rev 1 at 15; Lois Maclean & John McNiven “The Complaint Resolution Project” (1995) 34:1 Alta L Rev 54 at 58; Michael J Trebilcock, “Regulating the Market for Legal Services” (2008) 45:5 Alta L Rev 215 at 226. David Tanovich incorporates the duty into his model code for law students: David M Tanovich, “Learning to Act Like a Lawyer: A Model Code of Professional Responsibility for Law Students” (2009) 27 Windsor YB Access Just 75 at 108–109.

69 Chapman, *ibid* at 617, 634–35.

70 *Ibid* at 630–31.

71 *Ibid* at 632.

72 *Ibid*. See also Montbriand, *supra* note 17 at 292, citing Chapman, *ibid* at 634.

73 Montbriand, *ibid*.

74 *Ibid* at 192–93.

75 *Ibid* at 193–94, at 193 quoting Boudreau, *supra* note 64: “Il est du devoir de l’avocat de contribuer à la protection du public et de dénoncer sans délai au syndic les actes dérogatoires commis par des confrères. Agir autrement porte ombrage à l’image de la profession.” [“It is the duty of the lawyer to contribute to the protection of the public and to report without delay to the syndic any derogatory acts committed by colleagues. Acting differently brings shame upon the profession.” – translated by author]. See also Montbriand at 251: “L’obligation de dénonciation d’un collègue fautif est, comme nous l’avons déjà vu, un des mécanismes pour préserver l’honneur, la dignité et la réputation de la profession ET pour maintenir le lien de confiance du public envers celle-ci” [emphasis in original] [“The obligation to report a colleague at fault is, as we have already seen, one of the mechanisms to preserve the honor, dignity and reputation of the profession AND to maintain the bond of public confidence in it.” – translated by author].

76 Montbriand, *ibid* at 175.

77 *Ibid* at 196–98. Montbriand at 198 suggests that there may be an exception where a lawyer knows that another lawyer has made a report.

78 *Ibid* at 255: “Comme nous l’avons vu, l’obligation de dénonciation est personnelle et personne ne peut l’assujettir à une quelconque autorisation ou autre forme de contrôle” [“As we have seen, the obligation to report is personal and no one can subject it to any approval or other form of control” – translated by author]. See also 284–86. (Indeed, as Montbriand notes at 291, under the *Professional Code*, CQLR c C-26, s 188.2.1, discouraging a person from meeting her ethical obligations constitutes a provincial offence.) See also FLSC *Model Code*, *supra* note 7, r 6.1-1: “A lawyer has complete professional responsibility for all business entrusted to him or her.”

79 Montbriand, *ibid* at 295, quoting *Quebec Code*, *supra* note 20, s 6, which in English states that “[a] lawyer who exercises authority over another lawyer must ensure that the framework within which such other lawyer engages in his professional activities allows him to comply with his professional obligations.”

80 Montbriand, *ibid* at 195, quoting *Drolet-Savoie c Avocats*, 2004 QCTP 19 at para 34.

Montbriand also relies on *Chokker* for the proposition that the duty is a continuing one<sup>81</sup> and underlines that the correction of the misconduct (such as repayment of misappropriated funds) does not neutralize the duty to report.<sup>82</sup> While recognizing that the triggering threshold is unclear, Montbriand suggests that, when in doubt, it is better to report than not to report.<sup>83</sup> Interestingly, he suggests that a threat to report another lawyer constitutes misconduct because it implies that the lawyer may not comply with the reporting obligation.<sup>84</sup>

While Montbriand's focus is on misconduct and not on mental health issues,<sup>85</sup> he does note that the latter are covered by the reporting duty.<sup>86</sup> Montbriand ultimately concludes that the duty to report, though not a complete solution, is an important tool to protect the public interest.<sup>87</sup>

Devlin, Downie, and Wildeman, while recognizing that the duty to report is a corollary of self-regulation, suggested several problems with the "mental instability" version of the rule.<sup>88</sup> Most importantly, it was discriminatory in singling out mental illness among other factors potentially affecting a lawyer's capacity to practice.<sup>89</sup> Similarly, the heading ("Duty to Report Misconduct") implied that mental illness in itself constitutes misconduct.<sup>90</sup> From a functional perspective, "mental instability" is a term with no clear definition and a state that lawyers are unqualified to assess.<sup>91</sup>

Similar themes were emphasized in a recent report by the Mental Health Task Force of the Law Society of British Columbia:

[T]he phrase "mental instability" in 7.1-3(d) is an emotionally charged term that connotes negative attitudes toward mental health conditions and the people affected by them. Additionally, mental health is the only condition, or "state of being" enumerated in 7.1-3, in contrast to the other items in the rule, which focus on conduct. As such, 7.1-3(d) makes the unfounded and stigmatizing assumption that lawyers living with mental health challenges present an elevated risk to the public.<sup>92</sup>

While acknowledging that "the Law Society must be aware of, and responsive to the ways in which mental health and substance use issues may impact on a lawyer's professional conduct and competence," the task force noted that "[t]he majority of lawyers living with a

<sup>81</sup> Montbriand, *ibid* at 199–200, at 200 quoting *Chokker*, *supra* note 60 at 18.

<sup>82</sup> Montbriand, *ibid* at 295.

<sup>83</sup> *Ibid* at 224. See also 229: "[e]nfin, en cas de doute, et afin notamment de faire en sorte de réaliser l'accomplissement de l'objet de l'obligation de dénonciation, ne vaut-il pas mieux dénoncer plutôt que de s'abstenir de le faire ... ?" ["Finally, in case of doubt, and in particular in order to ensure that the object of the duty to report is fulfilled, is it not better to report rather than to refrain from doing so ... ?" – translated by author].

<sup>84</sup> *Ibid* at 198.

<sup>85</sup> *Ibid* at 177.

<sup>86</sup> *Ibid* at 271.

<sup>87</sup> *Ibid* at 303.

<sup>88</sup> Devlin, Downie & Wildeman, *supra* note 1.

<sup>89</sup> *Ibid* at 21.

<sup>90</sup> *Ibid* at 21–22.

<sup>91</sup> *Ibid* at 21.

<sup>92</sup> *Interim Greenberg Report*, *supra* note 4 at para 151. Indeed, it was this report that recommended that the Law Society of British Columbia adopt the updated rule from the FLSC *Model Code*: para 154.

mental health condition are not at risk of acting unethically or unprofessionally, and it is critically important that diagnosis is not incorrectly correlated with impairment.”<sup>93</sup>

There is a rich United States literature on the corresponding ABA rule — “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority”<sup>94</sup> — but its relevance for the Canadian context is limited. Three aspects are important for my purposes. First and most important are the concerns, similar to those raised by Devlin, Downie, and Wildeman in the Canadian context, that the ABA rule may increase stigma around mental illness and that lawyers with mental illness may be disproportionately reported.<sup>95</sup>

The second important aspect of the US literature is the assessment of the importance of the rule. Many commentators agree that the reporting requirement is a necessary part of the legal profession’s system of self-regulation<sup>96</sup> and is integral to the profession’s ability to police itself.<sup>97</sup> Several commentators warn that failure to comply with the reporting duty could result in the legal profession’s loss of its privilege of self-regulation.<sup>98</sup> Similarly, the reporting requirement is arguably essential to enhance the legal profession’s public image<sup>99</sup> and to foster public confidence<sup>100</sup> and trust in the legal profession.<sup>101</sup> From a functional perspective, reporting is necessary because lawyers have a special ability and opportunity to detect and identify problematic conduct by other lawyers that is not shared by the public at large.<sup>102</sup>

<sup>93</sup> *Interim Greenberg Report, ibid.*, at 12, paras 37–38.

<sup>94</sup> ABA *Model Rules, supra* note 23, r 8.3(a); Chapman, *supra* note 18 at 627. See also Montbriand, *supra* note 17 at 190–91, noting the similarity of the ABA rule.

<sup>95</sup> John V Jacobi, “Professionalism and Protection: Disabled Lawyers and Ethical Practice” (1998) 69 U Pitt L Rev 567 at 572.

<sup>96</sup> See e.g. Lonnie T Brown Jr, “Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report” (2001) 62:5 Ohio St LJ 1555 at n 1; Michael A Fisher, “Why Does Doing the Right Thing Have to be so Hard? A Law Firm Partner’s Difficult Decision on Whether to Report Suspected Misconduct” (2004) 87:5 Marq L Rev 1005 at 1017; Douglas R Richmond, “The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation” (1999) 12 Geo J Leg Ethics 175 at 175 [Richmond, “A Practical Analysis”]; David C Olsson, “Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough” (1989) 31:3 Ariz L Rev 657 at 659.

<sup>97</sup> See e.g. Parker D Eastin, “Should Kentucky Impose an Enforceable Duty on Lawyers to Report Other Lawyers’ Professional Misconduct?” (1999) 87:4 Ky LJ 1271 at 1272.

<sup>98</sup> See e.g. Michael Bloom & Carol Lynn Wallinger, “Lawyers and Alcoholism: Is it Time for a New Approach?” (1988) 61 Temp L Rev 1409 at 1429; Cynthia L Gendry, “Ethics: An Attorney’s Duty to Report the Professional Misconduct of Co-workers” (1994) 18 S Ill ULJ 603 at 606; Nikki Ott & Heather Newton, “A Current Look at Model Rule 8.3: How is it Used and What are Courts Doing About It?” (2003) 16 Geo J Leg Ethics 747 at 766; Richmond, “A Practical Analysis,” *supra* note 96 at 175; Olsson, *supra* note 96 at 658.

<sup>99</sup> See e.g. Eastin, *supra* note 97 at 1297; Arthur F Greenbaum, “The Attorney’s Duty to Report Professional Misconduct: A Roadmap for Reform” (2003) 16 Geo J Leg Ethics 259 at 267–68; Ott & Newton, *supra* note 98 at 766; Fisher, *supra* note 96 at 1017.

<sup>100</sup> See e.g. Greenbaum, *ibid* at 264; Douglas R Richmond, “Associates as Snitches and Rats” (1997) 43 Wayne L Rev 1819 at 1848 [Richmond, “Snitches and Rats”].

<sup>101</sup> See e.g. Thomas R DeBray Jr, “No One Likes a Tattletale: Why Alabama Should No Longer Force Attorneys to Report the Professional Misconduct of Other Attorneys” (2009) 34 J Leg Prof 181.

<sup>102</sup> See e.g. Bloom & Wallinger, *supra* note 98 at 1428; Eastin, *supra* note 97 at 1272; Alex B Long, “Whistleblowing Attorneys and Ethical Infrastructures” (2009) 68:4 Md L Rev 786 at 799; Richmond, “A Practical Analysis,” *supra* note 98 at 175.

The third important aspect of the US literature is the array of proposed amendments to the rule. These include clarifying the parameters “knows,”<sup>103</sup> “substantial question,”<sup>104</sup> and “as a lawyer,”<sup>105</sup> adding a specific timeliness requirement,<sup>106</sup> adding a list of specific ethical violations that would trigger the rule,<sup>107</sup> and adding a prohibition against retaliation.<sup>108</sup> Another is to add an exemption for lawyers in close personal relationships, such as spouses.<sup>109</sup>

### III. RULE 7.1-3 AND HUMAN RIGHTS LAW

Having set out the text and history of what is now rule 7.1-3 in Part II, I turn next to an analysis of rule 7.1-3 under contemporary human rights law.

I start with a brief canvass of the duties that law societies owe their members and prospective members under human rights law. While this work is largely descriptive, it is curiously absent from the literature and is necessary context for my analysis in the remainder of this part.

Human rights law prohibits discrimination by self-governing professions to the extent of undue hardship. For example, the Ontario *Human Rights Code* provides that “[e]very person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination.”<sup>110</sup> The unifying and distinguishing feature of human rights law as it applies to self-governing professions is that undue hardship is evaluated not in terms of the typical factors of cost,

<sup>103</sup> See e.g. Michael J Burwick, “You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct” (1994) 8 *Geo J Leg Ethics* 137 at 154. Although ABA rule 1.0(f) provides that “knows” “denotes actual knowledge of the facts in question” and that “knowledge may be inferred from the circumstances,” there is disagreement over where this lies on the spectrum between suspicion and certainty: see e.g. Vincent R Johnson, “Legal Malpractice Litigation and the Duty to Report Misconduct” (2011) 1 *St. Mary’s J Leg Malpractice & Ethics* 40 at 55; Greenbaum, *supra* note 99 at 291. Commentators also disagree as to whether “knowledge” is objective or subjective: see e.g. Douglas R Richmond, “Law Firm Partners as Their Brothers’ Keepers” (2007) 96:2 *Ky LJ* 231 at 253 [Richmond, “Brothers’ Keepers”]; Richmond, “A Practical Analysis,” *supra* note 96 at 186.

<sup>104</sup> See e.g. Eastin, *supra* note 97 at 1282, 1287. While the commentary to rule 8.3 provides that reporting applies only “to those offences that a self-regulating profession must vigorously endeavor to prevent” and that “‘substantial’ refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware” (ABA *Model Rules*, *supra* note 23, r 8.3, comment 3), uncertainty persists: see e.g. Ott & Newton, *supra* note 98 at 751; Gerard E Lynch, “The Lawyer as Informer” (1986) 1986 *Duke LJ* 491 at 516.

<sup>105</sup> See e.g. Lynch, *ibid* at 544. This phrase creates some uncertainty over whether, and what, extraprofessional conduct triggers the duty: Johnson, *supra* note 103 at 69–70.

<sup>106</sup> See e.g. Burwick, *supra* note 103 at 154; Laurel Fedder, “Obstacles to Maintaining the Integrity of the Profession: Rule 8.3’s Ambiguity and Disciplinary Board Complacency” (2010) 23 *Geo J Leg Ethics* 571 at 582.

<sup>107</sup> See e.g. Lynch, *supra* note 104 at 539; Greenbaum, *supra* note 99 at 289; Eastin, *supra* note 97 at 1287.

<sup>108</sup> See e.g. Greenbaum, *ibid* at 322–25; Long, *supra* note 102 at 824; Richmond, “Snitches and Rats,” *supra* note 100 at 1850. On retaliation generally, see e.g. Gendry, *supra* note 98 at 606; Richmond, “Snitches and Rats,” *supra* note 100 at 1838. On discharge or expulsion, see e.g. Brown, *supra* note 96 at 1603; Eastin, *supra* note 97 at 1296; Lindsay Oldham & Christine Whitledge, “The Catch-22 of Model Rule 8.3” (2002) 15 *Geo J Leg Ethics* 881 at 889; Long, *supra* note 102 at 797–98; Ott & Newton, *supra* note 98 at 753; Ryan Williams, “Reputation and the Rules: An Argument for A Balancing Approach Under Rule 8.3 of the Model Rules of Professional Conduct” (2008) 68 *La L Rev* 931 at 948; Richmond, “Brothers’ Keepers,” *supra* note 103 at 259.

<sup>109</sup> Greenbaum, *ibid*. (I note here Greenbaum’s suggestion at 319 that such an exemption may not be necessary because disciplinary boards likely already take such relationships into consideration when determining whether to impose sanctions. However, transparency and clarity of expectations favour such an exemption.)

<sup>110</sup> *Human Rights Code*, *supra* note 46, s 6.

health, and safety<sup>111</sup> but instead in terms of harm to the public interest.<sup>112</sup> This unique conception of undue hardship follows clearly from the law society's primary statutory duty to protect the public interest. Nonetheless, a regulatory body must protect the public interest while complying with human rights law; that is, the mandate to protect the public interest does not allow a breach of human rights law.<sup>113</sup>

The duty to accommodate to the extent of undue hardship applies most clearly in disciplinary and capacity proceedings. In disciplinary proceedings, this duty will most often require a mitigation of penalty where disability, including mental illness, is a factor.<sup>114</sup> In particular, revocation will only be appropriate where it is necessary to maintain public confidence in the profession.<sup>115</sup> In the most severe cases, mental illness will only reduce the penalty from revocation to permission to surrender.<sup>116</sup> However, this duty to accommodate disability will sometimes preclude a finding of misconduct altogether: where mental illness has caused the conduct at issue, a finding of misconduct is itself contrary to the public

<sup>111</sup> See e.g. *ibid*, s 17(2): “the cost, outside sources of funding, if any, and health and safety requirements, if any.”

<sup>112</sup> See e.g. *Law Society of Ontario v Yantha*, 2018 ONLSTH 94 at para 10 [*Yantha*]: “In the case of regulatory proceedings by the Law Society, undue hardship arises when the public interest is harmed by the accommodation.” Curiously, the case law on the law society's duty to accommodate lawyers comes almost as much from law society disciplinary decisions, primarily in Ontario, as from human rights decisions. See also *Law Society of Upper Canada v Czernick*, 2010 ONLSP 122 at para 44: “A failure to fulfil such [professional] obligations that is caused by a disability must be accommodated by the Law Society and this Panel, unless and to the extent that accommodation would cause undue hardship in the form of harm to the public interest.” But see also *MH v College of Nurses of Ontario*, 2014 CanLII 57012 (Ont HPARB) at para 61 [emphasis added]: “The Board is satisfied ... that the Applicant's desire to be registered with the College cannot be accommodated without undue hardship upon the College and the public interest that the College is mandated to protect.”

<sup>113</sup> See e.g. *Fossum v Society of Notaries Public of British Columbia*, 2011 BCHRT 310 at para 306, citing *Human Rights Code*, RSCB 1996, c 210:

The Society argues that it is statutorily required to ensure that its members are able to provide services authorized by the Act. It is required to protect the public and it is a self-regulated profession mandated to discipline its Members. This is accepted. However, the Society is required to do so without breaching the Code. Section 4 of the Code states that “If there is a conflict between this Code and any other enactment, this Code prevails.”

<sup>114</sup> See e.g. *Law Society of Ontario v Khan*, 2018 ONLSTH 131 at paras 82, 84 [citations omitted] [*Khan*]: Mental illness mitigates penalty not only “where the medical circumstances explained or contributed to the misconduct, wholly or partly,” but also “where the illness did not directly cause the licensee's conduct, but nevertheless ‘set the stage’ in terms of poor practice or financial management, or created personal circumstances that deserve compassionate treatment or recognition in assessing the total impact of a fair penalty.” See also *Law Society of Upper Canada v Ellis*, 2016 ONLSTH 20 at para 36 [citations omitted] [*Ellis*]: “while not excusing the misconduct, a health condition may assist in explaining why the conduct occurred and was out of character, even if it does not remove the licensee's ethical responsibility for the misconduct.”

<sup>115</sup> See e.g. *Khan*, *ibid* at paras 53, 66 [emphasis added]:

[T]he Law Society and the Tribunal must accommodate the licensee up to the point of undue hardship, if the individual can still carry out the essential duties of a licensee ... In assessing the appropriate penalty, the duty of accommodation will be met if the individual circumstances ... do not satisfy the Tribunal that he or she can meet the essential duties of every licensee: to permit the regulator to assure public confidence in the continued integrity of the legal professions and its self-regulation. At that point, it constitutes undue hardship to the public interest to permit the licensee to retain membership.

See also para 62: “The Law Society is entitled to assure the public that with accommodation, if appropriate, individuals who are permitted to retain their status as licensees can perform the essential duties of their profession, as set out in the professional conduct rules and the governing statute.” See also *Ellis*, *ibid* at para 38: “[I]f the need to reassure the public of the integrity of the legal profession could not be obviated without revocation or permission to surrender, this would cause undue hardship to the Law Society and the public.”

<sup>116</sup> See e.g. *Yantha*, *supra* note 112 at para 33. See also *Law Society of Upper Canada v Adams*, 2018 ONLSTH 20 at paras 61–63.

interest.<sup>117</sup> The duty to accommodate may also apply in the investigative and hearing processes, for example requiring adjournments.<sup>118</sup> Mental illness may well trigger capacity proceedings, in which similar considerations of protection of the public interest and undue hardship apply.<sup>119</sup>

## A. THE LEGAL TESTS

The test for prima facie discrimination under human rights law, recently reaffirmed by the Supreme Court of Canada in *Stewart v. Elk Valley Coal Corp.*, requires that a person have a protected characteristic, that they suffered an adverse impact, and that the former factored into the latter.<sup>120</sup> Chief Justice McLachlin for the majority emphasized that “stereotypical or arbitrary decision making” or “[t]he existence of arbitrariness or stereotyping is not a stand-

<sup>117</sup> *Law Society of Upper Canada v Helen Patricia Luzius*, 2013 ONLSHP 193 at para 50 [emphasis added]: An enlightened approach to issues of mental health within the profession cries out for a balancing of interests between, on the one hand, *the protection of the public* in respect of inadequate legal services and, on the other, the ability to regulate our members with compassion and insight. In circumstances where it is demonstrated that there is a compelling nexus between the mental illness and the alleged misconduct, *it can neither be said to be just nor in the public interest* to declare a licensee guilty of professional misconduct.

See also *Law Society of Upper Canada v Robinson*, 2016 ONLSTH 200 at para 35 [citations omitted]: At issue in all of these cases is whether a licensee can be properly found to have engaged in professional misconduct where the failure to fulfil professional obligations is caused by mental illness. Though framed in different ways, all these cases recognize that it cannot be professional misconduct to fail to do what one cannot do because of physical or mental illness. Interpreting the *Rules of Professional Conduct* and the meaning of “professional misconduct” as used in s. 33 of the *Law Society Act* in this way is consistent with the professional regulatory purposes of the *Law Society Act* and with the obligations imposed by the *Human Rights Code*.

See also *Law Society of Upper Canada v Vader*, 2013 ONLSHP 8 at para 58: “Consideration of the existence and consequence of mental health issues only as factors in the penalty phase of a hearing is ill-conceived, being based on outdated principles.”

<sup>118</sup> See e.g. *Law Society of Ontario v Burt*, 2018 ONLSTH 63 at para 83, where the tribunal held, and the Law Society of Ontario acknowledged, that the law society “has a duty to accommodate a licensee in an investigation.” On adjournments, see e.g. *Law Society of Ontario v Desrochers*, 2018 ONLSTH 148 at para 24 [citations omitted], where the panel held that justice, fairness, and the duty to accommodate will typically support adjournments “where ... there is medical evidence that a licensee’s health difficulties prevent her from being able to participate fully in the Tribunal process.”

<sup>119</sup> See e.g. *Law Society of Upper Canada v Nobili*, 2015 ONLSTH 43 at para 32: capacity proceedings “are not about denouncing conduct or making findings of character. They relate to the interests of the public and of licensees that lawyers and paralegals in active practice are able to meet their obligations and thus reflect confidence in the profession.” See also e.g. *Law Society of Upper Canada v Lyon*, 2014 ONLSHP 1 at para 22 [emphasis added]:

The capacity provisions of the Act, which are notably distinct from conduct and competence applications, serve two primary purposes. First, they ensure that there is a mechanism to *protect the public* when a licensee cannot meet his or her obligations for medical reasons. Second, they recognize that when actions which would otherwise constitute professional misconduct result from illness or addiction, in some cases it may not be appropriate to treat them as wrongdoing. The focus in a capacity application is on ensuring that *the public interest is protected*, not deterrence. As required by the *Human Rights Code*, ... any orders based on a licensee’s medical condition must be reasonably necessary to *protect the public*, and accommodate the disability to the point of undue hardship.

See also e.g. *MH v College of Nurses of Ontario*, 2014 CanLII 57012 (Ont HPARB) at para 59: “The *Health Professions Procedural Code* addresses the incapacity of members so as to accommodate disability in a manner consistent with the health and safety of the public.” In the UK context, see e.g. *In the matter of Horan*, [2011] Eq LR 473 at paras 44, 56, holding that “an important impairment of his [a barrister’s] abilities” does not necessarily constitute incapacity, as “in determining the question of fitness to practise the relevant panel must take account of adjustments which judges can be expected reasonably to make.”

<sup>120</sup> 2017 SCC 30 at para 24 [Stewart], quoting *Moore v British Columbia (Education)*, 2012 SCC 61 at para 33. Justices Moldaver and Wagner concurring (at paras 48–50), and Justice Gascon dissenting (at para 60) did not disagree on this point, although Justices Moldaver and Wagner used the term “connection” as well as “factor” (para 50).



alone requirement for proving *prima facie* discrimination,”<sup>121</sup> and that “the protected ground or characteristic need only be ‘a factor’ in the decision,” not a “significant” or “material” factor.<sup>122</sup>

The three-part test to justify a *prima facie* discriminatory standard, reaffirmed by the Supreme Court of Canada in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d’Hydro-Québec, section locale 2000 (SCFP-FTQ)*, requires that the standard have a purpose rationally connected to the performance of the job, an honest and good faith belief in the necessity of the standard, and the reasonable necessity of the standard for that purpose.<sup>123</sup> Justice Deschamps for the Court emphasized that “[w]hat is really required is not proof that it is impossible to integrate an employee who does not meet a standard, but proof of undue hardship, which can take as many forms as there are circumstances.”<sup>124</sup> She elaborated that “the goal of accommodation is to ensure that an employee who is able to work can do so.... The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.”<sup>125</sup> These tests apply with minor modification to a self-regulating profession. Recall, as described above, that undue hardship in the context of a self-regulating profession is about the impact on the public interest.<sup>126</sup> To paraphrase Justice Deschamps, the goal is to ensure that a lawyer (or a prospective lawyer) who is able to practice is allowed to do so. That is, lawyers and prospective lawyers who are otherwise fit to practice are not unfairly excluded where regulatory demands can be adjusted without undue hardship. I turn now to such an example.

## B. A PRECEDENT: BAR ADMISSIONS QUESTIONS

Other than discipline and capacity proceedings, the other context in which human rights factors arise in regulated professions is entry to a profession.<sup>127</sup> While there have been no reported human rights challenges, or challenges under the *Charter*,<sup>128</sup> to the duty to report, and virtually no considerations of these issues in the literature, there is case law and literature on a similar regulatory tool: fitness questions on applications for bar admission. These questions are used to screen for fitness to practice issues, with a positive answer leading to follow-up and potentially denial of admission. Concerns about these questions were first raised in the Canadian legal literature in 2001 and 2007 by Jocelyn Downie and Sara Josselyn.<sup>129</sup> For example, in British Columbia in 2001, applicants were required to answer, “Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, bipolar mood disorder, or manic depressive illness?”<sup>130</sup> And in the

<sup>121</sup> *Stewart, ibid* at para 45.

<sup>122</sup> *Ibid* at para 46.

<sup>123</sup> 2008 SCC 43 at para 11 [*Hydro-Québec*], quoting *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3 SCR 3 at para 54.

<sup>124</sup> *Hydro-Québec, ibid* at para 12.

<sup>125</sup> *Ibid* at para 14.

<sup>126</sup> See note 112, above, and accompanying text.

<sup>127</sup> See e.g. *Khan, supra* note 114 at paras 55–57.

<sup>128</sup> *Charter, supra* note 6.

<sup>129</sup> Sara Josselyn, “Bar Mental Fitness Questions: Perpetuating the Stigma” (2007) 16 Dal J Leg Stud 85; Jocelyn Downie, “Law Societies as Arbiters of Mental Fitness” (2001) 24 Adv Q 467.

<sup>130</sup> Downie, *ibid* at 467. This question is no longer asked of applicants: “Application: Law Society Admission Program Enrolment,” online: <[www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-admissions/admission-app.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/forms/MS-admissions/admission-app.pdf)>.

Yukon, “Have you ever been under treatment for any mental illness?”<sup>131</sup> Soon afterward, such questions were the subject of the leading case on discrimination by a law society, *Gichuru v. The Law Society of British Columbia (No. 4)*.<sup>132</sup>

Downie and Josselyn raised several issues with these questions. Downie argued that they were overinclusive in that they included mental illnesses that would not affect fitness to practice and underinclusive in that they did not include physical disabilities that might affect fitness.<sup>133</sup> She also suggested that these questions would deter law students from seeking treatment for mental illness.<sup>134</sup> Similarly, Josselyn argued that these questions were overinclusive in both breadth (they included mental illnesses that would not affect fitness to practice) and time (they included past mental health status as opposed to merely current status).<sup>135</sup> She also flagged the deterrent effect.<sup>136</sup> Both Downie and Josselyn also noted that law societies have little if any expertise in mental health.<sup>137</sup> At a broader level, these questions have a significant impact on applicants’ privacy interests,<sup>138</sup> as well as reinforcing stigma around mental illness.<sup>139</sup> From a legal perspective, Downie suggested that these questions constitute an infringement of section 15 of the *Charter*, which failed a section 1 justification at minimal impairment.<sup>140</sup> Similarly, Josselyn suggested a section 15 infringement that fails at the rational connection or minimal impairment stage,<sup>141</sup> as well as a breach of human rights legislation.<sup>142</sup>

The focus in *Gichuru* was the question above — “[h]ave you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, bipolar mood disorder, or manic depressive illness?” — as it appeared on applications for articles, as well as the processes that were engaged by a positive response to the question. The decision-maker held that the question constituted systemic discrimination against applicants with mental illness.<sup>143</sup> In reaching this conclusion, the decision-maker acknowledged the law society’s statutory obligation to protect the public interest, which included the assessment of the “competence and fitness of applicants to practice law.”<sup>144</sup> Importantly for my purposes, the complaint in *Gichuru* was not about a lack of reasonable accommodation but per se discrimination.<sup>145</sup> As I will explain below, the human right analysis in *Gichuru* provides a good model for a human rights analysis of the previous version of the duty to report rule (with the language of “mental instability”).

The decision-maker in *Gichuru* first held that prima facie discrimination was made out. The protected ground — disability, and specifically the specified mental illnesses — was not

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<sup>131</sup> Downie, *ibid.*

<sup>132</sup> 2009 BCHRT 360 [*Gichuru*].

<sup>133</sup> Downie, *supra* note 129 at 470–71.

<sup>134</sup> *Ibid* at 474–75.

<sup>135</sup> Josselyn, *supra* note 129 at 95–96.

<sup>136</sup> *Ibid* at 97.

<sup>137</sup> *Ibid* at 106; Downie, *supra* note 129 at 477.

<sup>138</sup> Josselyn, *ibid* at 101.

<sup>139</sup> *Ibid* at 103.

<sup>140</sup> Downie, *supra* note 129 at 475–76.

<sup>141</sup> Josselyn, *supra* note 129 at 110–11.

<sup>142</sup> *Ibid* at 111.

<sup>143</sup> *Gichuru*, *supra* note 132 at para 2. Less important for my purposes is the holding of individual discrimination against Gichuru himself.

<sup>144</sup> *Ibid* at para 494. See also paras 473, 499, 529.

<sup>145</sup> *Ibid* at para 635.

in issue.<sup>146</sup> The key factor here was whether there was adverse treatment: “the Law Society argues that simply asking a question cannot constitute adverse treatment giving rise to a *prima facie* case of discrimination, particularly in the context of the statutory obligation on the Benchers to be satisfied as to fitness.”<sup>147</sup> In rejecting this argument, the decision-maker acknowledged that not “all applicants answering the Question affirmatively are automatically denied membership.”<sup>148</sup> However, she focused on the process triggered by an affirmative answer to the question — a more “intrusive” assessment of the application for admission, and a resulting delay in completing that assessment — as well as the increased likelihood of conditions being imposed on membership if the applicant was indeed admitted.<sup>149</sup> The connection between the prohibited ground and the adverse treatment was intentional and “explicit”: “it is precisely the purpose of the Question. Individuals with a number of named conditions are singled out for increased scrutiny, and a barrier is created for them that is not present for others.”<sup>150</sup>

The decision-maker then held that justification failed. While Gichuru argued that the standard was the obligation to answer the question, and the law society argued that the standard was “fitness,” the decision-maker instead held that the standard “is that an applicant must be medically fit to practice law competently.”<sup>151</sup> The standard was adopted for the purpose of meeting the law society’s statutory obligations around competence and fitness and protection of the public,<sup>152</sup> which purpose was rationally connected to the function at hand,<sup>153</sup> and the standard was adopted in good faith to meet those statutory obligations.<sup>154</sup> However, the standard was not reasonably necessary to do so, particularly given that the question asked only about mental disability, not physical disability;<sup>155</sup> and only about a partial subset of mental disabilities that were not defensible on the evidence, including one (“paranoia”) that was not a medical term;<sup>156</sup> and with no time limit;<sup>157</sup> and other law societies used narrower questions;<sup>158</sup> and the question did not seem to accomplish the purpose effectively.<sup>159</sup> There were also issues around the process used to adopt the question and the consequences of an affirmative answer to the question being more severe than positive answers to other questions.<sup>160</sup> I emphasize here, as I will return to below, that the question in *Gichuru* assumed that the existence or diagnosis of specified mental illnesses, in themselves, indicated that the lawyer may be unfit to practice.<sup>161</sup>

<sup>146</sup> *Ibid* at para 460.

<sup>147</sup> *Ibid* at para 461.

<sup>148</sup> *Ibid* at para 463.

<sup>149</sup> *Ibid* at paras 463–69.

<sup>150</sup> *Ibid* at para 470.

<sup>151</sup> *Ibid* at paras 493–94. I do note that as the analysis progresses, it seems to treat the rule itself as the standard in issue.

<sup>152</sup> See *ibid* at para 458: “I do accept, however, that the issue must be viewed in the context of the Law Society’s statutory authority and obligation to protect the public interest.”

<sup>153</sup> *Ibid* at paras 499–501.

<sup>154</sup> *Ibid* at paras 503–506.

<sup>155</sup> *Ibid* at para 524.

<sup>156</sup> *Ibid* at paras 520, 522–23.

<sup>157</sup> *Ibid* at paras 532–34.

<sup>158</sup> *Ibid* at para 527.

<sup>159</sup> *Ibid* at paras 535–39.

<sup>160</sup> *Ibid* at paras 510–18.

<sup>161</sup> See especially *ibid* at para 470: “it is precisely the purpose of the Question. Individuals with a number of named conditions are singled out for increased scrutiny, and a barrier is created for them that is not present for others.” See also para 502:

At some points in his argument, Mr. Gichuru raised the issue of whether there is, in fact, a rational connection between a past diagnosis of mental illness and a present impairment. However, he did

I note that the law society in *Gichuru* invoked the harm-to-the-public-interest concept of undue hardship:

[T]hat it would suffer undue hardship, and that it would be contrary to the public interest, to require it to admit an applicant ... or approve an applicant for Call and Admission, without objective and complete information necessary to enable the Benchers to be satisfied that the applicant was in fact fit to undertake the duties and responsibilities involved in the practice of law.<sup>162</sup>

The decision-maker, however, essentially responded that the law society remained able to ask relevant questions in a non-discriminatory way: “[t]his decision should not be taken as a finding that the Law Society is not entitled to ask any question, or make any enquiries, relating to medical fitness to practice law competently. It is simply a finding that, as currently formulated, the Question has a discriminatory effect that has not been justified by the Law Society.”<sup>163</sup> In so doing, she presaged the holding described above that regulators have a duty to protect the public interest while complying with human rights law.<sup>164</sup>

### C. RULE 7.1-3

Against this context, I now analyze how rule 7.1-3 interacts with human rights law. First I consider the previous version of the rule (with the language of “mental instability”), and then I contrast it with the current version of the rule.

At the outset, I acknowledge that each law society’s specific version of rule 7.1-3 would be measured against the specific human rights law in force in the corresponding province or territory. Nonetheless, the similarities among the various rules and the similarities among the various human rights laws (and particularly the unifying impact of the interpretation of these laws by the Supreme Court of Canada) allow me to draw meaningful conclusions from a general analysis of the model rule itself.

As I outlined above, prior to March 2016, the model rule dealt with mental illness differently. Instead of “conduct that raises a substantial question about the lawyer’s capacity to provide professional services,”<sup>165</sup> it referred to “the mental instability of a lawyer of such a nature that the lawyer’s clients are likely to be materially prejudiced.”<sup>166</sup> As part of the 2016 amendments, the heading was changed from “Duty to Report Misconduct” to its current “Duty to Report.”<sup>167</sup>

As discussed above, Devlin, Downie, and Wildeman argued that the previous rule was discriminatory, particularly in singling out mental illness among other factors potentially

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not call any evidence in this regard, and he did not seek to have Dr. O’Shaughnessy attend for cross-examination. As a result, there is no evidence before me that contradicts Dr. O’Shaughnessy’s opinion supporting the proposition that the purpose outlined above is rationally connected to the Law Society’s function of assessing the fitness and competence of applicants, and I find that there is such a rational connection.

<sup>162</sup> *Ibid* at para 544.

<sup>163</sup> *Ibid* at para 545.

<sup>164</sup> See note 113, above, and accompanying text.

<sup>165</sup> FLSC *Model Code*, *supra* note 7, March 2016.

<sup>166</sup> *Ibid*, October 2014.

<sup>167</sup> *Ibid*.

affecting a lawyer's capacity to practice and in the heading's implication that mental illness in itself constitutes misconduct and also because "mental instability" is a term with no clear definition and a state that lawyers are unqualified to assess.<sup>168</sup>

The previous "mental instability" rule was discriminatory under human rights law in a way remarkably similar to the admissions question in *Gichuru*. The key foundation for the analysis is that being reported under the rule constituted adverse treatment — in other words, that the making of a report about a lawyer led to, or could potentially lead to, an investigation of that lawyer, which could lead to consequences such as license suspension or revocation for incapacity. It is clear that this result is necessary for the question to accomplish its purpose. Like the question in *Gichuru*, the previous "mental instability" rule invoked a protected ground (disability); the rule required reports that led directly to adverse treatment (or the risk of adverse treatment) of reported lawyers, and the reports were specifically triggered by the protected ground.

Like the question in *Gichuru*, a justification of the previous rule would pass the first step of the analysis, that the standard was adopted for a purpose rationally connected to the function.<sup>169</sup> Here the standard is best defined as the requirement that other lawyers report lawyers for "mental instability."<sup>170</sup> Likewise, the rule was presumably adopted to meet the law societies' statutory obligations around competence and fitness and protection of the public, and the reporting rule was rationally connected to the function of ensuring the sufficiently effective practice of law.<sup>171</sup>

However, even presuming that the previous rule (on mental instability) was adopted in good faith, the rule was not reasonably necessary to protect the public, given that it covered only "mental instability" and not physical disabilities affecting capacity to practice and that "mental instability" is not a legal or medical term of art.<sup>172</sup> This emphasis on diagnosis, instead of conduct, as well as omission of physical disability or illness, invokes discriminatory stereotypes of persons with mental illness.

In contrast, the current version of the rule appears to comply with human rights law, capturing as it does mental illness under "conduct that raises a substantial question about the

<sup>168</sup> See e.g. Devlin, Downie & Wildeman, *supra* note 1 at 21.

<sup>169</sup> *Gichuru*, *supra* note 132 at paras 499–501.

<sup>170</sup> I acknowledge that, in the alternative and following *Gichuru* strictly, the standard could be defined as the requirement of fitness or capacity. However, the result of the analysis would be the same. Moreover, defining the standard as the reporting rule itself provides for a clearer analysis.

<sup>171</sup> See note 152, above, and accompanying text. See e.g. *Brar and others v BC Veterinary Medical Association and Osborne*, 2015 BCHRT 151 at para 426 of Appendix U: "One of the BCVMA's purposes is protection of the public. In order to achieve this goal, it must be reasonably assured that an applicant is reasonably medically fit to practise. In this respect, I accept that such a standard is rationally connected to the function of practicing veterinary medicine." See also *Van Leening v College of Physical Therapists*, 2006 BCHRT 357 at para 51 [emphasis added], on the registration standards of the College that required physiotherapists to be able to perform the physical tasks that constituted the practice of physiotherapy:

The College is required by law to create registration standards. The registration standards relate to the functions performed; the treatment of the injured. The College adopted the standards in good faith; to ensure that the objects of the College are met and to accomplish its purpose or goal to serve and protect the public. The College was accountable for addressing Mr. Van Leening's situation, *without sacrificing its legitimate objects, including protecting the public.*

<sup>172</sup> Devlin, Downie & Wildeman, *supra* note 1 at 21.

lawyer's capacity to provide professional services" and removing the reference to "misconduct" in the title.<sup>173</sup>

The current rule remains *prima facie* discriminatory. The phrase "conduct that raises a substantial question about the lawyer's capacity to provide professional services" connects to the protected ground of disability. While the FLSC *Model Code* does not define "capacity,"<sup>174</sup> the commentary to the reporting rule clearly illustrate that the concern is disability: "[i]nstances of conduct described in this rule can arise from a variety of stressors, physical, mental or emotional conditions, disorders or addictions."<sup>175</sup> Like the previous rule, a report about a lawyer has the potential to lead to an investigation and potentially to capacity or disciplinary proceedings and a suspension or revocation of the lawyer's licence.<sup>176</sup>

The current rule is, however, likely justifiable. Like the previous "mental instability" rule, the current rule was presumably adopted to meet the law societies' statutory obligations around competence and fitness and protection of the public, and the reporting rule was rationally connected to the function of ensuring the sufficiently effective practice of law. The current rule was evidently adopted in good faith in order to replace the previous discriminatory rule. Unlike the previous "mental instability" rule, the current rule is reasonably necessary to the protection of the public. As I mentioned above, a law society cannot protect the public interest by regulating capacity unless it becomes aware of capacity problems. Impeding the protection of the public interest would constitute undue hardship. Moreover, the current rule covers all impediments to capacity, not just mental illness. And unlike the previous rule and the question in *Gichuru*, the current rule focuses not on a diagnosis, which lawyers are unable to identify and which in itself does not impede capacity, but on the conduct, which lawyers are more likely to be able to identify and which demonstrates a risk of impeded capacity.

Following *Gichuru*, justification might fail if reports about conduct related to capacity under rule 7.1-3(e) were treated differently, that is, they resulted in more negative adverse treatment, than reports about conduct related to "honesty, trustworthiness, or competency" under 7.1-3(d), or any of the other reportable circumstances in rule 7.1-3.<sup>177</sup>

I do note here that the current Quebec rule,<sup>178</sup> with its reference to "a health condition that could materially prejudice a client,"<sup>179</sup> is likely also justifiable under human rights law. While the focus is on the condition itself instead of the conduct is problematic, the qualifier — "that could materially prejudice a client"<sup>180</sup> — is narrow and specifically suited to the objective of protecting the public.

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<sup>173</sup> FLSC *Model Code*, *supra* note 7, r 7.1-3.

<sup>174</sup> *Ibid*, r 1.1-1.

<sup>175</sup> *Ibid*, r 7.1-3, commentary 3.

<sup>176</sup> *Ibid*, preface.

<sup>177</sup> *Gichuru*, *supra* note 132.

<sup>178</sup> See note 20, above.

<sup>179</sup> *Quebec Code*, *supra* note 20, s 134(5).

<sup>180</sup> *Ibid*, s 134(5).

#### IV. RULE 7.1-3 AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

While my focus in this article is human rights law, the previous “mental instability” rule likely unjustifiably infringed section 15 of the *Charter* whereas the current rule does not infringe section 15 or, if it does, that infringement is justified under section 1. As mentioned above, there are no reported challenges to the rule under the *Charter*. As in the human rights analysis above, each law society’s specific version of rule 7.1-3 would be measured against section 15; nonetheless, the similarities among the various rules allow me to draw meaningful conclusions from a *Charter* analysis of the model rule itself.

I note at the outset that the Supreme Court of Canada has explicitly stated that a reasonable accommodation analysis under human rights law is distinct from a justification analysis under section 1 of the *Charter*.<sup>181</sup> Thus, although I argue that the outcome of a *Charter* challenge to the rule would be the same as the outcome of a human rights challenge to the rule, the corresponding analyses are different.

The *Charter* clearly applies to law societies, including their administrative decisions and the rules of professional conduct themselves.<sup>182</sup> This includes section 15 of the *Charter*: “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>183</sup> Section 15 is engaged where there is a discriminatory distinction on an enumerated or analogous ground:

The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground....The second part of the analysis focuses on arbitrary — or discriminatory — disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.<sup>184</sup>

Both the previous rule and the current rule satisfy the first part of the test by drawing a distinction based on the enumerated ground of disability, meaning the section 15 analysis turns on the second part of the test.

<sup>181</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 66–71 [*Hutterian Brethren*]. Note that this is an implicit rejection of *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 79 [*Eldridge*]: “[R]easonable accommodation ... is best addressed as a component of the s. 1 analysis.” Although I refer below to *Eldridge*, I do so with this caution in mind. See also Jennifer Koshan, “Under the Influence: Discrimination Under Human Rights Legislation and Section 15 of the *Charter*” (2014) 3 Can J Human Rights 115 at 139–42.

<sup>182</sup> *Charter*, *supra* note 6. On decision-making, see e.g. *Doré v Barreau du Québec*, 2012 SCC 12 at paras 2–6; *Histed v Law Society of Manitoba*, 2007 MBCA 150 at para 93 [*Histed*], leave to appeal to SCC refused, [2008] SCCA No 67, 32478 (24 April 2008). On the rules of professional conduct themselves, see e.g. *Histed* at para 57; see also *Re Klein and Law Society of Upper Canada* (1985), 50 OR (2d) 118, (Div Ct) at 157–58 (Callaghan J), 126 (Henry J dissenting but not on this point).

<sup>183</sup> *Charter*, *ibid*, s 15(1). Section 15(2) is not relevant for my purposes.

<sup>184</sup> *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 19–20, Justice Abella for the Court [*Taypotat*], reaffirmed in *Centrale des syndicats du Québec v Québec (Attorney General)*, 2018 SCC 18 at para 22, Justice Abella for the majority, Chief Justice McLachlin dissenting but concurring on this point at para 154.

The previous rule (on “mental instability”) clearly constituted an infringement of section 15 of the *Charter*. Persons with mental illness are unquestionably a historically disadvantaged group.<sup>185</sup> Following the Supreme Court of Canada’s approach to section 15 in *Taypotat*, the imperative that lawyers with “mental instability” — a term with neither a medical nor legal meaning, and, for example, not lawyers with a physical disability — be reported to the law society reinforces, perpetuates, and exacerbates that disadvantage.<sup>186</sup> While it is unclear following *Taypotat* what the precise role is in section 15 for stereotyping and prejudice,<sup>187</sup> it is clear that mandatory reporting of “mental instability” perpetuates stereotyping and prejudice. That is, the rule itself both perpetuates disadvantage and reinforces stereotypes about the abilities of people with mental illness, the impact of a mental illness on a person’s functioning, and the stigmatization of mental illness relative to physical illness.<sup>188</sup> As the Supreme Court of Canada recognized in *Granovsky*, section 15 is powerful in requiring the state to reorient its treatment of persons with disabilities by avoiding stigmatization or stereotyping:

*What s. 15 of the Charter can do, and it is a role of immense importance, is address the way in which the state responds to people with disabilities. Section 15(1) ensures that governments may not, intentionally or through a failure of appropriate accommodation, stigmatize the underlying physical or mental impairment, or attribute functional limitations to the individual that the underlying physical or mental impairment does not entail, or fail to recognize the added burdens which persons with disabilities may encounter in achieving self-fulfillment in a world relentlessly oriented to the able-bodied.*<sup>189</sup>

I emphasize that section 15, in this context, is about how the law society responds to people with disabilities and prohibits stigmatization or incorrect attribution of functional limitations.

The previous rule would fail justification under section 1 of the *Charter* as a “reasonable limi[t] prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>190</sup> The objective — protecting the public interest in sufficiently effective practice of law — is sufficiently pressing and substantial.<sup>191</sup> Indeed, in a section 1 justification

<sup>185</sup> See e.g. *Eldridge*, *supra* note 181 at para 56 [citations omitted]:

It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions.... This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the “equal concern, respect and consideration” that s. 15(1) of the *Charter* demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms.

<sup>186</sup> *Taypotat*, *supra* note 184 at para 20.

<sup>187</sup> See e.g. Alicia Puchta, “*Quebec v A and Taypotat*: Unpacking the Supreme Court’s Latest Decisions on Section 15 of the *Charter*” (2018) 55:3 *Osgoode Hall LJ* 665 at 690.

<sup>188</sup> See e.g. *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28 at paras 27, 29, [*Granovsky*]:

Unlike gender or ethnic origin, which generally stamp each member of the class with a singular characteristic, disabilities vary in type, intensity and duration across the full range of personal physical or mental characteristics.... The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called “disabled” individual may not be impaired or limited in any way at all.

<sup>189</sup> *Ibid* at para 33 [emphasis added].

<sup>190</sup> *Charter*, *supra* note 6, s 1.

<sup>191</sup> See both the Canadian and American literature, above notes 1 and 96 and accompanying text.



analysis, it is the societal perspective that is determinative.<sup>192</sup> However, the rule would likely fail at rational connection, and certainly at minimal impairment, given its non-medical and non-legal concept of “mental instability,” its omission of physical disability, and its focus on diagnosis instead of conduct. The rule would fail at the final balancing step of section 1 for similar reasons.

In contrast, the current rule would almost certainly be justifiable under section 1 and might not even infringe section 15. While the current rule creates a distinction based on the analogous ground of disability, its focus on conduct instead of diagnosis does not impose “arbitrary disadvantage” in the meaning of *Taypotat*<sup>193</sup> and arguably does not illustrate or reinforce prejudice or stereotyping about people with disabilities — that is, it corresponds with the “the actual capacities and needs of the members of the group” of persons to whom it applies.<sup>194</sup> Moreover, it no longer singles out (and stigmatizes) mental illness or brands it misconduct. Thus the current rule may not infringe section 15.

Even if it did infringe section 15, the current rule would likely be justifiable under section 1. Like the previous rule, it has a pressing and substantial objective. Unlike the previous rule, it would pass rational connection and minimal impairment and balancing. The rule is carefully tailored to provide for the adequate protection of the public interest with the minimum possible imposition on lawyers with disabilities — namely, to only require the reporting of disability that goes to capacity to practice. Without this information, the law societies cannot effectively regulate the profession. And while there still may well be negative impacts on lawyers with disabilities, the protection of the public interest is a benefit that outweighs these negative impacts. Moreover, lawyers accept restrictions on their *Charter* rights that do not apply to, and would not be justifiable for, the general public.<sup>195</sup>

## V. RECOMMENDATIONS

In this part, I propose amendments to the rule and make related recommendations. The replacement of the “mental instability” language not only makes the reporting duty compliant with human rights law but indeed is a commendable change that vastly improves the rule as it relates to lawyers with mental illness. Despite the fact that the current rule complies with human rights law and the *Charter*, improvements can still be made. Similarly, while modernization of the rule is a promising step in law societies’ approaches to mental illness among lawyers, further steps remain.

<sup>192</sup> *Hutterian Brethren*, *supra* note 181 at para 69.

<sup>193</sup> *Taypotat*, *supra* note 184 at para 20.

<sup>194</sup> *Ibid.*

<sup>195</sup> See e.g. *Histed*, *supra* note 182 at para 79:

While litigants and other interested persons may comment publicly on cases before the courts and may criticize judicial decisions in terms which some might consider offensive, lawyers are bound by the constraints of the professional standards which apply to all members of the legal profession.... [I]f Histed wishes to have that same unfettered right to criticize the administration of justice, he may do so, but not while a member of the Law Society.

## A. AMENDMENTS TO RULE 7.1-3

The rule should be amended in several ways. Three of these would make the rule and its requirements more precise. Most importantly, the rule should specifically indicate the threshold that triggers the duty to report. Given the screening function of the rule, and the holding in *Lang Michener (Re)*, reasonable suspicion, specifically reasonable grounds to suspect, is an appropriate threshold.<sup>196</sup> In the alternative, reasonable belief would also be appropriate. Similarly, the required timeliness of the report should be specified. Given the potential need for prompt law society investigation and action, the standard should be “as soon as possible” or, if that is too strict, “promptly.”<sup>197</sup> A clearer and more definite rule would provide lawyers with mental illness with more certainty about when they may be the subject of a report. It might also reduce the opportunity for lawyers to justify their non-compliance to themselves and among their colleagues.

The rule could also be improved by an anti-retaliation provision. As in the *Human Rights Code* context, both retaliation and the threat of retaliation should be addressed. For example, “[n]o lawyer shall retaliate against, or threaten to retaliate against, another lawyer for making a report under this rule.” In the alternative, a blanket provision could be used that would prohibit any negative treatment by a lawyer against another lawyer for complying or attempting to comply with his or her obligations under the Code of Professional Conduct, the rules and bylaws of the Law Society, or related legislation. Such amendments would likely improve compliance with the reporting duty.

The FLSC should consider an exception to the reporting requirement for mental illness among lawyers in close personal relationships.<sup>198</sup> In this narrow context, the benefits of reporting are likely outweighed by the deterrence effect. Lawyers with mental illness should be able to disclose their illness to spouses or children who happen to be lawyers without fear of being reported. This disclosure may be an important step in acknowledging and addressing mental illness.

## B. OTHER RECOMMENDATIONS

Important steps around the duty to report go beyond amendments to the text of rule 7.1-3. As a first step, law societies should re-examine the processes and responses that are triggered by a report under rule 7.1-3, including those triggered by a report of “conduct that raises a substantial question about the lawyer’s capacity to provide professional services,”<sup>199</sup> to ensure that persons with mental illness are not exposed to harsher treatment than persons reported under other parts of the rule. A related step would be to provide further transparency around how the law society processes and responds to these reports. Another step would be

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<sup>196</sup> *Supra* note 50.

<sup>197</sup> While Montbriand, *supra* note 17 at 242 suggests “une norme qui s’assimilerait à celle d’un délai raisonnable” [“a standard which would be equated to that of a reasonable time” – translated by author] more precision is necessary in my view. Montbriand also notes at 241 that rule 7.1-4 uses a “as soon as reasonably practicable” standard.

<sup>198</sup> In the American literature, see Greenbaum, *supra* note 99 at 319. (I note here Greenbaum’s suggestion at 319 that such an exemption may not be necessary because disciplinary boards likely already take such relationships into consideration when determining whether to impose sanctions. However, transparency and clarity of expectations favour such an exemption.)

<sup>199</sup> FLSC *Model Code*, *supra* note 7, r 7.1-3(e).

to continue to emphasize diversion and other initiatives to decrease reliance on disciplinary and capacity proceedings in response to these reports.<sup>200</sup> If lawyers understand and believe that reported lawyers will be treated fairly and compassionately, and more specifically will not be discriminated against by the regulator or other lawyers — and that reporting will prevent more serious problems — they should be more likely to comply with their reporting obligations. A broader step would be to emphasize the duty of the individual lawyer to assist the law society in the protection of the public interest and how that duty is a key corollary to the privilege of self-regulation, while continuing to attempt to decrease the stigma around reporting other lawyers while emphasizing all lawyers’ “special responsibility to respect the requirements of human rights laws.”<sup>201</sup>

## VI. CONCLUSION

In this article, I have analyzed the rule requiring lawyers to report other lawyers to the law society, with a special focus on mental illness. Based on this analysis, I concluded that the 2016 amendments bring the reporting rule into compliance with human rights law, but that there remains more for the law societies to do to meet the spirit of human rights legislation. Moreover, further amendments to the rule would improve its utility for the regulation of the legal profession in the public interest.

Further changes to and around rule 7.1-3 are a necessary part of law societies’ continuing embrace of their obligations under both the letter and spirit of human rights law, to show that the same standard applies to the regulator as to individual lawyers, namely, “a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.”<sup>202</sup>

The law societies have a statutory mandate to protect the public interest by ensuring lawyers meet rigorous standards of both competence and capacity. The reporting rule plays — or could play — an important role in fulfilling that mandate but only if lawyers comply. At the end of the day, disciplinary enforcement of the duty to report will be a weak or even counterproductive strategy to improve compliance. It will be rare situations in which the society can detect, and prove, that a lawyer had awareness of another lawyer’s conduct that would be sufficient to trigger the reporting duty. Instead, law societies should commit to demonstrating to the profession that reports will be dealt with fairly and compassionately and that reporting a lawyer may allow early intervention that indeed prevents the reported lawyer from greater trouble in the future.

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<sup>200</sup> See e.g. the Nova Scotia Barristers’ Society’s Fitness to Practice Program: “Complaints,” online: <nsbs.org/legal-profession/your-practice/complaints>.

<sup>201</sup> FLSC *Model Code*, *supra* note 7, r 6.3-5, commentary 1.

<sup>202</sup> *Ibid.*

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