

# TLA Mirror

Reflecting your membership

## Would You Report another Lawyer for Professional Misconduct? You May Not Have a Choice.

Erin Cowling, Cowling Legal

In my career I have been fortunate to work with lawyers who are courteous, civil, and formidable opponents or colleagues. Most will promptly return my phone calls or emails, consent to requests for adjournments or extensions for filing defences (when appropriate), and use polite language, even in the most heated arguments.

I have only dealt with a handful of “unprofessional” lawyers. Some lawyers simply refuse to respond to emails, letters, or phone calls. Others think that profanity, derogatory remarks, or excessive yelling helps their argument. Once, when a judge asked opposing counsel why he had not responded to my multiple requests for document disclosure he answered, “Well, I don’t know, I guess sometimes I am just a real a-hole.” When I witness this behaviour I may complain to a colleague or my husband and think: “Someone ought to report this person to the Law Society”. Then I move on to the next client, or the next file, and forget about these lawyers and their questionable behaviour.

However, when the newly amended *Rules of Professional Conduct* (the “*Rules*”) came into effect on October 1, 2014, I reread them in their entirety. One rule stood out for me: Rule 7.1-3 (old Rule 6.01(3)) which governs a lawyer’s duty to report a fellow lawyer’s professional misconduct. This made me think: Am I under a *duty* to report any uncivil or unprofessional behaviour I witness to the Law Society of Upper Canada?

### Rule 7.1-3

The new *Rules* are based on the Federation of Law Societies of Canada’s (“FLSC”) *Model Code of Conduct*. Rule 7.1-3 states:

A lawyer *shall* report to the Law Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

- a) The misappropriation or misapplication of trust monies,
- b) The abandonment of a law or legal services practice,
- c) Participating in serious criminal activity related to a licensee’s practice,
- d) The *mental instability* of a licensee of such a serious nature that the licensee’s clients are *likely to be materially prejudiced*; and
- e) [FLSC not in use]
- f) *Any other situation where a licensee’s clients are likely to be severely prejudiced*. [emphasis added]

Interestingly, the LSUC chose not to implement section (e) of the FLSC's Model Code which states: "*conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer*". Perhaps the LSUC chose not to adopt this section as the wording is very broad and could open the floodgates for potential reports of misconduct.

So, what situations will give rise to a duty to report? The first three scenarios under Rule 7.1-3 seem straightforward and fairly easy to identify. If you are aware of a lawyer who has stolen trust funds, abandoned his or her law practice, or participated in serious criminal activity related to his or her law practice, it is clear that you have a duty to report such behaviour to the LSUC.

However, the scenarios in subsections (d) and (f) raise some questions. Am I qualified to determine whether a fellow lawyer is mentally unstable? Or, am I able to determine if any such mental instability will "materially prejudice" a client? Also, what type of behaviour would fall into the 'catch-all' provision of "any other situation" where a client is "likely to be severely prejudiced"?

### What is my duty?

Curious about my duty to report, I called the Practice Management Helpline at the LSUC. When I introduced myself as a lawyer writing on this topic I was asked for my LSUC number and advised that the LSUC would not respond to questions about hypothetical situations. So I used real examples that had happened to me in the past, and asked for some guidance on my duty to report "any other situation" where a lawyer's clients "are likely to be severely prejudiced". The individual I spoke with parsed the sentence for me and suggested that the use of the words "*likely to be severely prejudiced*" means that the Rule only applies to *future* client prejudice and not prejudice that has already occurred. In other words, if I am in a situation where I know a lawyer's client is *going to be* severely prejudiced due to the lawyer's actions I must step in and report the conduct to the LSUC, but if the client *has already been* severely prejudiced then I have no duty to report. I question this interpretation of the Rule. The damage may have already been done but I would think the LSUC would want to be aware of the situation to prevent any future misconduct.

The Commentary to Rule 7.1-3, provides some further guidance. It states, in part:

Unless a licensee who departs from proper professional conduct 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. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Law Society any instance involving a breach of these rules or the rules governing paralegals. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Law Society directly or indirectly (e.g. through another lawyer). [emphasis added]

Contrary to the actual Rule, which according to the Practice Management Help Line seems to promote a very narrow interpretation of when there is a duty to report misconduct, the Commentary suggests a much broader duty, or at least an opportunity, for a lawyer to report *any breach* of the *Rules* as a whole. Therefore, if I am aware of a lawyer who breaches her duty to conduct herself honestly and with integrity, civility, courtesy and good faith,<sup>1</sup> it would be appropriate for me to report such conduct. However, if I am also aware that this conduct will likely severely prejudice that lawyer's clients, it is not only appropriate for me to report such conduct, I am obligated to do so.

I could not find any LSUC disciplinary decisions that dealt directly with the "Duty to Report Misconduct". However, *The Law Society of Upper Canada v. Groia*<sup>2</sup> provides some guidance on 'incivility' in the profession and examples of the type of behaviour that will amount to professional misconduct in courtroom proceedings. Justice Nordheimer noted:

The reality is that incivility amounting to professional [mis]conduct does not allow for a fixed definition.<sup>3</sup>

I start with the principle that a lawyer's conduct **must first be uncivil to invoke the disciplinary process**. Zealous advocacy, including the use of language that may be very tough in its expression, is not, by itself, sufficient to open the door to professional misconduct proceedings.<sup>4</sup>

Rather, the conduct that engages the incivility concern begins with **conduct that it is rude, unnecessarily abrasive, sarcastic, demeaning, abusive or of any like quality. It is conduct that attacks the personal integrity of opponents, parties, witnesses or of the court, where there is an absence of a good faith basis for the attack, or the individual counsel has a good faith basis for the belief but that belief is not an objectively reasonable one.**<sup>5</sup>

In my view, however, there **must be an additional element** attached to the uncivil conduct, in order for it to rise to the level of professional misconduct. For uncivil conduct to rise to the level that would properly engage the disciplinary process, **it must be conduct that, in addition to being uncivil, will also bring the administration of justice into dispute, or would have the tendency to do so.**<sup>6</sup>

There is no bright-line test for actions that amount to incivility. The determination of professional misconduct is very fact and context specific. However, according to *Groia*, it must be more than ill-chosen words or sarcastic and nasty comments. It must also bring the administration of justice into dispute. Repeated personal attacks on the integrity of other

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<sup>1</sup> See Rules 2.1-1 and 5.1-5.

<sup>2</sup> 2015 ONSC 686 (Div. Ct) affirming 2013 ONSLAP 0041 ("Groia").

<sup>3</sup> *Groia* at para. 68.

<sup>4</sup> *Groia* at para. 73.

<sup>5</sup> *Groia* at para. 74.

<sup>6</sup> *Groia* at para. 75.

lawyers, and deliberate allegations of prosecutorial wrongdoing were enough in the context of this case to make a finding of professional misconduct.

### **Will You Report?**

Reporting a fellow lawyer for breaching the *Rules* may result in serious ramifications for that lawyer. However, not reporting misconduct could result in even more serious consequences for that lawyer's clients if the conduct prejudices their case or legal rights.

If the potential misconduct you witness is a result of a colleague or friend struggling with mental or emotional trouble, or drug or alcohol abuse, approaching that individual may be the best first step. You can remind them about the confidential counselling service provided by the LSUC.

While most lawyers would be hesitant to report another lawyer, we must remember that we may not have a choice. The best suggestion to deal with any hesitancy is perhaps to call the LSUC's Practice Management Helpline and hopefully they can provide you with some guidance on your specific situation. Burying our heads in the sand and simply ignoring the misconduct of a fellow lawyer could result in worse implications for that lawyer, the public, and the profession as a whole.

Erin Cowling is a freelance lawyer, legal researcher, and writer at Cowling Legal ([www.cowlinglegal.com](http://www.cowlinglegal.com)). Erin is also the co-founder of Flex Legal Network ([www.flexlegalnetwork.com](http://www.flexlegalnetwork.com)), a network of freelance lawyers who assist sole practitioners, small to mid-size firms, and in-house legal departments.