

AM I MY PARTNER'S KEEPER? THE DUTY TO REPORT A COLLEAGUE

John Chapman*

The obligation to report to a law society a breach by another lawyer of ethical standards has traditionally been confined to the most serious forms of violations, such as theft. The obligation has been expanded under the recent Federation of Law Societies Model Code, now in force in many provinces. Under Rule 7-1-3(e) of the Model Code there is an obligation to report conduct that raises a “substantial question” with respect to a lawyer’s honesty, integrity or competence. A combination of Rule 7-1-3(e) and the availability of detailed information on the activities of firm members may mean that those in management roles at law firms will increasingly be under an obligation to report matters which up to now have not been frequently reported.

Curiously, Ontario has decided not to include the Model Code’s Rule 7-1-3(e) its new Rules. However, it is submitted that even given this absence, the fact that power to discipline is linked to the wide phrase “professional misconduct” means that law firms in Ontario are also obliged to report conduct of their members that raises a “substantial question” with respect to that member’s honesty, integrity or competence. Still, it would be better if Ontario’s Rules were amended to include the Model Code’s 7-1-3(e) and to make the issue more clear.

L’obligation pour un avocat de signaler au barreau toute violation des normes déontologiques commise par un autre avocat a traditionnellement été limitée aux formes les plus graves de violation, comme le vol. Elle a été récemment élargie dans le Code type de déontologie de la Fédération des ordres professionnels de juristes du Canada, aujourd’hui en vigueur dans plusieurs provinces. L’article 7-1-3(e) du Code type prévoit en effet l’obligation de signaler toute conduite qui « remet en question » l’honnêteté, l’intégrité ou la compétence d’un juriste. La combinaison de l’article 7-1-3(e) et de la disponibilité d’informations détaillées sur les activités des membres d’un cabinet pourrait signifier que les personnes qui assument un rôle de direction dans ce cabinet seront de plus en plus obligés de signaler des conduites qui n’étaient pourtant que rarement signalées jusqu’à présent.

* Miller Thomson LLP, Toronto. The title is inspired from a useful article on the US experience; see Douglas R Richmond, “Law Firm Partners as Their Brothers’ Keeper” (2007-8) 96 Ky LJ 231.

Curieusement, l'Ontario a choisi de ne pas inclure l'article 7-1-3(e) dans son nouveau Code de déontologie. On a cependant laissé entendre que le fait que le pouvoir disciplinaire soit lié à la notion imprécise de « faute professionnelle » implique néanmoins que les cabinets ontariens sont également tenus de signaler toute conduite de leurs membres qui « remet en question » leur honnêteté, leur intégrité ou leur compétence. Il serait toutefois préférable que le Code de l'Ontario soit modifié afin d'y inclure l'article 7-1-3(e) du Code type et ainsi clarifier la situation.

... he complained that legal counsel sold their services, faked lawsuits for money, settled them by collusion and made a great boast of the large incomes to be made by robbery of their fellow citizens. (the view of one Roman counsel as quoted by Pliny the Younger *circa* 100 AD)¹

... (we have) random people working full time on random research projects in standard “churn that bill, baby!” mode “... That bill shall know no limits.” “I hear we are already 200k over our estimate – that’s Team DLA Piper!” (large law firm *circa* 2010)²

I. Overview

This paper focuses on one ethical dilemma: the duty to report possible professional misconduct of a colleague – a partner, associate or employer who works with you in your law firm – to the law society. Obviously, if there is knowledge a colleague is stealing from clients, is engaged in facilitating a mortgage fraud or is knowingly filing false affidavits with the court, an obligation to report will presumptively arise.³ But what obligation to report a colleague exists if there is a reasonable belief that less serious misconduct has occurred? Had the notorious DLA Piper events occurred in Canada, would there have been an obligation on those with knowledge at the firm to report to their local law society their colleagues who were apparently file churning?

I confess in advance that the topic discussed in this paper is by no means one of the most important topics facing the profession. Its focus is

¹ As quoted in Anthony Everitt, *Hadrian and the Triumph of Rome*, (Random House LLC, 2009) at 179.

² Peter Lattman, “Suit Offers a Peek at the Practice of Inflating a Legal Bill” *The New York Times* (25 March, 2013), online: Dealbook Online <http://dealbook.nytimes.com/2013/03/25/suit-offers-a-peek-at-the-practice-of-padding-a-legal-bill/?_php=true&_type=blogs&_r=0>.

³ As will be seen, even this is subject to a qualification if the report would result in a breach of client confidentiality or of solicitor-client privilege.

on one segment of the legal market, mid- to large-sized firms,⁴ that comprises at most 25 per cent of practitioners by number, does not have as its focus areas the most common practice areas where individuals need assistance,⁵ has a client base which on average is less vulnerable than the general public to exploitive lawyer behaviour⁶ and for which the (limited) evidence that exists suggests there is a much lower incidence of professional misconduct than for the profession generally.

Before explaining why I have chosen this topic, I might first examine how larger law firms to some degree self-regulate or, through market forces, have outside constraints on the behaviour of firm members that may differ from the forces that impact sole practitioners or smaller (and, I shall assume for now, less prosperous) firms.

As a practical matter in the larger law firm segment of the profession, the most important regulator of individual lawyer misconduct is not the law society but the market. The market comprises both the client market and the structures of the larger law firm created to serve that market. For most members of the larger firm there will be strong financial and personal binds which align their long term interests with that of the firm and which, one would hope, would also tend to align their interests with the long term interests of the firm's clients. Often the individuals will have grown up professionally in the firm and will have some of their closest personal relationships there. A large portion of the professional goodwill that they have developed over their careers will be the goodwill they have with other firm members or which is intertwined with the firm. Ties to the firm culture and to the community of professionals that exists in the (idealised) larger law firm will provide a strong disincentive from straying from firm norms.

⁴ I use the 25-50 lawyer firm as being mid-sized and the 51 and over firm as being large (this is how law firm size is broken down by law societies in their statistical reporting).

⁵ The areas of practice engaged in by most of the largest firms will tend to largely exclude the common services needed by individuals; criminal law, plaintiffs' personal injury, residential real estate and family law will often form a vanishingly small proportion of their practice mix. Instead, their concentrations will be in corporate and commercial law, securities, tax and commercial litigation.

⁶ Increasingly, clients of size will have specified policies that lawyers must follow in providing services. Many will be able to compare costs among service providers and some will have sophisticated computer systems to assist in this endeavour. At least some will have the expertise to evaluate the more elusive issue of the value of legal services and will have moved towards billing models based on value as opposed to hours worked. Clients of size will be further protected by the desire of law firms and individual lawyers in law firms to maintain client goodwill.

This idealised larger law firm will also have access to detailed and immediate information about the practices of individual lawyers. It will have the ability to detect lawyers who may potentially pose an enhanced risk (such as the underemployed lawyer afraid for his or her future and who needs the next pay cheque⁷ or the lone wolf lawyer who is highly dependent on a questionable client for a large amount of work⁸). Individual lawyers will work with others in the firm on a significant portion of their files. At least in theory, other colleagues will have knowledge on day-to-day file matters. Typically some practice group system will be in place which places everyone under the monitoring of at least one partner. In this model, the chance of detection of individual lawyer misconduct is significantly enhanced.

The law firm's sanction for individual lawyer misconduct can be swift and severe; it is much easier for a law firm to fire an associate or exit a partner than it is for a law society to disbar a professional.⁹ Any lawyer who leaves a law firm under an ethical cloud can expect to see a sharp drop in income and to see friendships cool or be broken. The sense of community, enhanced chance of detection and the chance of an immediate and crushing sanction by the firm must for most lawyers in the large law firm setting act as a strong disincentive to misbehaviour. In simple terms, the cost/benefit equation for professional misconduct may differ sharply from that which exists for less prosperous or more isolated members of the profession.¹⁰

One may then ask: If the nature of the larger law firm market is such a fine mechanism for insuring lawyer behaviour, why bother writing an article on the duty to report a colleague?

There are a few reasons.

First, as the quote from the unfortunate DLA Piper emails demonstrates, the idealised economic world painted in the introductory paragraphs is not the real world – or at least is not the entire real world for larger law firms.

⁷ *Law Society of Upper Canada v Leslie Andrew Vandor*, 2012 ONLSP 66 (available on CanLII) [*Vandor*].

⁸ See, for example, the lawyers in *Re Tulk* 1993 CanLII 459 (ON LSCD) and *Re Orsini*, [1991] 2 BLR (2d) 271, 14 OSCB 4820 (Ont Sec Comm). It is persons such as these who are most incentivised to use the firm's reputational capital for their own personal benefit.

⁹ See for instance, *Law Society of Upper Canada v Michael Winton*, 2007 ONLSP 112 (available on CanLII) [*Winton*]. In this case the lawyer was out of the law firm within 12 days of theft suspicions becoming known to the firm.

¹⁰ See Randal Graham, *Legal Ethics*, (Toronto: Edmond Montgomery, 2004) for the economic approach.

In the real world, law firms may have difficulty overseeing and supervising their lawyers. Lawyers are notoriously autonomous and bridle under systems that may restrict their ability to act as they want. Law firm managers may themselves be uncomfortable with telling others what to do or how to do it. Law firm managers may tend to avoid clashes with important partners. There is a natural tendency to trust one's colleagues, to think the best and to just not want to see unethical behaviour in others, as to see may be to force us into a difficult dilemma.¹¹ Warning signals will tend to be overlooked. We may not see because we do not want to see. The personal bonds to one's partners that existed in the one office, 50-lawyer law firm of the 1990s may be lessened in a multi-office 500-lawyer law firm of the 2010s. With increased lawyer mobility, colleagues may be strangers. Some lawyers will be without real personal or cultural ties to the law firm. The risk of rogue partner behaviour in larger firms may rise.

Secondly, although law firms may be expected to act swiftly and severely with respect to certain types of misconduct once known, such as theft or other obviously criminal behaviour, it is unclear that they have historically had as strong an economic incentive to deal with matters that contain (or that law firms convince themselves contain) an element of gray. Overbilling, where the firm shares in the short-term economic benefit, and where at least a portion of the client base may not be able to effectively monitor legal costs, is one example where the firm may not be incentivised to look too closely. Conflicts – where there will be an economic incentive to favour the large client over the small – is another obvious example. A difficult area for the law firm will be the possibly misbehaving partner who controls a large client list.¹²

The law firm's structure, which sees 100 per cent of its profit paid out to partners at year's end, will also tend to lead a law firm to focus on short-

¹¹ Jennifer K Robbenolt and Jean R Sternlight, "Behavioural Legal Ethics" (2013) 45 *Ariz St LJ* 1107, online: University of Nevada Online <<http://scholars.law.unlv.edu/facpub/883>> at 37.

¹² Perhaps the (undiscussed) sub-text that underlay the Lang Michener-Pilzmaker decision; see *In the Matter of Albert Gnat et al* (Law Society of Upper Canada discipline decision, January 1990) [*Gnat*]; *Pilzmaker v Law Society of Upper Canada* (1990), 36 OAR 244 (Div Ct). That case involved a law firm's executive committee receiving information that suggested a partner with a very large book of business may have been engaged in immigration fraud. The executive committee investigation of the issue dragged out over many months. Arguably, it was not conducted with any great sense of urgency. Although eventually the matter was reported to the Law Society, the allegation was that the members of the executive committee had not reported the matter in a timely fashion. 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.

term financial results. Increased partner lateral mobility may exacerbate this tendency. Poor short term performance and the threat of partner defections may lessen the glue that used to hold the law firm together. As lawyers, used to advancing arguments on behalf of a client, law firm leaders may be culturally inclined to come up with arguments as to why possibly questionable conduct is not misconduct. Confirmation bias will lead them to discount information that is inconsistent with the opinion that they want to be correct. Lawyers, we are told, tend to believe that they and their law firms have more stringent ethical standards than other lawyers or firms¹³ and the groupthink that permeates law firm decision-making structures will tend to ignore dissenting views.

In short, there will be countervailing factors that will challenge a firm's ethical culture even if misbehaviour ought to be suspected. Given these factors, strong moral fibre by those at the law firm leadership level – and one might suggest strong law firm compliance systems – will be necessary to counteract the normal human tendency of business leaders to focus on achieving the bottom line. Indeed, it may be this need to have formal systems to make sure that the ethical perspective is not lost that has led a number of the very largest firms to create formal positions such as ethics counsel or general counsel in their organisations. Every organisation needs a conscience. In former days it may have been a senior partner who everyone knew and who everyone went to in time of trouble. Now, large law firms need systems so they do not forget their ethical foundations.

The third reason I raise this topic is because others, usually those of an academic bent, have raised the issue of whether our professional codes adequately – or at all – deal with the challenges posed by the market forces that have led to consolidation in the legal industry and the rise of the larger law firms. At best, these commentators express scepticism at some of the practices that have for many years provided the foundation of the economic structure of larger firms¹⁴ and raise a concern that the commercial focus of the large law firm may be inconsistent with true professionalism.¹⁵ Indeed, it may be for some commentators that the larger law firms are looked at as a sub-species of Joel Bakan's view of the corporation as an organisation committed to the pathological pursuit of profit.¹⁶

¹³ Robbennolt and Sternlight, *supra* note 11 at 14.

¹⁴ Alice Woolley, "Time For Change: Unethical Hourly Billing in the Canadian Profession and What Should Be Done About It" (2004) 83 Can Bar Rev 859.

¹⁵ See e.g. the discussion in Adam Dodek, "Regulating Law Firms in Canada" (2011) 90 Can Bar Rev 383.

¹⁶ *The Corporation: The Pathological Pursuit of Profit* (New York: Free Press, 2005).

Lastly, I note the obligation to report a colleague is an issue on which little has been written in Canada and on which the various provincial codes of professional conduct have historically provided no specific guidance. Indeed, the codes as written have treated the obligation to report a colleague in the same manner as an obligation to report any other lawyer. As will be discussed, given that a decision to not report a colleague may be tainted by issues of self-interest, it is arguable that different considerations apply. In particular, to the extent the codes of professional conduct make reporting of possible professional misconduct discretionary (and they do in many cases), one can ask whether a lawyer who fails to report because it is against their personal self-interest to do so may be guilty of professional misconduct. An argument exists that, at least in some instances, a failure to report a colleague may be equivalent to a cover up of misbehaviour and should be fully deserving of sanction.

2. *The (Limited) Risk Statistics on Lawyers*

Although the evidence is thin and difficult to collate, as far as one can discern lawyers at mid- to large-sized Canadian law firms are on average less likely – indeed it appears much less likely – to be the subject of professional discipline than sole practitioners or those at smaller firms.

I use as a discussion point the statistics published by the Law Society of Upper Canada (LSUC). The LSUC annually receives approximately 5,000 complaints that are within its regulatory mandate. Most are dealt with and resolved relatively informally while about 1200-1400 of these involve complaints that result in a formal investigation to see whether disciplinary action should be taken. About 75 to 90 discipline hearings are reported every year and the overwhelming majority of contested hearings lead to a finding of professional misconduct. Of the lawyers disciplined, perhaps a quarter are disbarred and close to 50 per cent receive a suspension.¹⁷

About 34% of all lawyers in private practice in Ontario are sole practitioners, 30% are at small firms (2-10 lawyers or paralegals), 6% at medium-sized firms (26-50) and 21% at large firms (over 51).¹⁸ The LSUC does not publicly provide any statistics breaking down disciplined lawyers by whether they are sole practitioners or in small, medium-sized or large law firms. Nevertheless, it is quite apparent from a reading of the discipline cases that lawyers at mid- to large-sized law firms form an

¹⁷ Ontario, The Law Society of Upper Canada, *LSUC's 2012 Annual Report* (Toronto: The Law Society of Upper Canada, 2012), online: The Law Society of Upper Canada <http://www.lsuc.on.ca/annual-report> [2012 Report].

¹⁸ *Ibid.*

extremely small percentage of lawyers disciplined – possibly less than 2 to 3 per cent.¹⁹ Indeed, it may be this statistical rarity (and the *schadenfreude* that is characteristic of the legal profession) that leads to such intense interest in the profession and the media when a lawyer at a well-known firm faces professional discipline.

There are some obvious explanations for the low rate of discipline (and, one infers, complaints) of lawyers at mid- to large-sized firms. In addition to the different cost/benefit analysis faced by members of large law firms, it is worth noting that although the rules of conduct are broad, the instances where formal discipline is actually imposed tend to be concentrated in a few areas. In recent years mortgage fraud (whether active participation or being a dupe) has been a leading cause of disbarment/suspension, comprising perhaps 15 to 20 per cent of all formal discipline.²⁰ Outright theft by lawyers from trust accounts or from their law firms tends to go up and down with the economy but in recent years has been about 5 to 10 per cent of the mix.²¹ These two types of misconduct involve large losses inflicted on the public by lawyers, albeit the losses to the public may be mitigated to some degree by mandatory insurance or recovery from the Compensation Fund.²²

¹⁹ Such a small percentage would be consistent with the results of one jurisdiction (Queensland) that breaks down complaint (as opposed to discipline) statistics. In its most recent annual report, the discipline body indicated that lawyers at mid- to large-sized firms were seventeen times less likely to be the subject of a complaint than solo or small firm practitioners; see Queensland Legal Services Commission, *Annual Report* (Brisbane, Australia: 2013).

The rate of discipline of employed counsel (government or industry) is likely even less. Much of the discipline there seems to involve discipline for conduct outside of the practice of law; see e.g. *In the Matter of Peter Atkinson et al* (20 Sept 2013), (Settlement Agreement) (OSC) online: Ontario Securities Commission <https://www.osc.gov.on.ca/documents/en/Proceedings-SET/set_20130920_black-atkinson.pdf> ; Romina Moriano, “OSC approves settlement with Peter Atkinson in Hollinger case” *Financial Post*, (23 September 2013), online: Financial Post <<http://business.financialpost.com/2013/09/23/osc-approves-settlement-with-peter-atkinson-in-hollinger-case/>>.

²⁰ Typically if knowing involvement is shown, absent unusual extenuating circumstances, disbarment is the penalty. Dupes usually receive suspensions.

²¹ Also usually leading to disbarment; see e.g. *Law Society of Upper Canada v Christopher Martin Scott*, 2013 ONLSHP 183 (available on CanLII); *Law Society of Upper Canada v Massimiliano Pecoraro*, 2011 ONLSHP 11 (available on CanLII); *Law Society of Upper Canada v Peter John Lewarne*, 2006 ONLSHP 105 (available on CanLII).

²² The LSUC Compensation Fund is a discretionary fund of last resort – it typically requires the client to exhaust all remedies against anyone who might bear some responsibility for the client’s loss. The Fund typically pays out perhaps \$1 to \$3 million per year to 100 to 150 claimants.

In reading through the reported cases, the vast majority of the members who violated their trust by stealing or defrauding have had practices of apparent marginal economic viability or some other pressing need for funds (such as gambling addictions). It would be wholly inaccurate to say that they were compelled to criminality – their choice was their own – but it would be accurate to say that they may have felt tempted by criminality given their economic circumstances. In contrast, those who are at mid- to large-sized law firms have up to now (with rare exceptions) enjoyed an income that is significantly above that of most lawyers. Theft or similarly blatantly criminal behaviour has been much less tempting. Mid-sized to large firms will also have institutional protections, such as internal financial personnel or a requirement of two signatures on trust cheques,²³ against the most common of serious financial sins. This is not to say that larger law firms are immune from the rogue partner risk²⁴ – the cases pointed to most frequently by critics of large law firm partners misbehaving tend to fall within this category – it is just to say that they appear to be rare in a statistical sense.

Failures to communicate with clients or respond to law societies are perhaps the most common type of complaint to end up in formal discipline. These usually attract a reprimand or short suspension unless there is a serious discipline record. In this less serious stratum of common misbehaviours, the larger law firm's client base often will not tolerate a failure to report and so failures along these lines will often be quickly escalated to someone else at the firm. Such failures can be addressed by the firm before the issue becomes critical. Further, personal problems that may lead to professional conduct issues such as drug, alcohol or depression issues, will also tend to be detected earlier when one has colleagues with whom one works every day and supervisors who every month check docketed hours and bills sent.²⁵

²³ That is not to say such systems are foolproof; see *Scholz (Re)*, 2008 LSBC 2 (available CanLII) at para 23:

The Respondent acted alone respecting these matters, and the firm was unaware of his activities. The Respondent did not follow the firm's policy respecting the processing of trust cheques. In fact, he was not authorized by Alexander Holburn to sign trust cheques at the time that he did so to implement this investment.

²⁴ See e.g. *Re Cooper*, 1991 CanLII 857 (ON LSDC); *Re Donaldson*, 1992 CanLII 216 (ON LSDC); *Re Freyseng*, 1993 CanLII 1154 (ON LSDC); *Winton*, *supra* note 8; *Scholz (Re)*, *ibid*; *Vandor*, *supra* note 7. Insider trading is another example of rogue lawyer behaviour; see *Statement of Allegations In the Matter of Gil I Cornblum et al* (OSC Oct. 23, 2009); and *Law Society of Upper Canada v Stanko Josef Grmovsek*, 2011 ONLSP 137 (available on CanLII).

²⁵ Complaints relating to incivility have also been growing. Law societies do take formal action against those who write uncivil letters but, aside from the *Groia* case (*Law*

We thus should not be surprised if lawyers at larger firms have lower complaint/discipline histories for the most common forms of professional misconduct.

There will be some areas, however, where larger firms might be expected to be at greater risk and where we should not be too surprised to see at least some tendency towards misconduct, unless strong firm institutional safeguards are in place to deal with heightened risks.

Arguably, conflicts of interest could be a likely area of exposure for lawyers at larger firms – unlike sole practitioners or smaller firms the very nature of large law firms is that they are constantly faced with this issue. Conflict issues have the potential to impact the individual lawyer's pocketbook. Depending on the details of a firm's conflict system, often the first filter for detecting a possible conflict will be a review by an individual lawyer of a computer printout to see whether he or she can take a file. That person may have a personal financial incentive to discount or ignore a possible conflict. Even if a possible conflict is flagged for review by a committee or an ethics partner (or management)²⁶ issues will arise. If an issue involves a conflict between two large longstanding clients a firm may be expected, if only in its self-interest, to do the right thing and step away. If the conflict is between a potentially lucrative file for a large client and a smaller client the economics (but not the ethics) will be different. There are a great many disqualification cases in the courts and some civil damage awards on a conflicts basis. Many of the leading disqualification cases involved large law firms acting in conflict. The frequency of these cases does suggest large firms do find it difficult from time to time to turn down a lucrative file.²⁷

If we turn to the discipline cases, solo and small firm practitioners (especially in the real estate area) are fairly frequently disciplined for acting in conflict but there was in my research only one reported case where discipline was imposed on a member of a large law firm for acting

Society of Upper Canada v Joseph Peter Paul Groia, 2012 ONLSPH 0094), there have not been formal proceedings related to in-court behaviour.

²⁶ Individual lawyers dissatisfied with a decision made in the ethics area may try to appeal their case to higher levels of firm management.

²⁷ *Ford Motor Co of Canada v Osler, Hoskin & Harcourt* (1996), 27 OR (3d) 181 (Ont Sup Ct); *Chapters Inc v Davies, Ward & Beck LLP* (2001), 52 OR (3d) 566 (CA); *Canadian National Railway Co v McKercher LLP*, 2013 SCC 39, [2013] 2 SCR 649. With the exception of *Strother (Re)*, 2012 LSBC 1, [2012] LSDD No 1 (QL), which was largely overturned on appeal, there have recently been no large conflict damage awards against large law firms. In *Hollinger Inc (Re)*, 2011 ONCA 579, (2011), 107 OR (3d) 1, the settlement amount paid by a large law firm on a conflict claim was kept confidential although press reports suggested the amount may have been in the range of \$30 million.

in a conflict and the facts there were highly unusual.²⁸ Indeed, the two highest profile cases that the LSUC has brought forward in the conflict area involving members or former members of large firms have either been resoundingly dismissed on the merits²⁹ or botched at the investigation/prosecution stage.³⁰ In the result, it may be that in the conflicts area the courts are the real outside regulator of large law firm conduct, with law societies playing an extremely minor role.³¹

Many critics of larger law firms focus on their billing practices. Overbilling cases as found in the discipline reports tend to be confined to fraudulent conduct. Typically, legal aid or another public body has been egregiously overcharged in a manner which makes the fraud (or the recklessness) relatively easy to prove³² or there has also been a theft of trust funds to pay the excessive account. There are also some cases involving unsophisticated personal injury or matrimonial clients where there has knowingly been overbilling.³³ Although there are isolated cases imposing discipline for bills that were excessive solely due to

²⁸ *Law Society of Upper Canada v George Douglas Hunter*, 2007 ONLSHP 27 (available on CanLII) (lawyer – a former Treasurer of LSUC – engaging in sexual relations with client).

²⁹ *Law Society of Upper Canada v DeMerchant* 2013 ONLSHP 153 (available on CanLII).

³⁰ *Baker, Re*, 2000 CanLII 3599 (ON LSCD).

³¹ There is a proceeding in British Columbia arising out of the *Strother* case, *supra* note 27; see *Strother v 3464920 Canada Inc*, 2007 SCC 24, [2007] 2 SCR 177.

³² See *Law Society v Kopyto* (disbarment) [November 10, 1989]; *Re Svami*, 1995 CanLII 3841 (ON LSCD) (lawyer permitted to resign); *Re Lennon* 1998 CanLII 2017 (ON LSCD) (lawyer recklessly docketed and charged to Legal Aid more than 24 billable hours per day on 53 separate days; one year suspension); *Dennison (Re)*, 2007 LSBC 23 (available on CanLII) [*Dennison*] (fraudulent alteration of dockets for purpose of defrauding client); *Law Society of Manitoba v Tennenhouse*, Case 11-09 (lawyer disbarred for overcharging multiple residential school survivors a total of \$960,000).

³³ See e.g. *Law Society of Upper Canada v Joseph Omer Jean-Michel Farant*, 2005 ONLSHP 0001 and 2005 ONLSHP 31 (available on CanLII). The member performed work for a client who could not read or write and had only a rudimentary comprehension of money. The member took total fees of \$193,000. No written accounts were sent to the client. The docketed time was for only \$46,000.

See also *Law Society of Upper Canada v Sussman*, [1997] LSDD No 39 (QL) (where clients, at the urging of lawyer, spent some \$50,000 defending a \$1,600 claim. The services rendered were of no value to the client and lawyer's account had been assessed at zero); *Law Society of Upper Canada v Hale Luther Miller*, 2008 ONLSHP 0003 (available on CanLII) (member also stole from clients); *Law Society of Upper Canada v Billy Wong*, 2009 ONLSHP 60 (available on CanLII) (member also misappropriated funds).

In *Law Society of Upper Canada v Roderick John Byrnes*, 2013 ONLSHP 125 (available on CanLII), a solicitor was disbarred for overbilling; it was his third disciplinary matter. He had "churned Mr. Rasheed's file, overbilled extensively for work of very limited

incompetence,³⁴ as a practical matter, professional discipline for overbilling has largely been confined to conduct that was fraudulent or billing that was so grossly excessive that there has been complete advantage taken of a client.

There is a fairly broad history of larger law firms being criticised, sometimes scathingly, by assessment officers or judges for overbilling,³⁵ but there is essentially no history of lawyers at larger firms being professionally disciplined. Indeed, on my research I could find only one case where this occurred. That case involved billing for work not actually performed and where the lawyer had been careless in his billing practices.³⁶ This was also, as noted below, one of the rare known cases where a colleague directly reported the issue to a law society.

The lack of discipline cases in the conflicts and overbilling areas can be viewed in a number of ways. It may be law societies do not generally actively encourage³⁷ complaints in these areas. Further, although the ethical rules do not require that lawyers knowingly violate rules for

value and failed to account to or keep his client informed” and had charged \$26,000 for work of no value.

³⁴ *Law Society of Upper Canada v Ravinder Pal Sawhney*, 2012 ONLSHP 13 (available on CanLII). A lawyer billed \$137,054 for work that involved a wrongful dismissal pleading, a pleadings motion and an amendment. The accounts were eventually assessed at \$6,500. A two-month suspension was imposed.

³⁵ See Woolley, *supra* note 14.

³⁶ One example was the Emanuel Montenegrino case; see “Top lawyer disciplined for billing ‘recklessly’” online: Canada.com <<http://www.canada.com/story.html?id=84d98bb3-6004-4187-a10d-d1827cae6916>>. It was held that there was “no hint of dishonesty” and “no hint of any attempt to defraud the client.” The Ottawa Citizen on May 8, 2008 reported in part:

In 2004, Daniel Leduc, a fellow partner at Lang Michener, complained to Mr. Montenegrino that the city had been charged for “internal meetings” between the two men that had never taken place. When an initial investigation by the firm found the discrepancies amounted to less than \$1,000 in fees, Mr. Leduc (who is now a partner with Ogilvy Renault in Ottawa) launched a formal complaint to the Law Society of Upper Canada.

A subsequent audit by KPMG discovered numerous discrepancies and the firm eventually credited the city for \$24,525 plus interest and GST. The audit firm found that more than half of all fees billed to the city for “internal meetings” between Lang Michener lawyers on city files had no corresponding entry by a second lawyer.

See “Ottawa lawyer guilty of professional misconduct”, *Ottawa Citizen* (8 May, 2008).

³⁷ For instance, the LSUC website does not specifically mention overbilling or conflicts as examples of matters subject to public complaint. Nor does the LSUC website provide any informational assistance to lay persons about how to negotiate legal fees with lawyers, how to avoid overcharging by lawyers etc.

overbilling or conflicts, it may be that the approach has been that in order to lay a formal complaint it requires knowing misbehaviour or at least something like gross negligence. Law societies, in order to prioritise the allocation of resources, may only look at matters where there is overwhelming evidence of gross overcharging or conflict. A case of whether there is excessive charging may be viewed by the regulator as a “fee dispute” to be dealt with in the civil courts, the assessment process or negotiation. Additionally, for larger firms overbilling and acting in conflict may be under-reported to law societies as the abused clients, if knowledgeable, fight back and get a reduction in fees or simply leave the firm rather than engaging in a formal complaint process.³⁸

Alternatively, it is possible that although some overbilling and conflict sins are committed, the internal systems at larger law firms designed to deal with these issues are in fact robust and effective and that the market forces that tend to deter such conduct are very strong.

There is no cogent evidence for either proposition. In the absence of hard statistics most of the discussion is anecdotal – but it is also the case that some of the anecdotes are troubling. In the United States, there are surveys of lawyers that suggest overbilling (and in some cases fraudulent overbilling) is fairly widespread.³⁹ A survey by the Queensland Legal Services Commissioner⁴⁰ in Australia found that 20 per cent of the 325 lawyers who responded reported that they had observed instances of bill padding. One can only question what our law societies would find if they did some study of the issue.

3. Reporting Other Lawyers⁴¹ to the Law Society

Although the wording differs among the relevant provincial statutes, the statutory power given to law societies⁴² in the common law provinces

³⁸ Even if reported, many overbilling/conflict complaints may be expensive for law societies to litigate – the (unsuccessful) *DeMerchant* case took over 100 days of hearing time – and law societies may well think their resources are best allocated elsewhere in dealing with the low hanging fruit of lawyers who steal and defraud. In *DeMerchant* the successful lawyers had legal fees totaling \$4 million and the LSUC was eventually ordered to pay them \$500,000 as a partial cost reimbursement; see “Sukonick, *DeMerchant* awarded \$250K as LSUC ‘should have known’ case became unwarranted”, *Law Times* (26 May 2014).

³⁹ See Woolley, *supra* note 14.

⁴⁰ Law Society of Upper Canada, 2012 Report, *supra* note 16 at 37.

⁴¹ A lawyer may also be required to report himself; for instance, there may be a requirement to self-report criminal and certain similar charges. Lawyers are also required to report errors or omissions that may give rise to an insured claim.

⁴² In Nova Scotia, the Barristers Society.

to discipline tends to be framed in very wide language. The wording refers to “professional misconduct” or “conduct unbecoming”⁴³ or similar language.⁴⁴

As guidance to the profession, the law societies have promulgated their various rules or codes of professional conduct. These, in turn, were historically modeled on the wording of the Canadian Bar Association’s *Code of Professional Conduct*. In broad terms, over time the various provincial codes were modified and made more detailed in order to deal with particular issues that came to the forefront in the profession⁴⁵ or to provide more detailed guidance on everyday problems.⁴⁶ This led to some divergence in drafting between jurisdictions. Divergence was difficult to justify given the common issues faced across Canada and over the last few years with the creation of the Federation of Law Societies of Canada (FLSC) *Model Code of Conduct*,⁴⁷ the major focus has been greater harmonisation of the rules in the common law provinces. Indeed, six provinces⁴⁸ have modified their professional codes based on the Model Code with Ontario’s modifications to go into effect later in 2014.

Although often entitled “codes,” the various provincial rules of professional conduct are not all-encompassing. There has always been the ability to discipline even if there is no violation of a specific provision of a code. Legally, it is the individual provincial statutes, rather than the

⁴³ The Ontario language. Traditionally, “professional misconduct” has related to misconduct as a lawyer, while “conduct unbecoming” relates to behaviour outside of the practise but which nevertheless reflects poorly on the profession.

⁴⁴ For instance in Alberta the phrase is “conduct deserving of sanction,” while the Saskatchewan statute simply uses the phrase “conduct unbecoming.” Both statutes then contain definitions that are “expansive;” see *Anthony Merchant v Law Society of Saskatchewan*, 2009 SKCA 33 at para 62, (2009), 324 Sask R 108 [*Merchant*].

In Quebec, under s 117.3 of *Professional Code*, CQLR c C-26 defines conduct that is derogatory to the honour, dignity or integrity of a member of a disciplinary council. Under section 152, where there is no provision in the Code, the Act constituting the order of which the respondent is a member or a regulation or by-law under this Code or that Act which applies in the particular circumstances, the disciplinary council shall decide to the exclusion of any court whether the act with which the respondent is charged is derogatory to the honour or dignity of the profession or to the discipline of the members of the order.

⁴⁵ For example, specific rules with respect to acting as a broker on mortgage lending and, more recently, the need to safeguard against mortgage frauds.

⁴⁶ This was reflected in the fine tuning of conflict rules.

⁴⁷ Federation of Law Societies of Canada, *Model Code of Professional Conduct*, online: FLSC <flsc.ca/_documents/CODEModelCLOct2014.pdf> [Model Code].

⁴⁸ British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Nova Scotia.

professional codes, that give law societies the power to discipline.⁴⁹ This residual power to discipline in the absence of specific rule violation almost certainly continues to be the case under the newer versions of the provincial codes modelled on the Model Code.⁵⁰ Nevertheless, it is extremely rare for a lawyer to be disciplined for conduct that is not contrary to any specific rule and so for that reason the provincial codes are in almost all cases the starting and end point of the analysis.

The provincial codes have always had some very general and broad statements about the need for integrity and then more specific rules or commentary on specific issues. Rule 2.1-1 of the Model Code continues this approach, providing:

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

The specific provisions in the common law provinces of the various provincial codes dealing with reporting lawyers to the law society 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.

At first blush the lack of a blanket obligation to report misconduct may seem strange – after all, why shouldn't lawyers report all professional misconduct to their law society? If the rules designed to govern the

⁴⁹ See e.g. *Law Society of Upper Canada v Roy Francis Demello*, 2011 ONLSP 97 (available on CanLII) [*Demello*], dealing with the Ontario Rules as they then existed. The definition of “professional misconduct” simply sets out instances included in that conduct, and is not intended as a complete list. Further, Rule 1.03(1)(f) specifically recognizes that the Rules “cannot address every situation.” While the Rules are “intended to specify the bases on which lawyers may be disciplined”, they do not limit the ultimate role of the hearing panel which is to determine whether a lawyer has committed “professional misconduct” as set out in s. 33 of the *Law Society Act*.

⁵⁰ The Model Code does not have specific wording similar to the old Rule 1.03(1)(f) referenced in *Demello*, *ibid*, but it notes in its preface “some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction.” Even if the Model Code was somehow viewed as being exhaustive, the very wide wording of its integrity section provides ample room to deal with new forms of misconduct.

Similarly, it is also the case that a breach of a specific rule may not necessarily be sanctionable.

profession and to protect the public are broken, should not the regulator be informed? There is no obligation on the law society to prosecute. If the breach is relatively minor, the regulator may decide to take no formal action. It may treat the matter as an opportunity to educate the lawyer on his or her professional obligations in order to reduce the chance of transgressions in the future. Further, if there are reports from multiple sources of seemingly minor transactions a pattern of misconduct may be revealed. Although this approach has some intrinsic appeal, the practical reality is that if mandatory reporting was the rule we could possibly expect a flood of reports – and perhaps tit-for-tat reporting – dealing with matters such as uncivil conduct which would often be of relatively minor importance.⁵¹ On this approach, it makes sense to impose an obligation only to report another lawyer to the law society if the misconduct is of some seriousness.⁵²

The Model Code rule dealing with the duty to report misconduct takes this approach and provides:

7.1-3 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;
- (b) the abandonment of a law practice;
- (c) participation in criminal activity related to a lawyer's practice;
- (d) the mental instability of a lawyer of such a serious nature that the licensee's clients are likely to be materially prejudiced;
- (e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

⁵¹ See in this vein the Comment to the American Bar Association, *Annotated Model Rules of Professional Conduct* r 8.3 on the Duty to Report:

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavour to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule.

⁵² It is noted that the situation in Quebec is different. *Professional Code*, *supra* note 43 contains a detailed list of what constitutes a "derogatory act." In 2004, section 4.03.00.01 of the Code was added, providing a general requirement to report ("An advocate shall immediately inform the syndic when he knows of a derogatory act committed by another advocate").

- (f) any other situation where a lawyer's clients are likely to be materially prejudiced.

The Commentary to Rule 7.1-3 provides this common sense explanation for reporting fellow lawyers:

[1] Unless a lawyer 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 Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

[2] Nothing in this paragraph is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made without malice or ulterior motive ...

As noted, the purpose behind the Model Code was to achieve greater harmonization on the codes of professional conduct across the country. The duty to report was one area where the previous codes had inconsistencies. The new Rule 7.1-3 is a synthesis of various elements that previously existed in the provinces, with perhaps some inspiration from other jurisdictions.

Of special note is subsection 7.1-3(e), which can be viewed as a general basket clause. Before the Model Code was approved, one law society's code had a similarly-worded rule,⁵³ although most (and the CBA's *Code of Professional Conduct* upon which they were based) did not. The basket clause in the Model Code fairly closely tracks concepts in force in both the United States⁵⁴ and England.⁵⁵ Of all the subsections,

⁵³ British Columbia's former *Professional Conduct Handbook* (Chapter 13.1(c)): "... a lawyer must report to the Law Society another lawyer's ... conduct that raises a substantial question as to the other lawyer's honesty or trustworthiness as a lawyer".

⁵⁴ American Bar Association, *Annotated Model Rules of Professional Conduct*: "8.3(a) 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."

⁵⁵ The *Solicitors' Code of Conduct* published by the Solicitors Regulation Authority (SRA), provides in part:

20.06 You must (subject where necessary to your client's consent) report to the Solicitors Regulation Authority if:

- (a) you become aware of serious misconduct by a solicitor ...; or
- (b) you have reason to doubt the integrity of a solicitor

In its guidance, the SRA says that "in general any conduct involving dishonesty or

Rule 7.1-3(e) provides the widest reporting obligation and hence the most protection for the public. Indeed, the first six provinces to modify their codes based on the Model Code adopted Rule 7.1-3(e) in its entirety.⁵⁶

Notably – and, some might think remarkably – Ontario’s new *Rules of Professional Conduct* which came into effect late in 2014 water down Rule 7.1-3 considerably.⁵⁷ In Ontario’s new rules, it is only participation in *serious* criminal activity of a fellow lawyer in connection with their practice that has to be reported to the law society. The average citizen might find this somewhat baffling. Isn’t any participation in criminal activity related to legal practice something that the law society should know about? If a lawyer is engaging in some (albeit minor) criminal activity does not this raise red flags that repeated (and, possibly, more serious) criminal activity may also be occurring? What is “serious” criminal misconduct anyway? How do practitioners when considering their obligation to report determine this? Is not a rule that requires all known criminal activity in connection with a practice to be reported easier to actually follow?

Another notable divergence is that the basket clause, the Model Code’s Rule 7.1-3(e), is entirely deleted from Ontario’s version of its new *Rules of Professional Conduct*. It is not clear why a rule that is suitable for all other common law jurisdictions in Canada is unsuitable for Ontario. The failure to include 7-1-3(e) in Ontario impacts on everyday practical examples. It is likely, for instance, that under Rule 7.1-3(e) of the Model Code there would be an obligation to report a lawyer whom one knows is engaged in sexual harassment of a co-worker, discriminatory practices, overbilling of the vulnerable or acting in conflict. All of these would in the wording of the sub-section likely raise a “substantial question as to another lawyer’s honesty, trustworthiness, or competency.” In contrast in Ontario, given its failure to enact Rule 7.1-3(e), the duty to report may not exist.

If we leave aside for a moment the curiously different path that Ontario has taken, there are two major practical challenges to Rule 7.1-3. The first point relates to client confidentiality and solicitor-client

deception or a serious criminal offence amounts to serious misconduct for these purposes.”

The rule for barristers is similar.

⁵⁶ British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Nova Scotia. British Columbia adds another instance - the failure to meet an undertaking – that must be reported.

⁵⁷ Ontario also substitutes the word “severely” for “materially” in its version of the Model Code Rule 7.1-3(f).

privilege.⁵⁸ It is possible that a report of the misconduct of another lawyer to the law society may be contrary to the interests of one's client. If, for instance, a new client in seeking advice advises that her previous solicitor had committed an illegal action on her behalf that previous lawyer will have violated professional standards.⁵⁹ However, a report to the law society about that lawyer's misconduct (unless the client has consented)⁶⁰ will involve a breach of solicitor-client privilege.⁶¹

The opening words of Rule 7.1-3 may also negate the duty to report if to do so would violate the related, but conceptually distinct, obligation of client confidentiality.⁶² The obligation to report in Rule 7.1-3 is subject to the opening condition "unless to do so would be unlawful ...". The obligation of confidentiality that lawyers owe their clients is very broad. "A lawyer shall at all times hold in strict confidence all information concerning the business and affairs of a client acquired in the course of a professional relationship and shall not divulge any such information" unless an exception exists.⁶³ The exceptions to the obligation of confidentiality are, in turn, very narrow.⁶⁴ This obligation to remain silent may mean that it is unlawful to report a lawyer to a law society if to do so would violate client confidentiality, even if no solicitor-client privilege exists.

⁵⁸ If the misconduct of another lawyer is discovered in litigation it may also be that a court order relieving from the implied undertaking will be needed; see e.g. *Petitioner No 1, A Lawyer*, 2011 BCSC 921, (2011), 23 BCLR (5th) 210.

⁵⁹ Rule 3.2-7: "A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct"

⁶⁰ For an example where the client consented, see *Re Rovet* 1992 CanLII 2431 (ON LSC) (new lawyer reported client's former lawyer for knowingly making false representations to labour board.)

⁶¹ A lawyer when faced by an investigatory demand by a law society may be forced to reveal matters covered by solicitor-client privilege; see *Stewart McKelvey Stirling Scales v Nova Scotia Barristers' Society*, 2005 NSSC 258, (2005), 236 NSR (2d) 327; *Skogstad v The Law Society of British Columbia*, 2007 BCCA 310, 9 WWR 218; *Merchant*, *supra* note 44; *Cusack v The Lawyers' Professional Indemnity Co*, 2013 ONSC 5511, (2013), 116 OR (3d) 659; *Law Society Act*, RSO 1990, c L8 s 49.8. However, under the introductory wording to Rule 7-1-3 he or she cannot voluntarily make a disclosure that would violate privilege or confidentiality.

⁶² For the distinction see Malcolm Mercer, "Professional Conduct Rules and Confidential Information versus Solicitor-Client Privilege" (2013-14) 92 Can Bar Rev.

⁶³ Model Code, *supra* note 46, r 3.3.1.

⁶⁴ A proposal to expand the exceptions to allow a lawyer to inform the authorities of a client who was engaging in defrauding members of the public was rejected in the discussions over the Federation of Law Societies of Canada, *FLSC Model Code: Advisory Committee on the Future Harm Exception – Final Report* (2010), online: <<http://www.flsc.ca/en/model-code-of-professional-conduct/>>.

The second large practical challenge to the rule is the level of knowledge required to trigger any duty to report. Rule 7.1-3 gives no assistance in determining what level (certainty, balance of probability, reasonable grounds for believing etc.) needs to exist before an obligation arises. To look at the answer to this question, one might naturally turn to previous discipline decisions. There are, however, aside from the infamous Lang Michener-Pilzmaker case (which is effectively bereft of analysis),⁶⁵ simply no cases on the knowledge requirement.⁶⁶ In the absence of authority, one might try to look at the question in a pragmatic and functional fashion. If one uses as a hypothetical a possible misappropriation of trust funds, a report to the law society, although stressful to the member reported, has as its only immediate outcome the triggering of a further investigation by the law society to determine the underlying facts. In this context, it may be that the obligation to report should arise if the evidence available to the lawyer would lead a reasonable lawyer to believe that one of the matters in Rule 7.1-3 exists. This general observation is reinforced by the wording of 7.1-3(e). This sub-section is linked to a “substantial question” being raised, which suggests that a test of certainty is inappropriate.⁶⁷

For a practitioner dealing with possible misconduct by another lawyer, Rule 7.1-3 will raise many questions. He or she might ask, especially given the general wording of subsection 7.1-3(e): If there is any doubt as to the obligation to report isn't it safer to report? It is for this reason, among others, that outside advice is often sought on the obligation to report. Practically, 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

⁶⁵ *Supra* note 12.

⁶⁶ There is one Prince Edward Island case where a lawyer was disciplined for failing to report the theft of hundreds of thousands of dollars by his partner. He embarked on a course of conduct designed to conceal what the partner had done. It was, initially, to be a “limited concealment,” to hide the thefts until the partner repaid the money, but turned into a longer-term deceit, spanning nearly nine months; see “Aylward resigns, avoids disbarment” *CBC Online* (02 March, 2011), online: <<http://www.cbc.ca/news/canada/aylward-resigns-avoids-disbarment-1.277855>>. In Quebec, where the Professional Code rule is that an advocate shall immediately inform the syndic when he knows of a derogatory act committed by another advocate, one case notes that the Code “n'impose pas à un avocat l'obligation d'informer le syndic lorsqu'il pense, croit ou peut avoir des motifs de croire qu'un autre avocat a commis une infraction disciplinaire;” see *Dubé c St-Martin*, 2006 CanLII 53387 (QC CDBQ).

⁶⁷ There are many US cases on point but the state codes tend to vary in wording. One approach is that the duty arises when “the supporting evidence is such that a reasonable lawyer under the circumstances would form a belief that the conduct in question more likely than not occurred;” see *In Re Riehlmann*, 891 So2d 1239 (La 2005) at 1247.

downside to reporting.⁶⁸ Indeed, even if there is no obligation to report, the lawyer will have the discretion to report (say in connection with non-serious breaches). The reporting lawyer may later take personal comfort if the reported lawyer goes on to commit further acts of misconduct that the law society was warned was a potential problem.

It is unknown how often lawyers report other lawyers. The law societies' annual reports do not provide that information.⁶⁹ Nor do we know how often lawyers report colleagues at their own firms.

4. *The Duty to Report a Colleague*

As noted previously, before reporting any lawyer to the law society it must first be considered whether such a report is precluded on the basis that it might breach solicitor-client privilege or client confidentiality. In some cases this may bar any disclosure to the law society, although the law firm would be free to fire or expel the lawyer for misconduct. The interaction of the rules of privilege and confidentiality with the duty to report may be especially troubling to some in a law firm context. If, for instance, one takes the example of a partner who has knowingly assisted a client to commit an investment fraud there will, be an issue as to whether the firm's obligation of confidentiality⁷⁰ to the fraudster-client means that the law firm cannot report the partner to the law society. The confidentiality obligation to the client may allow the misdeeds of one of the law firm's members to remain hidden.⁷¹

If we turn to the instance where a client may have been victimised, the opportunity for misconduct often arises out of the power imbalance between lawyer and client and the trust reposed by the client. The client's lack of information and their limited ability to understand and analyse information leaves them vulnerable to opportunistic behaviour. This same imbalance can make it difficult for clients to access and analyse information indicating that misconduct may have occurred. In contrast, other lawyers in a law firm may have access to better information and will have the expertise to properly analyse information in an ethical context. On

⁶⁸ There could be personal downside if the other lawyer is a friend or a referral source.

⁶⁹ Presumably in some areas – lack of civility or improper courtroom behaviour – lawyers might be expected to make the majority of complaints.

⁷⁰ On this hypothetical there would likely be no privilege issue given the crime-fraud exception.

⁷¹ For an argument that client confidentiality and legal privilege rules are primarily of benefit to lawyers see Daniel R Fischel, "Lawyers and Confidentiality" (1998) 65 U Chi L Rev 1.

a level of principle, if we wish to deter misconduct there is much to be said for imposing a heightened obligation to report misconduct of a colleague to the law society as compared to, for instance, the general obligation to report a member of the bar who is a stranger to them.

What then is the reality if some evidence of misconduct by a colleague comes to a lawyer's attention? A lawyer faced with the question of whether to report a partner, associate or employer is in a much different practical position than the lawyer who is considering reporting a lawyer with whom they are at arm's length. The practical considerations in dealing with a colleague are many: often the colleague will be a friend, possibly of long standing. It is personally difficult to report someone if you know their spouse and children. The colleague may be a superior or a generator of work for the lawyer. It is financially difficult to report someone if it may mean your job. The individual lawyer who has cause for concern will typically report the matter to those in the firm in charge of supervising ethical matters. An individual who decides, against the tide of opinion held by others, that there is an obligation to report to the law society may be seen by those in power as acting detrimentally to the law firm.⁷²

At the firm level, business and ethics may point in different directions. There may be a concern that reporting the matter will lead to the rupture of a relationship with a client when it becomes aware of the colleague's possible misconduct. If a report is made the colleague may leave the firm, taking his or her book of business with them. There will be concerns about harm to the general reputation of the firm. The personal relationships and economic ties which bind colleagues in a law firm will tend to act as a disincentive to any reporting. Put somewhat differently, there will be a natural desire not to report a colleague if there is any discretionary aspect involved in the duty to report. Without some counter-balancing weight, we might expect to see that the reporting of colleagues will be confined to instances where there are fairly black letter rules requiring the report (or, possibly, where the colleague is an underperforming one who is not viewed as a long term member and so there is less cost to the firm by the report). Again, although these generalisations seem reasonable there is a total void of information on how often law firms (or individual members of law firms) report colleagues or what matters form the subject matter of reports. Through the grapevine of lawyers and the reported cases, there is little doubt that for those areas where mandatory reporting is clearly called for,

⁷² See e.g. *Bohatch v Butler & Binion* 977 SW2d 543 (1998) (partner expelled by law firm for internally raising issues of possible overbilling by a more senior partner); *Clyde & Co LLP & Anor v van Winklehof* [2014] UKSC 32 (lawyer alleged she was expelled from the partnership as she had reported alleged criminal activity on the part of the managing partner of office).

such as theft, reports to the law society are always made at the larger firms.⁷³ If nothing else, the shared tribal memory in the legal community of *Law Society v Gnat et al*⁷⁴ ensures that.

It is the possibly gray areas that are more interesting. By way of example, as far as can be ascertained from the discipline cases, there is only one instance⁷⁵ of a lawyer at a larger firm reporting another lawyer for overbilling. That case involved a more junior lawyer who reported the managing partner of his office. The junior lawyer then seems to have left the law firm more or less immediately. We may admire the lawyer's courage, but the example does serve to show the almost impossible personal position individual lawyers can sometimes be put in.

Clearly, it is possible that there have been more reports by large firms to law societies about a colleague's billing practices. But any law firm making such a report would also at the same time ensure that the account to the client was adjusted. If there is any truth to the evidence collected by others, at least some lawyers at some large firms bill excessively at times, and occasionally this is done knowingly. If so, the lack of formal discipline in this area would suggest that there is a risk that law firms (or individuals at law firms) tend not to report billing misconduct to law societies or that law societies do not see such cases as a priority. In turn, if the perception is that law societies are not interested in investigating or dealing with certain types of issues, lawyers will simply stop reporting these issues to them.⁷⁶

⁷³ E.g. the lawyers referenced *supra* note 24.

⁷⁴ *Supra* note 11.

⁷⁵ "Top lawyer disciplined for billing 'recklessly'," *supra* note 35; see also *Dennison*, *supra* note 32 (smaller firm reporting lawyer who had fraudulently altered dockets).

⁷⁶ In a different context (the LSUC discipline history for in-court behaviour), The Ontario Attorney General's *Report Of The Review Of Large And Complex Criminal Case Procedures* noted:

We encountered widespread dismay amongst members of the judiciary, if not outright cynicism, on the subject of LSUC discipline for court room misconduct. There is a widespread perception that the LSUC will do little or nothing in response to these matters. That perception has considerable basis in fact. As a result, the judiciary has simply given up on referring lawyers to the LSUC when they misconduct themselves in the course of criminal proceedings.

.... we have arrived at a stalemate in this area. The LSUC has a history of treating these cases with undue leniency, and often with complete silence, and so the judiciary has given up on reporting them. The result is that the LSUC is concerned about increasing incivility in the courts but is no longer part of the solution because they are not receiving complaints.

See The Honourable Patrick J Lesage, and Professor Michael Code for the Attorney General of Ontario, *Report Of The Review Of Large And Complex Criminal Case Procedures*, (Ontario: Queen's Printer for Ontario, 2008).

In some instances – a bill based on knowingly false docket, for example – overbilling might amount to criminal conduct and one would hope that law firms, small and large, would not hesitate in reporting such conduct to law societies and that law societies would proceed with a formal complaint. As a practical matter, however, it is relatively unlikely the firm or individuals working on a matter will have that sort of specific knowledge. The more common dilemma will be where the firm, or individuals at the firm, have information that falls short of fraud but may still raise serious concerns about overbilling. On occasion, this may be accompanied by the sort of smoking gun emails that were sent in the DLA Piper matter referenced at the beginning of this article.

What obligation is there to report the DLA Piper sort of churning/bill padding behaviour?

The Model Code does not specifically distinguish between the obligation to report a colleague and the obligation to report an outside lawyer. On first reading, a lawyers' ethical obligation to report a colleague who has churned a file is no greater than his or her ethical obligation to report a lawyer at some other firm who has churned a file. The practical impact of the new Rule 7.1-3(e), however, when combined with modern law firm communication and informational systems, may impose a wider obligation. The wide wording of Rule 7.1-3(e) ties the obligation to report to conduct that raises "a substantial question" as to honesty, trustworthiness or competency. Engaging in conduct like the conduct referenced in the internal DLA Piper emails must initially to a reasonable lawyer raise a substantial question of honesty and integrity. It seems likely therefore that absent some immediate credible explanation for emails that seem to defy such an explanation, a DLA Piper-like email received by a lawyer would trigger an obligation to report under Rule 7-1-3(e).⁷⁷

The Ontario version of Rule 7-1-3 does not include the Rule 7-1-3(e) found in the Model Code. If one confines oneself to the specific Ontario

⁷⁷ On cases involving difficult judgment calls, outside advice will be sought. In addition to minimising the possibility of a wrong disclosure decision, there are good reasons related to the firm's internal cohesiveness for this. A number of partners will have some information about the possible misconduct. Lawyers talk. They will have different views on the underlying facts, on the application of the applicable codes to those facts and on the obligation to report. Just as the reporting of a colleague can lead to business issues, the failure to report a colleague can also lead to significant internal dissension. Partners with mobile practices are free to go whenever they want. Partner concern that management is not acting ethically can be a powerful motivator to departures. Procedures which see decisions on ethical issues made with the advice of outside counsel make those decisions more explicable to and palatable to all partners.

rule, it may be that no obligation to report on this example exists.⁷⁸ If that is correct, the result will be ethically unappealing - it allows the law firm to effectively hide a colleague's misdeeds. It may be that the solution to this is to remember that the professional codes are not all encompassing but a guideline. Our ethical rules should seek to counteract and sanction any law firm tendencies towards an internal code of silence. Even if the provisions of Ontario's version of Rule 7-1-3(e) are not triggered there is still the general obligation to act with integrity. Further, the statutory basis for discipline is grounded in a very general term – professional misconduct. In the result, I believe the better view in Ontario is that it would be professional misconduct to fail to report even if the black and white wording of the specific Ontario rule had not been breached. Still, it seems odd that the issue is gray. It is odder still that one needs to engage in a convoluted analysis when enactment of the Model Code's Rule 7-1-3(e) in Ontario would have made the issue clear.

5. Does Law Firm Management Have a Higher Duty?

Traditionally, our codes have regulated individual lawyers and not law firms. Nor do they impose any special obligations on those in management or supervisory positions at law firms. The obligations instead fall on the individual lawyer. There is an obligation not to knowingly assist or induce another lawyer to violate or attempt to violate ethical rules. There likely is an obligation to take measures to stop professional misconduct that one knows about at one's firm from continuing.⁷⁹ There is no specific rule, however, requiring systems be implemented to help ensure that one's colleagues do not violate ethical rules. Although all law firms of any size have systems in place to minimise violations, these systems have been created by the law firms in their own self-interest and are not a professional ethical requirement.

⁷⁸ The only specific sub-section of its Rule 7-1-3 that might be implicated in Ontario is that a duty to report would arise if a lawyer's clients "are likely to be severely prejudiced."

⁷⁹ As knowingly acquiescing in such ongoing behaviour would almost certainly amount to professional misconduct. I note, however, that the Model Code has no specific wording.

In contrast in Quebec *Professional Code*, CQLR c C-26 r 4.02.02 specifically addresses this issue:

It is also derogatory to the dignity of the profession of advocate for an advocate who engages in his professional activities within a partnership ... to fail to take reasonable measures to put an end to, or prevent the repeated performance of, an act derogatory to the dignity of the profession of advocate which has been performed by another person who engages in his professional activities within the said partnership ... which has been brought to his attention for more than 30 days.

The existence of these systems at the law firm will, however, mean that management will have access to information and responsibility for ethical compliance. Possible breaches of ethical obligations will be reported up the chain of command and come to their attention. With additional information will come ethical responsibility. Although management has no higher or different responsibility than any other member of the firm to report misconduct, practically they will have greater information and knowledge. They will be the ones whose reporting decision is most carefully scrutinised.

6. Compliance Systems

The need to report a colleague to the law society for ethical violations may be viewed by some as an indication of the failure of a firm's culture. This is not usually the case: there will always be rogue lawyers who deceive their colleagues and troubled lawyers who give no indication that anything is wrong. A report to a law society may, in fact, be an affirmation on the firm's ethical culture. Nevertheless, it is undoubtedly the case that the first line of defence of the law firm is standards and systems that lead to avoidance of ethical breaches.

It may be that large law firms lag behind many of their large clients in creating formal infrastructures to protect themselves. In part this is a function of our hubris – we are lawyers and so (we believe) by definition are ethical. As autonomous professionals we are appalled at the suggestion that we need formal systems to ensure we are ethical – and bristle at the idea of someone watching over us. At the same time we all have clients who are ethical organisations with robust systems – whistleblower hotlines, random audits of accounts to insure their customers have not been overcharged and the like. We see these as essential for our large clients but tend to see them as unnecessary for us because we are lawyers.

7. Conclusion

We now live in a world where ethical breaches are more and more likely to be discovered and made public. Large law firms live in a world where their most valuable partners (or clients) can easily depart if they have cause for concern about our ethics. We should not wait for some new Pilzmaker-type scandal to encompass one of our peers (or, God forbid, our own firm) before taking compliance and prevention issues more seriously. If, as posited in this article, law firms now face a heightened obligation to report possible profession misconduct of their partner or associates, the need for robust internal compliance systems is even more pressing.

At the same time we need to recognise that systems are easier to design on pieces of paper than they are to implement in real life. As the DLA Piper emails tell us, there will always be some who find it difficult to resist temptation.