Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

MODEL CODE OF PROFESSIONAL CONDUCT

CONSULTATION REPORT

JANUARY 29, 2020

INTRODUCTION

1. The Model Code of Professional Conduct (the "Model Code") was developed by the Federation of Law Societies of Canada (the "Federation") to synchronize as much as possible the ethical and professional conduct standards for the legal profession across Canada. First adopted by the Council of the Federation in 2009, the Model Code has now been adopted by 13 of the 14 provincial and territorial law societies.

2. The Federation established the Standing Committee on the Model Code of Professional Conduct (the "Standing Committee") to review the Model Code on an ongoing basis to ensure that it is both responsive to and reflective of current legal practice and ethics. The Standing Committee is mandated by the Federation to monitor changes in the law of professional responsibility and legal ethics, to receive and consider feedback from law societies and other interested parties regarding the rules of professional conduct, and to make recommendations for amendments to the Model Code.

3. In accordance with its mandate, the Standing Committee engages in an extensive process of review, analysis and deliberation before recommending amendments to the Model Code. Consultation with the law societies and other interested stakeholders is an essential component of this process.

REQUEST FOR FEEDBACK

4. The Standing Committee is seeking the feedback of a wide range of stakeholders including Canadian law societies, the Canadian Bar Association, the federal Department of Justice, the legal academy, and the general public on draft amendments to the Model Code.

5. The amendments proposed in this Consultation Report address issues related to the duties related to non-discrimination and harassment and ex parte communications with courts and tribunals. Feedback on any or all of the proposed amendments is welcomed.

6. The Standing Committee will carefully consider the substantive feedback it receives, making further changes to the proposed amendments as appropriate. The deadline for providing feedback is May 29, 2020. Please send your feedback to consultations@flsc.ca.

7. The final amendments will be presented to the Council of the Federation for approval in December 2020 and then submitted to the law societies for adoption and implementation.

I. DISCRIMINATION AND HARASSMENT

8. The Standing Committee is proposing amendments to Model Code Rule 6.3 concerning discrimination and harassment. The draft amendments revise the rule to provide significantly greater guidance on the duties of non-discrimination and non-harassment and to include specific guidance regarding bullying.

Background

9. The Law Societies Equity Network ("LSEN") provided the initial impetus for the examination of Rule 6.3 on Harassment and Discrimination. The LSEN is a network of law society staff engaged in efforts to prevent discrimination and harassment in Canadian legal workplaces and to promote diversity and inclusion. In June 2019, the LSEN sent a Memorandum to the Standing Committee suggesting that the current Model Code rules were insufficient. The LSEN identified one shortcoming in particular: the rules and commentary may not adequately reflect the importance of preventing discrimination and harassment. The LSEN suggested that the Standing Committee propose revisions to the Model Code directed at clarifying the obligations.

10. The Standing Committee took into account the considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession.

11. In 2015, the Law Society of Ontario's ("LSO") Challenges Faced by Racialized Licensees Working Group issued a Consultation Paper[1] in which it noted that these licensees continue to face barriers to full inclusion in the profession. The Report identified some of the barriers including discriminatory behaviours and assumptions and behaviours that amount to bullying.

12. The LSO's 2017 articling survey ("Articling Experience Survey")[2] revealed that significant numbers of those surveyed reported experiencing discrimination: 21% of respondents who had completed articling had experienced unwelcome comments related to personal characteristics protected under Ontario's *Human Rights Code*[3] and 17% of respondents

[1] Developing Strategies for Change: Addressing Challenges Faced by Racialize Licensees: https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/r/racialized-licensees-consultation-paper.pdf
[2] The Law Society of Upper Canada Summary of Articling Experience Survey Results: http://www.lawsocietygazette.ca/wp-content/uploads/2018/01/Summary-of-Articling-Experience-Survey-Results.pdf
[3] R.S.O. 1990, c. H.19.

believed that they had experienced differential treatment related to a protected ground. Of respondents who were articling at the time of the survey, 18% reported unwelcome comments and 16% reported differential treatment related to a protected ground.

13. In 2019, the prairie law societies (Law Society of Alberta, Law Society of Saskatchewan and Law Society of Manitoba) conducted surveys of articling students and recent calls in their jurisdictions. The Alberta results[4] indicated that 32% of respondents reported experiencing discrimination, harassment or both during the recruitment process or articles. In Manitoba, the number was 24%.[5]

14. In 2019, the International Bar Association ("IBA") released its Report on bullying and harassment in legal workplaces: *Us Too? Bullying and Sexual Harassment in the Legal Profession*.[6] This global survey of 6,980 respondents revealed alarming levels of bullying, harassment and sexual harassment: 1 in 2 female respondents and 1 in 3 male respondents reported experiencing bullying in their workplace and 1 in 3 female respondents and 1 in 14 male respondents reported being sexually harassed in a work context. Most of those who had experienced bullying or sexual harassment had not reported their experience.

15. The Standing Committee took all this information into account and determined that it was essential to clarify the harassment and discrimination provisions of the Model Code and to include specific guidance on bullying.

16. In clarifying the obligations relating to discrimination, harassment and bullying, the Standing Committee considered the recommendations of the LSEN, the rules of professional conduct of several Canadian law societies which have already expanded their rules and commentary on discrimination and harassment to provide more detailed guidance, and legislation and case law which establish the law and principles applicable to discrimination and harassment in Canada.

Proposed Amendments

17. The Standing Committee is proposing that Rule 6.3 be amended significantly to clarify the relevant obligations. The draft amendments are set out in Appendix A to this Report.

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[4] See the Articling Program Assessment Research Report and related materials online at https://www.lawsociety.ab.ca/2019-articling-survey-results/

[5] The LSM Articling Research Report can be accessed online at http://www.lawsociety.mb.ca/for-lawyers/miscellenous/miscellaneous-pdfs/2019%20LSM%20Articling%20Research%20Report.pdf/view

[6] The IBA's Report is available online at https://www.ibanet.org/bullying-and-sexual-harassment.aspx

18. Rule 6.3-1 would remind counsel of the obligation not to discriminate. The Standing Committee is suggesting that the prohibition on discrimination be the first rule in this section because it is the broadest duty, and as indicated in relevant case law, encompasses the duty not to harass.

19. The proposed Commentary to Rule 6.3-1 provides guidance on the obligation not to discriminate. As in the existing version, the first paragraph of the Commentary expresses the special responsibility of lawyers to respect the requirements of human rights laws. The amended Commentary would also refer to the requirement to respect workplace health and safety laws, reflecting the fact that these laws contain duties relevant to the obligations not to discrimination or harass and to create safe work places.

20. The second paragraph in the proposed Commentary largely parallels the existing Model Code Rule 6.3-1: it affirms that the principles of human rights laws, workplace health and safety laws and related case law apply to the interpretation of the Model Code rules on discrimination and harassment.

21. The third, fourth and fifth commentary paragraphs are new. Paragraph 3 draws on the judgment of Justice McIntyre in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. In that case, the Supreme Court of Canada defined discrimination; paragraph 3 incorporates that definition. Paragraph 4 provides a non-exhaustive list of behaviours which amount to discrimination. This list is intended to help legal professionals interpret their obligation of non-discrimination. Many of these examples are drawn from Supreme Court of Canada case law or human rights statutes.[7] Other examples have been drawn from the reports of the IBA and law societies.

22. The final paragraph of the proposed Commentary advises that providing ameliorative programs, services or activities is not discrimination. This clarification is drawn from s. 15(2) of the *Canadian Charter of Rights and Freedoms* and human rights legislation.[8]

23. Rule 6.3-2 is currently an interpretive provision: it provides that a term used in the Rule that is defined in human rights legislation has the same meaning as in the legislation. The Standing Committee is proposing to define key terms in the Commentaries to the rules instead. The new proposed Rule 6.3-2 would express the prohibition on harassment (replacing current rule 6.3-4) with Commentary providing guidance to this obligation.

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[7] Some of the relevant cases include: *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

[8] See for example the *Canadian Human Rights Act*, RSC 1985, c H-6, s 16(1).

24. The first paragraph of the Commentary defines harassment for the purposes of the Model Code. The second paragraph expresses the well-established principle of human rights law that intent is not required in order to establish harassment.[9] The third paragraph of the Commentary provides examples of behaviours which constitute harassment. Like the examples used in the Commentary to Rule 6.3-1, these examples are drawn from case law, statutes and law society reports. One of the behaviours the Commentary identifies as constituting harassment is bullying: for greater clarity, Commentary paragraph 4 provides a definition of bullying.

25. The final paragraph of the Commentary reminds counsel that the rule does not apply only to conduct related to or performed in the lawyer's office or legal practice: this is consistent with the Commentary to Rule 2.1-1 (Integrity) which specifies that "[d]ishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice." The Commentary to Rule 2.1-1 makes it clear that law societies may take disciplinary action for acts outside the professional sphere.

26. The Standing Committee is proposing that Rule 6.3-3 prohibition on sexual harassment be revised slightly to ensure its consistency with the proposed changes to the language in Rules 6.3-1 and 6.3-2. Proposed new Commentary defines sexual harassment and provides a non-exhaustive list of examples of behavior which amounts to sexual harassment. As in the Commentary to Rule 6.3-2, the Commentary to 6.3-3 clarifies that sexual harassment may be found even in the absence of intent on the part of an alleged harasser. The Commentary concludes with a provision identical to the Commentary to Rule 6.3-2 on the scope of the obligation.

27. The proposed new Rule 6.3-4 prohibits reprisals against persons inquiring about their rights or the rights or others, complainants, witnesses, and those assisting in investigations or proceedings related to a complaint of discrimination, harassment or sexual harassment. The Commentary to the new rule contains a non-exhaustive list (drawn from legislation) of behaviours which amount to reprisal.[10]

28. Rule 6.3-5, currently the prohibition on discrimination, would be deleted.

II. *EX PARTE* COMMUNICATIONS

[9] See for example *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536.
[10] A non-exhaustive list of the legislation consulted includes: the *Saskatchewan Human Rights Code, 2018*, SS 2018, c 24.2; *The Human Rights Code*, CCSM c H175; *Human Rights Act*, SNWT 2002, c 18; *Public Service of Ontario Act, 2006*, SO 2006, c 35, Sch A; *Labour Code*, CQLR c C-27; *Adult Protection Act*, SNL 2011, c A-4.01; *Public Service Act*, SNu 2013, c 26 and *Occupational Health and Safety Act*, RSY 2002, c 159.

29. The Standing Committee is proposing the addition of rules and commentary to Chapter 5: Relationship to the Administration of Justice to address the obligations of legal practitioners when communicating *ex parte* with a court or tribunal. The draft amendments are set out in Appendix B to this Report.

Background

30. This issue was first raised with the Standing Committee by the Law Society of Alberta ("LSA"). In correspondence to the committee, the LSA raised concerns about lawyers engaging in *ex parte* communications with courts and tribunals contrary to the general rule against discussing specific cases with judges in the absence of the other party except in exceptional cases.

31. The Supreme Court of Canada has suggested that the obligations that apply in *ex parte* proceedings are both legal and ethical.[11] The obligations are clear. Parties should rarely proceed *ex parte*; such proceedings should be reserved for exceptional circumstances.[12] If a party decides it is necessary to proceed *ex parte*, they must make full, frank and fair disclosure of all relevant, non-privileged, non-confidential information to the court or tribunal.[13] In general a legal practitioner should not discuss specific cases with a court or tribunal unless the other parties to the proceeding have knowledge of the communication and a chance to participate.[14] Currently, the Model Code does not contain provisions which expressly affirm those ethical obligations.

32. The LSA advised that prior to implementation of the Model Code, the Alberta Code of Professional Conduct included provisions enshrining the ethical obligations that apply to legal practitioners engaged in *ex parte* communications or proceedings. In implementing the Model Code, the LSA added Commentary that provides guidance to legal practitioners regarding *ex parte* proceedings and communications. Despite this guidance, it appears that lawyers in some practice areas in Alberta routinely engage in *ex parte* communications with courts and tribunals in circumstances that do not warrant *ex parte* communications. In some situations the communications are of an administrative nature, for example, confirming appointment dates, but in others counsel are seeking substantive remedies.

33. After reviewing the issues, the Standing Committee has concluded that the Model Code should be amended to provide greater guidance on *ex parte* proceedings and

[11] *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75 para 27.
[12] Id. The Supreme Court has indicated that exceptional circumstances include (1) situations in which the delay occasioned by giving notice would result in harm or (2) if there were reasons to fear a party would act improperly if notice were provided; Id para 25.
[13] Id; *Alexander v. Cherry*, 2007 ABCA 128.
[14] *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 para 74.

communications. In reaching this conclusion the Standing Committee took into consideration the experience in Alberta and the fact that both the LSA and the Law Society of British Columbia have included express language in their rules of professional conduct reaffirming the duties of legal practitioners in respect of *ex parte* communications and proceedings. The Standing Committee also considered the impact of electronic communications, noting that the ease and general informality of electronic communications may contribute, possibly through inadvertence, to breaches of the well-established principles governing communications with courts and tribunals.

Proposed Amendments

34. The proposed new Rule 5.2-1A addresses the duties of counsel in *ex parte* proceedings. It expresses the existing duty to "act with utmost good faith and inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision".

35. The following commentary reminds counsel of the exceptional nature of *ex parte* proceedings and the special obligations which arise as a result. The commentary provides guidance about two obligations in particular: the duty of candour to the tribunal and the obligation to proceed *ex parte* only when it is justified.

36. The first paragraph of the commentary reminds counsel of the special disclosure duties that arise in *ex parte* proceedings: the duty to make "full, fair and candid disclosure". The second paragraph of the commentary clarifies that this disclosure obligation is subject to the duty of confidentiality.

37. The third paragraph of the commentary reminds counsel that they should only initiate *ex parte* proceedings where permitted by law and justified. The commentary suggests that if counsel's client would not suffer prejudice, counsel should consider proceeding with notice even when an *ex parte* proceeding is permitted.

38. Rule 5.2-1B sets out the established ethical principle that communicating with a tribunal in the absence of opposing counsel or parties is not permitted except (1) where authorized by law or the tribunal, (2) where the opposing counsel or party has been made aware of the content of the communications and has consented, or (3) where the opposing counsel or party has appropriate notice. The commentary that follows the rule provides guidance as to what types of *ex parte* communications are and are not permitted.

39. The first paragraph of the commentary addresses communications with a tribunal in the absence of the opposing counsel or parties, reminding counsel not to discuss a matter with the tribunal, make submissions on a matter or attempt to influence the tribunal.

40. The second paragraph highlights the principle that even where a tribunal requests or invites a communication from counsel, counsel should still consider whether to inform the opposing counsel or parties. The general rule remains that the opposing counsel or party should be given notice of a communication or should be copied on the communication.

41. The third paragraph of the commentary notes that communications on routine administrative matters are permitted but, suggests that counsel should still consider providing notice.

42. The final paragraph of the commentary reiterates that, where no prejudice would occur, counsel should still consider providing notice even when *ex parte* communications with a tribunal are permitted.