
Legal Ethics & Professionalism

Federation of Law Societies of Canada – Proposed Model Code Amendments



Kathleen Lickers, I.P.C. and Candice Metallic, IPC
▪ Indigenous Bar Association
Virtual Conference ▪ October 9, 2020



Agenda

- Background
- Overview of Proposed Changes to FLSC Model Code
- Discussion on Discrimination
 - Systemic Discrimination
 - Context
 - Notable Absence
 - “Merit and Capability” - a presumed exclusion from discrimination
 - Conduct Unbecoming
- Harassment
- Additional Resources / Self Study



Indigenous Bar Association

- Non-profit professional association for Indigenous people (i.e. First Nation, Métis and Inuit) trained in the field of law
- Objectives:
 1. To recognize and respect the spiritual basis of our Indigenous laws, customs and traditions.
 2. To promote the advancement of legal and social justice for Indigenous peoples in Canada.
 3. To promote the reform of policies and laws affecting Indigenous peoples in Canada.
 4. To foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to Indigenous peoples in Canada.
 5. In pursuance of the foregoing objects, to provide a forum and network amongst Indigenous lawyers: to provide for their continuing education in respect of developments in Indigenous law; to exchange information and experiences with respect to the application of Indigenous law; and to discuss Indigenous legal issues.
 6. To do all such other things as are incidental or conducive to the attainment of the above objects.



Background

- 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

Background

- 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

Background

- 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

- The Standing Committee has taken into account the considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession
- The Federation of Law Societies is seeking substantive feedback and we take this opportunity to consider their amendments within this workshop

Existing Language

- 6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule
- 6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation
- 6.3-3 A lawyer must not sexually harass any person

Existing Language

- 6.3.4 A lawyer must not engage in any other form of harassment of any person
- 6.3.5 A lawyer must not discriminate
- Commentary [1] A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws



Overview of Proposed Changes

- Three substantive areas of amendment:
 1. Discrimination, Rule 6.3-1 and commentary (new)
 - Harassment, Rule 6.3-2 and commentary - not limited to office or legal practice
 - Bullying
 - Sexual harassment – not limited to office or legal practice
 - Reprisal, Rule 6.3-4
 2. Ex Parte Communications, Rule 5.2-1A

6.3 HARASSMENT AND DISCRIMINATION (Proposed)

- ~~6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule. A lawyer must not discriminate against a colleague, employee, client or any other person.~~
- **Commentary**
- [1] A lawyer has a special responsibility to respect the requirements of human rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights such laws

Discrimination: 6.3 Commentary

- [2] The principles of human rights and workplace health and safety laws and related case law apply to the interpretation of this rule and to rules 6.3-2 to 6.3-5



Discrimination, R. 6.3-1

- [3] Discrimination is a distinction, intentional or not, based on grounds related to actual or perceived personal characteristics of an individual or group, which has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Distinctions based on personal characteristics, attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Distinctions based on an individual's **merits and capabilities** will rarely be so classified (emphasis added)



Discrimination, R. 6.3-1

- [4] Types of **behavior** that constitute discrimination may include, but are not limited to:
 - a. Refusing to employ or to continue to employ any person for reasons related to any personal characteristic protected by applicable law;
 - b. Refusing to provide legal services to any person for reasons related to any personal characteristic protected by applicable law;
 - c. Charging higher fees for reasons related to any personal characteristic protected by applicable law;
 - d. Assigning lesser work or paying an employee or staff member less for reasons related to any personal characteristic protected by applicable law;
 - e. Using racial, gender, religious or derogatory language to describe a person or group of persons; or
 - f. Failing to provide reasonable accommodation to the point of undue hardship.



Discrimination, R. 6.3-1

- **[5]** It is not discrimination to establish or provide programs, services or activities which have the object of ameliorating conditions of disadvantage for individuals or groups who are disadvantaged for reasons related to any characteristic protected by applicable laws



Systemic Discrimination - Context

- Honourable Senator Murray Sinclair: “Discrimination becomes systemic when it becomes embedded within and perpetuated by an organization, culture, or social system, either intentionally or as an accidental bi-product of innocently motivated practices that adversely affect a defined group because of undeniable attributes.”
- TRC Report: “[u]ntil Canadian law becomes an instrument supporting Aboriginal peoples’ empowerment, many Aboriginal people will continue to regard it as a morally and politically malignant force.”
- *Law Society of Upper Canada v. Terence John Robinson*, 2013 ONLSAP 0018: “In appropriate circumstances, hearing panels may take judicial notice of systemic racism and discrimination and, with a proper evidentiary foundation, can give mitigating effect to systemic discrimination when it impacts on misconduct and influences the lawyer’s actions. This concession is drawn from the language of our appeal panel in *Law Society of Upper Canada v. Selwyn McSween*, 2012 ONLSAP 3



Harassment

- ~~R. 6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation. A lawyer must not harass a colleague, employee, client or any other person.~~
- Commentary [1]: electronic, physical or verbal conduct when such conduct might reasonably be expected to cause humiliation, offence or intimidation to the recipient of the conduct
- [2] Intent not determinative
- [3] Enumerates types of behaviour constituting harassment (non-exhaustive)
- [4] Bullying is a form of harassment
- [5] Rule is not limited to conduct in an office or legal practice – conduct unbecoming



Sexual Harassment

- R. 6.3-3 ~~A lawyer must not sexually harass any person.~~ A lawyer must not sexually harass a colleague, employee, client or any other person
- Commentary [1]: means means an incident or series of incidents involving unsolicited or unwelcome sexual advances or requests, or other unwelcome electronic, verbal, non-verbal or physical conduct of a sexual nature - focuses on impact on victim
- [2] Intent not determinative
- [3] Types of behaviour
- [4] Rule is not limited to conduct in an office or legal practice – conduct unbecoming



Reprisal

- ~~R. 6.3-4: A lawyer must not engage in any other form of harassment of any person.~~ A lawyer is prohibited from engaging or participating in reprisals against a colleague, employee, client or any other person who has
 - (a) inquired about their rights or the rights of others,
 - (b) made or contemplated making a complaint of discrimination, harassment or sexual harassment,
 - (c) witnessed discrimination, harassment or sexual harassment, or
 - (d) assisted or contemplated assisting in any investigation of or proceeding related to a complaint of discrimination, harassment or sexual harassment



Issues

1. Systemic Discrimination: Does the statement in R. 6.3-1, Commentary [3], “Distinctions based on an individual’s merits and capabilities will rarely be so classified” contribute to systemic discrimination?
2. Should the rules require consideration of Gladue type principles and historic disadvantages of Indigenous peoples in the legal framework, including the cultural differences between Indigenous cultures (oral traditions) and British norms (written). Should there be accommodation of this?
3. Does the FLSC have an obligation to examine systemic discrimination and make recommendation(s) to ameliorate?
 - Duty to educate
 - Duty to provide resources to identify and ameliorate systemic discrimination



Issues

4. Conduct unbecoming a barrister or solicitor means conduct, including conduct in a lawyer's personal or private capacity, that tends to bring discredit upon the legal profession
 - internal inconsistency re: discrimination, harassment and sexual harassment
5. Harassment / Sexual Harassment: Do the proposed changes to R. 6.3-2 and/or R. 6.3-3 and/or the respective commentary sufficiently address circumstances of LGBTQ2S? Should the Federation address these issues? If so, what would be appropriate?