



# **LIANS/NSBS Solo and Small Firm Virtual Conference 2021**

Hot Topics in Legal Ethics

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# January 2020 amendment

## Competence

**3.1-2** A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

## Commentary

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**[4A]** To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

**[4B]** The required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including: (a) The lawyer's or law firm's practice areas; (b) The geographic locations of the lawyer's or firm's practice; and (c) The requirements of clients.



# Purpose of amendments

- To prompt lawyers to consider both the benefits and risks associated with the use of technology
- To remind lawyers of their obligation to be and remain technologically competent
- The language reflects the understanding that the required level of competence is contextual, depending on a lawyer's practice areas and circumstances
- Determining whether a lawyer has maintained the required level of technological competence is a contextual inquiry
- Includes a non-exhaustive list of factors for lawyers and the Society to consider in determining the appropriate level of technological competence for a particular lawyer
- For example, the technological competence that might be expected in a rural area with unreliable internet connectivity will be different than what might be expected of a lawyer working in Halifax



# Background

Law Societies Equity Network (“LSEN”) provided the initial impetus for the examination of Rule 6.3 on Harassment and Discrimination, communicating in June 2019 its belief that the existing rules and commentary may not adequately reflect the importance of preventing discrimination and harassment

Appreciating the considerable empirical and anecdotal evidence that discrimination, harassment and bullying remain prevalent in the legal profession, the Federation of Law Societies’ Standing Committee of the Model Code of Conduct determined in 2019 that it was essential to clarify the harassment and discrimination provisions of the Model Code and to include specific guidance on bullying



# Equality, Harassment and Discrimination

The events of the past year have further underscored the need for robust rules and commentary on discrimination and harassment in the legal profession. The Black Lives Matter movement, continuing violence against First Nations, Inuit, and Métis peoples in Canada, the shadow pandemic of gender-based violence and the disproportionate job losses experienced by women, particularly racialized women, all suggest that justice system stakeholders – including the legal profession - must examine their roles in perpetuating social inequalities.

# Current rule

## **6.3 EQUALITY, HARASSMENT AND DISCRIMINATION**

**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.

**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 against any person.



# Draft amendments

**6.3-1** A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.

**6.3-2** A lawyer must not harass a colleague, employee, client or any other person.

**6.3-3** A lawyer must not sexually harass a colleague, employee, client or any other person.



# Draft amendments con't

## **Reprisal**

**6.3-4** A lawyer is prohibited from engaging or participating in reprisals against a colleague, employee, client or any other person because that person 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 or proceeding related to a complaint of discrimination, harassment or sexual harassment.

**6.3-5** Rules 6.3-1 to 6.3-4 are not limited to conduct related to, or performed in, the lawyer's office or in legal practice.

# Duty to report

This rule requires lawyers to report the conduct of other lawyers that arises within the lawyer's law practice, and that may prejudice a client.

This rule does not include a duty to report the conduct of other lawyers that harms persons other than clients (such as staff, articled clerks, associates, or others). Specifically, there is no duty to report a lawyer's violation of rule 6.3.

## **Duty to Report**

**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) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competence as a lawyer;
- (e) conduct that raises a substantial question about the lawyer's capacity to provide professional services; and
- (f) any situation in which a lawyer's clients are likely to be materially prejudiced.



# Broaden the duty

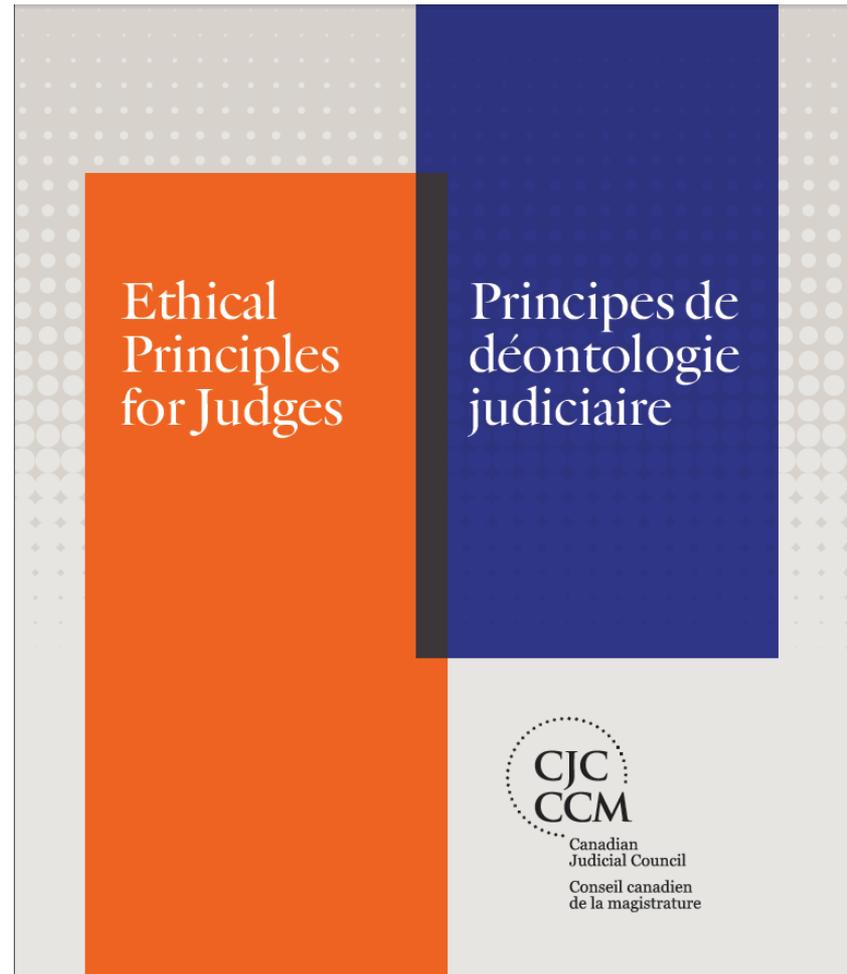
Barreau du Quebec's *Code of Professional Conduct*:

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

- (1) the unlawful custody or use of monies or other property held in trust;
  - (2) the termination of the practice of the profession;
  - (3) the inability to practise the profession;
  - (4) participation in an unlawful act when practising the profession;
  - (5) a health condition that could materially prejudice a client;
  - (6) conduct that raises a doubt as to his honesty, loyalty or competence;
- or
- (7) **the performance of any act whose nature or seriousness is such that it could adversely affect the honour, dignity or reputation of the profession or the public's confidence in the profession.**



# Canadian Judicial Council





# Judges returning to practice

The ethical issues that arise from judges appearing in court and/or returning to practice generally include:

- Apprehension of Bias;
- Conflicts of Interest;
- Confidentiality;
- Public Perception and Confidence in the Justice System;
- Suggestion or Perception of Qualitative Superiority; and
- Post-Judicial Employment



# Current rule

## **7.7 RETIRED JUDGES RETURNING TO PRACTICE**

**7.7-1** A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the Society approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.