



The Advocates' Society La Société des plaideurs

September 21, 2020

VIA EMAIL: consultations@flsc.ca

Standing Committee on the Model Code of Professional Conduct
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, Ontario K1P 1A4

Dear members of the Standing Committee,

RE: Proposed Amendments to the Model Code of Professional Conduct

The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada. The mandate of The Advocates' Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society is in receipt of the Federation of Law Societies of Canada's Consultation Report on the Model Code of Professional Conduct dated January 29, 2020. We reviewed the Consultation Report carefully and struck a Task Force to study and discuss the proposed amendments in detail. The Society's feedback on the proposed amendments is outlined below.

I. Discrimination and Harassment

Overall, the Society supports expanding the guidance in Rule 6.3 about lawyers' obligations not to discriminate against, harass, bully, or sexually harass others. In the attachment to this letter, we have suggested specific changes to the proposed Rule 6.3 for the Standing Committee's consideration. In the body of this letter, we provide the rationale for the Society's suggested changes.

Given the importance of this expanded guidance, the Society recommends that the Federation consider providing national training opportunities for lawyers once the new provisions of the Model Code come into effect. We recommend that this training include information about lawyers' duties of non-discrimination and non-harassment; practical information about how these duties can be implemented in various practice settings; as well as information about the role that unconscious bias may play in perpetuating systemic discrimination.

Rule 6.3: Harassment and Discrimination

We suggest that the title of Rule 6.3 be amended to place "discrimination" first, since it is dealt with first by the new rule.

Rule 6.3-1: Discrimination

The Society supports the proposed amendments in Rule 6.3-1 regarding counsel's duties of non-discrimination. The Society has suggested some revisions to more accurately reflect the extent of counsel's duties in this regard and the development of the law in this area.

First, the Society suggests that Commentary 2 be expanded to recognize the evolving nature of the definition of discrimination and the related grounds of discrimination, and to emphasize counsel's positive obligation to stay apprised of developments in the law in this area.

Second, we suggest adding new Commentary 3 to delineate counsel's multiple duties to refrain from discrimination. We have included the lawyer's obligation to refrain from discrimination in the context of service delivery and the workplace. Moreover, we have added that lawyers must refrain from all forms of discrimination, including direct, adverse effect, and systemic discrimination. Reference to the different forms that discrimination may take is crucial in the commentary under Rule 6.3-1 in order for counsel to understand the broad scope of their obligation not to discriminate against others.

Third, we suggest highlighting in Commentary 4 (which is former Commentary 3 – the definition of "discrimination"), that this definition continues to evolve over time and should not be considered a fixed concept.

Fourth, the Society encourages reference to some of the key grounds of discrimination in new Commentary 5. While we recognize that these grounds vary across jurisdiction, we believe that including some of the common grounds will be a helpful reference point for counsel. For example, addictions are an issue in the practice of law and some counsel may not know that addictions are in fact a ground of discrimination.

Fifth, we appreciate the list of examples set out in Commentary 6 (which is former Commentary 4). In subparagraph (a), we revised "refusing to employ" to "declining to employ" a person, as we believe the term "refusing" creates too high a standard for discrimination. We also suggest adding further examples in this Commentary to address adverse effect discrimination (and made a corresponding change to the introductory sentence). We have further included a basket clause at the end of the list in Commentary 6 to reflect that the definition of discrimination evolves over time and counsel must keep abreast of such evolution. Similar basket clauses have also been inserted in subsequent Rules in this section for the same reason.

Sixth, the Society suggests that it would be helpful to identify that counsel have an obligation to provide accommodations to the point of undue hardship. We have added new Commentary 7 to address this. The Federation may further wish to consider whether the Model Code should include a positive obligation for lawyers to inquire about human rights needs that may require accommodation.

Seventh, the Society suggests adding Commentary 8 to impose a positive obligation on lawyers to inform themselves regarding the role of unconscious bias in perpetuating systemic discrimination. In the experience of the Society's members, the more subtle conduct caused by unconscious bias, which may not meet the legal test for discrimination, is the most pervasive type of exclusionary behaviour experienced by equity-seeking individuals and groups.

Finally, we support the change suggested in Commentary 9 (which is former Commentary 5). We suggest one small change: to include the word "special" before programs, to link this Commentary to the language referenced in the case law on this topic.

Rule 6.3-2: Harassment

The Society supports the proposed amendments in Rule 6.3-2 regarding counsel's duties of non-harassment. However, the Society has a small number of suggested revisions aimed at improving clarity and ensuring that the provisions are interpreted expansively to cover all relevant situations.

First, we suggest that Commentary 1 be revised to provide that harassment includes "non-verbal" conduct in addition to electronic, physical, and verbal conduct. This mirrors Commentary 4 regarding bullying and the subsequent rules related to harassment. We also suggest that Commentary 1 state that harassment includes sexual harassment (and/or gender-based harassment, as discussed in more detail below). We believe this revision is necessary to make clear that sexual and gender-based harassment are examples or subsets of harassment generally. This revision would also create symmetry with the current last sentence of Commentary 1, which describes the relationship between harassment and discrimination.

Second, the Society suggests that the list of "behaviours" included in subparagraphs (a) to (f) of Commentary 3 be reorganized so that subparagraph (e) appears first rather than next to last. We also suggest removing the phrase "known or ought reasonably to be known to be" from subparagraph (e), and adding the word "discomfort" ("Objectionable or offensive behaviour that is ~~known or ought reasonably to be known to be~~ unwelcome, including comments, displays or jokes that demean, belittle or cause personal discomfort, humiliation or embarrassment"). The objectively reasonable standard of "known or ought reasonably to be known" is already incorporated in Commentary 2; including such language in subparagraph (e) of Commentary 3 arguably undermines the intent of Commentary 2. Moreover, this language is not included in the definition of sexual harassment under Rule 6.3-3 Commentary 1. The aim of these proposed revisions is to ensure that the rule is not interpreted to capture only blatant behaviours, but also more nuanced or insidious forms of harassment.

Third, the Society suggests that the words "may include, but is not limited to" be added to the opening paragraph of Commentary 4 regarding bullying, to make clear that the behaviours identified in subparagraphs (a) to (f) are not an exhaustive list. For similar reasons, we also suggest adding a basket clause to the end of this list indicating that bullying may include "any other behaviour which constitutes bullying according to any applicable law". These revisions are necessary because this area of the law changes frequently.

Finally, the Society suggests that Commentary 5 be deleted from this section and replaced by a new Rule 6.3-5 applicable to the entirety of Rule 6.3, as discussed below.

Rule 6.3-3: Sexual Harassment

The Society supports the proposed amendments in Rule 6.3-3, but has a number of suggestions aimed at clarifying the scope of the prohibited conduct.

First, we suggest that this Rule be clarified to make it clear that it covers not just "sexual harassment", but also all gender-based harassment. In this regard you will see that we have inserted references to "gender-based harassment" in each instance where "sexual harassment" is also referenced.

Second, in Commentary 1 we have expanded on the definition of sexual or gender-based harassment by including “comments or communications” with a view to capturing all activities which might constitute such harassment.

Third, we propose that the list ((a) to (g)) in Commentary 1 be moved into its own Commentary (new Commentary 4). While the list at (a)-(g) are potential effects and/or characteristics of sexual or gender-based harassment and they are helpful as an educational tool, we feel that including them in Commentary 1 unduly limits the scope of what is captured by “sexual or gender-based harassment”. In subparagraphs (b), (c), and (d), we have replaced the words “submission to such conduct” with “participation in such conduct”, as we believe that use of the word “submission” is not appropriate in the sexual harassment context.

Fourth, we propose to re-order current Commentary 2 and Commentary 3. In our view, providing examples of behaviour that may constitute sexual or gender-based harassment is the next logical step to follow after Commentary 1’s more general definition of sexual or gender-based harassment.

Fifth, in the list of types of behaviour included in new Commentary 2, we have removed “after the end of a consensual relationship” in item (k) as being unnecessary and unduly limiting. We have also suggested adding a basket clause to the end of the list for consistency with the suggested approach to other rules in this section.

Finally, the Society suggests that old Commentary 4 be deleted from this section and replaced by a new Rule 6.3-5 applicable to the entirety of Rule 6.3, as discussed below.

Rule 6.3-4: Reprisal

For reasons stated above in connection with Rules 6.3-1, 6.3-2, and 6.3-3, the Society suggests that Rule 6.3-4 be revised to include references to “sexual or gender-based harassment”. We also suggest, again for reasons stated above, that Commentary 1 be revised to refer to “declining” to employ a person rather than “refusing”, and to include a new basket clause providing that reprisal may include “any other behaviour which constitutes reprisal according to any applicable law”.

The Society’s Proposed Rule 6.3-5: Rule 6.3 Not Limited to Professional Activities

The Federation’s proposal currently provides that the prohibition against harassment and sexual harassment in Rules 6.3-2 and 6.3-3 is not limited to a lawyer’s professional activities (see Rule 6.3-2 Commentary 5 and Rule 6.3-3 Commentary 4). The Federation is not, however, proposing that the prohibition against discrimination in Rule 6.3-1 extend beyond a lawyer’s professional activities.

The Society believes that the prohibition against discrimination should also extend beyond a lawyer’s professional activities. Non-discrimination and non-harassment in all areas of a lawyer’s conduct (both personal and professional) should be recognized by the Federation as fundamental to a lawyer’s integrity. Accordingly, the Society is proposing a new Rule 6.3-5 that makes it clear that all of Rule 6.3 is not limited to a lawyer’s professional activities.

Lawyers have an obligation to be leaders in equity, diversity and inclusion among their communities and to model appropriate behaviour in these areas. The Society supports a clear statement in this regard within the Model Code.

II. Ex Parte Proceedings and Communications

The Society supports the addition of new rules and commentary pertaining to *ex parte* proceedings and communications with the court. We offer the following minor comments on the new rules for the Standing Committee's consideration.

Rule 5.2-1A: Ex Parte Proceedings

In Commentary 2, the Society suggests adding that the obligation to make full and frank disclosure in *ex parte* proceedings is subject to rules of privilege (e.g. "[2] The obligation to disclose all relevant information and evidence is subject to applicable rules of privilege and a lawyer's duty of confidentiality (see Rule 3.3)."

Rule 5.2-1B: Communicating with the Tribunal

In the Commentary to this Rule, the Society believes that reference to the "tribunal" is somewhat confusing. We suggest distinguishing between communications with the court office, and communications with the decision-maker. In the experience of the Society's members, it is not uncommon or inappropriate for counsel to communicate with court staff to canvass dates for scheduling without providing notice to or copying opposing counsel. However, absent exceptional circumstances, the Society's members would copy opposing counsel on all communications with the judge, and expect the same of opposing counsel.

Thank you for providing The Advocates' Society with the opportunity to make submissions in response to the Consultation Report. I would be pleased to discuss this letter with you further.

Yours sincerely,



Guy Pratte
President

CC: Vicki White, Chief Executive Officer, The Advocates' Society

Attachment:

1. The Advocates' Society's Suggested Changes to the Proposed Rule 6.3

Members of the Society's Task Force:

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APPENDIX A

6.3 ~~HARASSMENT AND DISCRIMINATION~~ AND HARASSMENT

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

Commentary

[1] A lawyer has a special responsibility to respect-uphold 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 such laws.

[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. A lawyer has an obligation to remain current on these laws and, in particular, on changes to the definition of discrimination and the grounds of discrimination, which vary by jurisdiction.

[3] A lawyer's obligation to refrain from discrimination arises within the context of both (a) a lawyer's service delivery to the public and (b) a lawyer's workplace, including but not limited to in relation to employees, colleagues and non-conventional employment circumstances such as third-party contractors. In all contexts, a lawyer must refrain from all forms of discrimination including direct, adverse effect, and systemic discrimination. For example, conduct that is facially neutral may have an "adverse effect" on the basis of a protected ground and constitute discrimination. A lawyer should be aware that adverse effect discrimination is more common than direct discrimination.

[34] As a general concept, dDiscrimination 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. A lawyer must be aware that the definition of discrimination continues to evolve over time.

[5] Grounds of discrimination vary by jurisdiction and include, but are not limited to, gender, gender identity or expression, race, disability, sexual orientation, mental health, addictions, family status, citizenship and place of origin.



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[46] Types of behaviour that constitute direct, adverse effect and/or systemic discrimination may include, but are not limited to:

- a. Refusing-Declining to employ or to continue to employ any person for reasons related to any personal characteristic protected by applicable law;
- b. Assigning lesser work or paying an employee or staff member less for reasons related to any personal characteristic protected by applicable law;
- ~~b-c.~~ Refusing to provide legal services to any person for reasons related to any personal characteristic protected by applicable law;
- ~~e-d.~~ Charging higher fees for reasons related to any personal characteristic protected by applicable law;
- ~~d.a.~~ 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. Applying policies regarding leave that are facially neutral (i.e., apply to all employees equally), but have the effect of penalizing women who take maternity leave in seniority or partnership;
- g. Depending on the size of the firm, offering only “informal” mentoring opportunities rather than a formal mentoring program, resulting in the exclusion of any person from such opportunities for reasons related to any personal characteristic protected by applicable law;
- h. Providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs (such as, for example, a learning disability or other need for accommodation);
- i. Declining to hire people who have “gaps” in their résumés because they have been out of the workforce for reasons related to any personal characteristic protected by applicable law;
- ~~e-i.~~ Creating a poisoned work environment, such as by putting up a “pin-up” poster; or
- ~~f-k.~~ Failing to provide reasonable accommodation to the point of undue hardship. Any other conduct which constitutes discrimination according to any applicable law.

[7] A lawyer has a duty to accommodate employees on the basis of protected grounds (such as, for example, disability) to the point of undue hardship. A lawyer should be familiar with the concept of undue hardship and accordingly understand that some degree of hardship may be expected. In assessing undue hardship, a lawyer should distinguish between relevant factors (such as cost and health and safety requirements, if any) and irrelevant factors (such as business inconvenience or client preferences). The duty to accommodate has both a substantive and a procedural component. The procedure to assess an accommodation (the process) is as important as the substantive content of the accommodation (the accommodation provided).

[8] Lawyers are obligated to inform themselves regarding the role of unconscious bias in perpetuating systemic discrimination.

[59] It is not discrimination to establish or provide special programs, services or activities which have the object of ameliorating conditions of disadvantage for individuals or groups who are

Attachment 1 – The Advocates’ Society’s Suggested Changes to the Proposed Rule 6.3

disadvantaged for reasons related to any characteristic protected by applicable laws.

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

Commentary

[1] In this Code, harassment includes an incident or a series of incidents involving electronic, physical, ~~or~~ verbal or non-verbal conduct when such conduct might reasonably be expected to cause humiliation, offence or intimidation to the recipient of the conduct, whether that individual is a colleague, employee, client or any other person. Harassment may constitute or be linked to discrimination. Harassment includes sexual or gender-based harassment, which are elaborated on in Rule 6.3-3.

[2] The intent of the lawyer engaging in the conduct is not determinative. It is the subjective and reasonable experience of the person experiencing the behaviour that is relevant.

[3] Types of behaviour ur that constitute harassment may include, but are not limited to:

a. Objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments, displays or jokes, that demean, belittle or cause personal discomfort, humiliation or embarrassment; or

a.b. Behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;

b.c. Bullying;

e.d. Verbal abuse;

d.e. Abuse of authority where a person uses the power inherent in a position to endanger, undermine, threaten or otherwise interfere with another person’s career; or

~~e.a. Objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments, displays or jokes, that demean, belittle or cause personal humiliation or embarrassment; or~~

f. Any other behaviour which constitutes harassment according to any applicable law.

[4] Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by persistent and repeated negative behaviour towards an individual or group of individuals. Bullying may include, but is not limited to:

a. Unfair or excessive criticism;

b. Ridicule;

c. Humiliation;

d. Exclusion or isolation;

e. Constantly changing or setting unrealistic work targets or assigning seniority inappropriate work; ~~or~~

f. Threats or intimidation; or

f.g. Any other behaviour which constitutes bullying according to any applicable law.



~~[5] For clarity, this rule is not limited to conduct related to, or performed in, the lawyer’s office or in legal practice.~~

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

Commentary

[1] In this Code, sexual or gender-based harassment means an incident or series of incidents involving unsolicited or unwelcome sexual or gender-based advances, ~~or~~ requests, comments or communications, or other ~~unwelcome~~ electronic, verbal, non-verbal or physical conduct of a sexual or gender-based nature.

- ~~a. When such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s);~~
- ~~b.a. When submission to such conduct is made implicitly or explicitly a condition for the provision of professional services;~~
- ~~c.a. When submission to such conduct is made implicitly or explicitly a condition of employment;~~
- ~~d.a. When submission to or rejection of such conduct is used as a basis for any employment decision including:
 - ~~i. The allocation of files;~~
 - ~~ii.i. Promotion;~~
 - ~~iii.i. Remuneration;~~
 - ~~iv.i. Job security; or~~
 - ~~v.i. Benefits affecting the employee;~~~~
- ~~e.a. When such conduct has the purpose or the effect of interfering with a person’s work performance or creating an intimidating, hostile, or offensive work environment;~~
- ~~f.a. When the use of a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees; or~~
- ~~g.a. A sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.~~

~~[2] As with harassment generally, in determining whether conduct or behaviour is sexual harassment, the intent of the lawyer engaging in the conduct is not determinative. It is the subjective and reasonable experience of the person experiencing the behaviour that is relevant.~~

[32] Types of behaviour that constitute sexual or gender-based harassment may include, but are not limited to:

- a. Displaying sexualized or gender-based or other demeaning or derogatory images;
- b. Sexually suggestive, intimidating or obscene, comments, gestures or threats;
- c. Jokes that cause awkwardness, humiliation, embarrassment or offence, or which by their nature are clearly embarrassing, humiliating or offensive;
- d. Innuendoes or leering;
- e. Gender-based insults or sexist remarks;

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- f. Communications with sexual overtones;
- g. Inquiries or comments about a person’s sex life;
- h. Sexual flirtations, advances, propositions, invitations or requests;
- i. Unsolicited or unwelcome physical contact or touching;
- j. Sexual violence; ~~or~~
- k. Persistent unwanted contact or attention ~~after the end of a consensual relationship;~~ or
k.l. Any other behaviour which constitutes sexual or gender-based harassment according to any applicable law.

[23] As with harassment generally, in determining whether conduct or behaviour is sexual or gender-based harassment, the intent of the lawyer engaging in the conduct is not determinative. It is the subjective and reasonable experience of the person experiencing the behaviour that is relevant.

[4] Sexual or gender-based harassment may have some or all of the following non-exhaustive characteristics or effects, but the presence or absence of such characteristics or effects does not limit what constitutes sexual or gender-based harassment:

- a. When such conduct might reasonably be expected to cause insecurity; discomfort, offence, or humiliation to the recipient(s);
- b. When submission to participation in such conduct is made implicitly or explicitly a condition for the provision of professional services;
- c. When submission to participation in such conduct is made implicitly or explicitly a condition of employment;
- d. When submission to participation in or rejection of such conduct is used as a basis for any employment decision including:
 - i. The allocation of files;
 - ii. Promotion;
 - iii. Remuneration;
 - iv. Job security; ~~or~~
 - v. Benefits affecting the employee; or
 - vi. Employment opportunities;
- e. When such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment;
- f. When the use of a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees; or
- g. A sexual solicitation or advance made by a person who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the person making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

[4] For clarity, this rule is not limited to conduct related to, or performed in, the lawyer’s office or in legal practice.

Reprisal

6.3-4 A lawyer is prohibited from engaging or participating in reprisals against a colleague, employee, client or any other person who has

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- (a) inquired about their rights or the rights of others,
- (b) made or contemplated making a complaint of discrimination, harassment or sexual or gender-based harassment,
- (c) witnessed discrimination, harassment or sexual or gender-based harassment, or
- (d) assisted or contemplated assisting in any investigation of or proceeding related to a complaint of discrimination, harassment or sexual or gender-based harassment.

Commentary

[1] Types of behaviour that constitute reprisal may include, but are not limited to:

- a. Refusing-Declining to employ or continue to employ any person;
- b. Penalizing any person with respect to that person’s employment or changing in a punitive way any term, condition or privilege of that person’s employment;
- c. Intimidating, retaliating against or coercing any person;
- d. Imposing a pecuniary or any other penalty, loss or disadvantage on any person; ~~or~~
- e. Threatening to do any of the foregoing; or
- e-f. Any other behaviour which constitutes reprisal according to any applicable law.

6.3-5 This rule is not limited to conduct related to, or performed in, the lawyer’s office or in legal practice.

Commentary

[1] The behaviour and conduct prohibited by this rule goes to a lawyer’s integrity and the application of this rule is not limited to conduct performed in the lawyer’s office or in the lawyer’s legal practice.

