

May 22, 2020

David Swayze  
Chair, Standing Committee on the Model Code of Professional Conduct  
Federation of Law Societies of Canada  
Via email: [consultations@flsc.ca](mailto:consultations@flsc.ca)

Dear Mr. Swayze:

I write in my capacity as President of the Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ) and in response to the Federation of Law Societies of Canada's (FLSC) call for feedback on its proposal to add new rules to its *Model Code* addressing the obligations that arise from *ex parte* communications with tribunals and during *ex parte* proceedings.

The Board of CALE/ACEJ has now had an opportunity to review and consider this proposal. As a general matter, we are supportive of new rules being added on this topic but do have some substantive concerns about the particular language used in the FLSC's proposal. Appendix A to this letter details these concerns and proposes alternative language.

Thank you for the opportunity to provide this feedback. If you have any questions or concerns arising from our response, we would be happy to address them in writing or by telephone or video-conference. I note that CALE/ACEJ has also reviewed the FLSC's proposed revisions to Rule 6.3 (discrimination and harassment) and may be providing additional feedback on these revisions at a later date, noting the FLSC's revised deadline of September 30, 2020.

Yours sincerely,



Amy Salyzyn  
President, Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ)

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## Appendix A:

### Comments in Response to the Model Code of Professional Conduct Consultation Report (January 29, 2020): *Ex Parte* Communications

#### Concerns

The language would be more accessible if it referred to proceedings and communications without notice rather than *ex parte* proceedings and communications.

Related concepts in the commentaries are not addressed together, so that the points are somewhat fragmented.

Information, evidence and material facts are not the same, but in places they are used as synonyms.

It is misleading to refer to a right, rather than an ability, privilege or option, to proceed *ex parte*.

The language is inconsistent as to how it refers to opposing parties and their lawyers.

As a matter of law, it is not correct to claim that the obligation to make full and frank disclosure can be subject to lawyer-client confidentiality. The scope of the latter is broad and includes much of the information conveyed by a client to a lawyer. The lawyer's obligation of confidentiality to the client in respect of that information is not an acceptable reason not to make disclosure of a material fact when proceeding *ex parte*. Rather, it must yield to the legal requirements of applicable civil procedure rules, just as it does when required in opposed proceedings (such as on discovery). Practically, this occurs customarily through client instructions and consent. Otherwise the matter should not proceed *ex parte*.

The notion of a proceeding is not explained and examples are not provided. As the term is used in rules of civil procedure, it generally includes actions, applications and other forms of legal process. It also includes procedures within a proceeding, such as a motion.

#### Redrafted Language

##### 5.2-1A Proceedings Without Notice

In proceedings without notice, such as an application or motion, a lawyer must act with utmost good faith and must inform the tribunal of all material facts, including those adverse to the client's interest, known to the lawyer so as to enable the tribunal to make an informed decision.

## Commentary

[1] Proceedings without notice (*ex parte*) are exceptional. Before initiating a proceeding without notice, a lawyer should ensure that it is permitted by law and is justified in the circumstances. Even when a proceeding without notice is permitted and justified, when no prejudice would occur a lawyer should strongly consider giving notice.

[2] The obligation to inform the tribunal of all material facts includes an obligation of full, fair and candid disclosure to the tribunal.

### 5.2-1B Communications Without Notice

A lawyer must not communicate with a tribunal concerning any matter of substance in the absence of the opposing party or, if represented, their lawyer, unless (i) the communication is permitted by law or the tribunal or (ii) the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.

## Commentary

[1] A lawyer should not attempt to influence, discuss a matter with or make submissions to a tribunal without the knowledge of the opposing party or, if represented, their lawyer.

[2] When a tribunal invites or requests a communication from a lawyer, the lawyer should consider whether to inform the opposing party or, if represented, their lawyer of the invitation or request. As a general rule, when responding the lawyer should provide a copy or give advance notice of the communication to the opposing party or their lawyer.

[3] This rule does not prohibit communication without notice with a tribunal on routine administrative matters, such as scheduling hearing dates or appearances, though a lawyer should nonetheless consider notifying the opposing party or, if represented, their lawyer of such communications. Routine administrative communications should not include any submissions dealing with the substance of the matter or its merits.

[4] Even when communication without notice is permitted by law or the tribunal, when no prejudice would occur a lawyer should strongly consider giving notice.