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David Swayze
Chair, Standing Committee on the Model Code of Professional Conduct
Federation of Law Societies of Canada
Via email: 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 proposed amendments to *Model Code* Rule 6.3 concerning discrimination and harassment. You will recall that CALE/ACEJ previously submitted written feedback on May 22, 2020 regarding the FLSC's 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 the proposed amendments to *Model Code* Rule 6.3 concerning discrimination and harassment. As a general matter, we are supportive of the FLSC's aim of "provid[ing] significantly greater guidance on the duties of non-discrimination and non-harassment and [including] specific guidance regarding bullying." However, we do have some feedback about the particular language used in the FLSC's proposal. Appendix A to this letter details this feedback and proposes alternative language in several instances.

In addition to feedback about the particular language used, we also wish to address one substantive matter. It has come to CALE/ACEJ's attention that there has been some opposition voiced to the suggested Commentary that notes "for clarity" that the prohibitions on discrimination and harassment are not "limited to conduct related to, or performed in, the lawyer's office or legal practice."[1] On this issue, we note that the current provisions on harassment and discrimination do not limit their reach to conduct related to, or performed in, the lawyer's office or legal practice.

[1] We note, for example, the mention of such opposition in an article titled "A lawyer's integrity outside of legal practice" published on September 29, 2020 in the CBA's *National* magazine (online: <https://nationalmagazine.ca/en-ca/articles/cba-influence/insight/2020/a-lawyer-s-integrity-outside-of-legal-practice>).

As you are aware, Rules 6.3-3 to 6.3-5 of the *Model Code* currently state:

> 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.

We are not aware of any problems arising from the reach of these provisions such that their scope needs to be narrowed. We also note that Commentary [3] to Rule 2.1-1 ("Integrity") in the *Model Code* acknowledges that law societies have jurisdiction over lawyer conduct outside of one's practice or legal workplace:

> [3] Dishonourable 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. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

Provisions such as these, as well as Canadian law societies' long-standing jurisdiction over "conduct unbecoming",[2] make it clear that the regulatory reach of Canadian law societies can include investigating and disciplining lawyer conduct that is outside the lawyer's practice or legal workplace.

We also note, however, that this jurisdiction over lawyers' extra-professional conduct has been subject to limits. For example, Commentary [4] to Rule 2.1-1 ("Integrity") in the *Model Code* states:

> [4] Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

Another example of explicit limits on law society jurisdiction over lawyers' extra-professional conduct can be found in the definition of "conduct unbecoming" in the Law Society of Ontario *Rules of Professional Conduct* which states:

> "**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 including, for example,

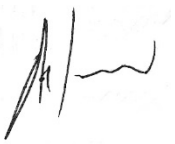
[2] See, for example, *Law Society Act*, RSO 1990, c L.8, s. 33 and s. 49.3.

> (a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer,
>
> (b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or
>
> (c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice.

Accordingly, we support retaining the "for clarity" commentary in the proposed amendments but would recommend that further language be included to clarify that conduct outside a lawyer's practice or workplace will generally only attract the attention of law societies where it amounts to conduct that either "brings into question the lawyer's professional integrity, impairs a client's trust in the lawyer, or otherwise undermines the administration of justice." We suggest new, specific language in Appendix A.

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 in a video-conference.

Yours sincerely,



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

Appendix A:

Comments in Response to the Model Code of Professional Conduct Consultation Report (January 29, 2020): Discrimination and Harassment Provisions

1. We propose the deletion of 6.3-2[5] and 6.3-3[4] and instead the addition of a new rule 6.3-5 stating:

   6.3-5 For clarity, rules 6.3-1 to 6.3-4 are not limited to conduct related to or performed in a lawyer's office or in legal practice.

   [1] A violation of rules 6.3-1 to 6.3-4 outside a lawyer's office or legal practice will generally only concern the Society when it amounts to conduct that brings into question a lawyer's professional integrity, impairs a client's trust in a lawyer or otherwise undermines the administration of justice.

2. 6.3-1[4](e): On its face, the proposed prohibition against "Using racial, gender, religious or derogatory language to describe a person or group of persons" could capture instances that would not amount to discrimination. For example, a group of persons can be referred to using gendered language – as in, "Law firm X's female associates have made a formal complaint that they are not paid as much as their male counterparts" – without an instance of discrimination arising. For alternative language, we suggest:

   Using, in a derogatory fashion, language in respect of the actual or perceived personal characteristics of an individual or group such as ableist, homophobic, racist, sexist, or transphobic language.

3. 6.3-1[5]: Add "or have been historically disadvantaged" as noted below:

   [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 **or who have been historically disadvantaged** for reasons related to any characteristic protected by applicable laws.

4. 6.3-3: In 6.3-3[1](c), the reference is only to "condition of employment"; in 6.3-3[1](d), the reference is to "any employment decision"; in 6.3-3[1](d)(v), the reference is "Benefits affecting the employee"; and in 6.3-3[1](f) the reference is only to the working conditions of "employees". We suggest that the language in these subsections be changed to account for the reality that not all lawyers who work in a law firms are employees. Some are partners, for example. These provisions could be amended as follows:

   6.3-3[1](c): When submission to such conduct is made implicitly or explicitly a condition of employment **or partnership in a law firm.**

   6.3-3[1](d): When submission to or rejection of such conduct is used as a basis for any employment **or partnership decision** including;

   6.3-3[1](d)(v): Benefits affecting the employee **or partner**

   6.3-3[1](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 partners**

5. 6.3-3[1]: We query whether the language for this commentary effectively covers everything applicable. The provision could be amended as follows:

   "In this Code, sexual harassment 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, **including but not limited to**"

6. 6.3-3[1]: Add a new section after [f] with the following language and re-letter the current [g] to [h]: "When the use of a position of power is used to import sexual requirements into a lawyer-client relationship and negatively alter that relationship." Related to this recommended change, we query whether the inclusion of language "and negatively alter" in 6.3-3[1][f] (and therefore also the proposed 6.3-3[1][g] noted in the previous sentence) is unduly redundant. The preceding language is not just neutral (e.g. "a sexual relationship arises") but rather refers specifically to using power to "import sexual requirements". It strikes us that the preceding language therefore already implies that there has been a negative change to the relationship.