



November 20, 2014

Via email: ghume@harrisco.com; jstrawcz@flsc.ca

Gavin Hume, Q.C.
Chair, Standing Committee on the
Model Code of Professional Conduct
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Frederica Wilson
Senior Director, Regulatory and Public Affairs
Federation of Law Societies of Canada
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Dear Mr. Hume and Ms. Wilson:

Re: Proposed Amendments to the FLSC *Model Code of Professional Conduct*

Thank you for seeking the input of the Canadian Bar Association on proposed changes to the Federation's *Model Code of Professional Conduct* set out in your memo of July 8, 2014.

The CBA's Ethics and Professional Responsibility Committee (the Committee) considered the proposals and provide the following comments for your consideration.

Communicating with Witnesses

The Committee reviewed the proposed amendments to the *Model Code* and concluded that they provide greater clarity to the rules regarding lawyers communicating with witnesses. The Committee has no substantive comments on the proposed amendments.

Errors and Omissions

The Committee reviewed the proposed amendments to the *Model Code* and concluded that they represent an improvement to the current language, subject to one comment and recommended revision. Specifically, the Committee's view is that the language in 7.8-2 should continue to include a reasonableness descriptor, as set out in the original provision or perhaps alternatively, "A lawyer must give notice as soon as practicable of any circumstance that may reasonably be expected to give rise to a claim...". This achieves the objective standard the Federation is seeking but still establishes a threshold.

We understand that most insurance policies governing lawyers impose a more rigorous standard for disclosure and that the Federation's objective is to enhance the consistency between the *Model Code* rule and the obligation to insurers. However, in our view, rules of professional conduct for

lawyers should not be governed by insurance requirements. Lawyers will be able to interpret and apply both. As an alternative, a commentary might be added to the rule that obligations under rules of professional conduct and under insurance policies may differ and that lawyers should interpret and follow each in the context of their distinct objectives.

Treatment of Equity Seeking Groups and the Duty to Report

The Committee consulted with the CBA's Equality Committee and Legal Profession Assistance Conference in considering these proposed amendments. All three groups support the proposed amendments.

With regard to the Duty to Report, the Committee noted that the French and English versions of Commentary 1 to 7.1-3 may read differently. In particular, the English version conveys that loss may occur to clients or others if a lawyer is not "checked" (in other words, halted) at an early stage. In comparison, the French version conveys that loss may occur if a lawyer is not careful to prevent improper conduct: "À moins d'intervenir tôt auprès d'un juriste qui s'écarte de l'éthique professionnelle...". The Committee recommends that a review be conducted of the French and English versions of Commentary 1 to 7.1-3 to ensure consistency.

Conclusion

We appreciate the opportunity to provide input on these proposed changes to the Federation's *Model Code*. Please let me know if you have any questions regarding our suggestions.

Yours truly,

(Original signed by Sarah MacKenzie for Anthony Kavanagh)

Anthony Kavanagh
Chair, Ethics and Professional Responsibility Committee