THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Model Code of Professional Conduct Amendments (cultural competency)

CANADIAN BAR ASSOCIATION
ETHICS AND PROFESSIONAL RESPONSIBILITY SUBCOMMITTEE, FAMILY LAW, ADMINISTRATIVE LAW AND CIVIL LITIGATION SECTIONS

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PREFACE

The Canadian Bar Association is a national association representing 40,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA Ethics and Professional Responsibility Subcommittee, Family Law and Civil Litigation Sections, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Policy Committee and approved as a public statement of the CBA Ethics and Professional Responsibility Subcommittee, Family Law and Administrative Law and Civil Litigation Sections.

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I. INTRODUCTION

The Canadian Bar Association Sections and Subcommittee (CBA Sections) writes to comment on amendments to the Model Code of Professional Conduct (Model Code) proposed in a Consultation Report dated November 23, 2023 (Report). We note the Federation of Law Societies of Canada's (FLSC) inclusion of Indigenous groups and individuals in the preparation of the report. We are grateful for this inclusion and the contribution of these esteemed groups and individuals. We believe any future amendments to the Code ought to include similar consultations and inclusions.

After consultation, the CBA Sections are generally supportive of the proposed changes to the Model Code relating to cultural competency. Below, we offer specific comments and suggestions for improvement. For ease of reference, our comments are organized according to the sections of the proposed commentary they relate to. We begin with a section on the use of terminology in the Report.

II. USE OF TERMINOLOGY

The CBA Sections note the inclusion of terminology throughout the amendments that may not be clear. Accordingly, we suggest including more precise language where possible and clarity with respect to definitions elsewhere. For example:

1. Care should be taken to ensure references to "Indigenous peoples" are not overbroadly used. References to "Indigenous P/peoples" is distinct from people who are Indigenous (i.e. Indigenous people/individuals). It is not always clear in the Report that these distinctions have been made. As an example, the reference to "Indigenous individuals" does appear to have been used deliberately in para 52 at page 20 in the proposed amendments to 2.4(vi). By comparison, it is less apparent that there is attention to the difference in the Report's reference to "Indigenous Peoples" in para 19(i) on page 7, where it seems that "Indigenous people" or "Indigenous individuals" may have been intended.

2. Use of the term "the Canadian state" is referenced several times in the proposed amendments but is not defined. In some cases, use of this term may be is misleading to those who are not informed about the jurisdiction to make legislation that has and continues to have an impact on Indigenous peoples. Where possible, "the Canadian state" should be replaced with "the Canadian, Provincial and Territorial governments."

3. Drawing the distinction between "Aboriginal Law" and "Indigenous Law" would also be beneficial as some are not aware of the difference or how and when Indigenous laws and legal traditions apply.

4. Similarly, some commentary about the meaning of "cultural competency", "culturally informed", or "trauma-informed" practices would help with the interpretation of the relevant amendments.

5. The Report notes the potential difficulty with interpreting the standard of knowledge required of a Canadian lawyer and the challenges associated with terms like "working knowledge". The CBA Sections agree that this standard should be made more clear and amendments should refrain from introducing new or vague terminology.

III. PROPOSED AMENDMENTS

A. Preface

The CBA Sections support the amendments to the Preface, however, the amendments should be expanded to include more information about the role of competency and ethical practice in reconciliation more broadly. This background would support a reconciliation-forward interpretation of the Model Code to help lawyers better appreciate the importance of improving cultural awareness and competency.

Additionally, care should be taken to avoid any language that might be interpreted to suggest that legal practitioners owe a fiduciary duty to Indigenous individuals who are not clients.

2.1 Integrity

2.1-2

Further to our comments about more specific use of terminology, above, we suggest the following changes to the proposed amendments:

> [2] ",… including the confidence, respect and trust of Indigenous peoples and Indigenous individuals…"

2.1-2

The CBA Sections have no feedback about the proposed amendments to the commentary of this provision of the Model Code.

3.1 Competence

3.1-1

Consistent with comments respecting the importance of clarity around terminology above, the CBA Sections seek to clarify the intent of the proposed amendment to 3.1-1 as noted:

> 3.1-1 In this section, "Competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's

> engagement, including: a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises, including the ways in which those areas intersect with the rights, law and legal processes of or applicable to Indigenous peoples;

3.1-2

Given the importance of avoiding any perception that reconciliation is simply a "box-checking exercise" commentary paragraph [4C] to rule 3.1-2 could be improved by removing the reference to "demonstrat[ing] an openness to learning about cultures…". Lawyers ought to simply be open to learning about cultures other than their own. Requiring lawyers to 'demonstrate' openness shifts the focus to performative actions rather than genuine openness. Additionally, the paragraph, as written, offers no guidance for how a lawyer might demonstrate 'openness,' which could lead to confusion. We suggest the following changes:

> "[4C] To provide competent service to clients from various cultures, it is important that a lawyer be open to learning about cultures other than their own, and to listen, to understand and to apply perspectives other than their own as may be appropriate to a matter"

Moreover, paragraph [5C] should be expanded to clarify what constitutes "Indigenous-led sources of knowledge and learning," enabling lawyers to effectively evaluate whether the information and training they access meet this ethical standard.

3.1 -3 Competence Informed by Indigenous Perspectives

We are concerned with the inclusion of a specific list or a curriculum in paragraph [2]. Paragraph [2] creates a specific list of items a lawyer must have "working knowledge" of to meet their ethical obligation pursuant to this provision. The inclusion of such a specific list is not seen elsewhere in the Model Code and is potentially inconsistent with the rest of the document. Additionally, a static list may fail to adapt to the evolving nature of our understanding and knowledge over time." What might look like a comprehensive list today may turn out to be lacking tomorrow.

Even as currently written, the list is not sufficiently comprehensive. For example, the list suggested in paragraph [2] overlooks important areas of Metis and Inuit knowledge, culture and the historical context with the Canadian, Provincial and Territorial governments. Other notable omissions include (but are not limited to):

- Scrip
- The distinction between "status", "non-status", "membership" and "citizenship"; and
- Metis Settlements

Further, including a list risks the perception that cultural competency is simply a box-checking exercise. In other words, once you determine you have some "working knowledge" of the enumerated items you can call your journey towards cultural competency complete. Rather, we suggest lawyers have a duty to continually educate themselves about Indigenous perspectives and Indigenous understandings as those perspectives and understandings evolve over time. This journey is never complete.

3.1-4

The Model Code ought to reflect a lawyer's ethical duty to have an enhanced cultural awareness and competency when working with Indigenous clients and parties and within and for Indigenous communities and groups. However, we respectfully suggest that the way this obligation is framed in proposed 3.1-4 ought to be rethought in light of the following:

- We have similar concerns with the inclusion of what proports to be a comprehensive list similar to those raised with paragraph [2] to 3.1-3, above;
- Care should be taken to ensure that this enhanced obligation is only triggered when a lawyer becomes aware of conditions that would give rise to same. For example, a lawyer may not know that an opposing party to a matter is Indigenous. It would not be appropriate for the enhanced duty from 3.1-4 to apply to lawyers in that instance;
- Any obligation imposed by this provision should not interfere with the obligation to maintain confidentiality. For example, a lawyer should only "seek advice from experts in the Indigenous community…" where doing so would be consistent with the lawyer's obligation to maintain confidentiality.

3.2 Quality of Service

3.2-1

The proposed addition to paragraph [3] of this provision appears to invite lawyers to make assumptions about their clients. A potential revision might look like this:

> "A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions. Culturally informed and trauma-informed practices can also help facilitate and improve communications with the client."

3.6 Fees and Disbursements

3.6-2

Although not directly related to Call to Action 27, the CBA Sections believe it may be helpful for the FLSC to address contingency and fee arrangements with Indigenous clients.

5.1 The Lawyer as Advocate

5.1-1

Lawyers have an ethical obligation to resolutely advocate for their clients. The commentary to this provision develops the complex contrast between a lawyer's duty to their client and that lawyer's duty to engage honorably and fairly. While it is important to situate "resolute advocacy" within the context of reconciliation, it is necessary to frame this clearly for lawyers. Otherwise, lawyers may believe they're placed in the impossible position of having to "advance every argument and ask every question, however distasteful…" while avoiding those arguments and questions that could be interpreted as "exploitative" and as reinforcing "systemic discrimination or stereotypes based on grounds protected by human rights legislation."

We propose that paragraph [1] of the commentary to this provision be rewritten to address the apparent incongruency identified above. A possible rewrite might look like this:

> "[1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to fearlessly raise every issue, advance every argument and ask every question that the lawyer thinks will help the client's case and to endeavor to obtain for the client the benefit of every remedy and defense authorized by law. The lawyer must discharge this duty by fair and honorable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected. This duty is also subject to a lawyer's obligation to avoid practices that directly or indirectly discriminate against or harass any person. The lawyer should be mindful to avoid practices that the lawyer ought to know are exploitative or that reinforce systemic discrimination or that rely on stereotypes based on grounds protected by human rights legislation and the legacy of the residential school system for adults and children."

The express inclusion of "the legacy of the residential school system" in the proposal above goes above protections in the human rights legislation to include the lawyer's duty to consider reconciliation.

6.2 Students

6.2-2 Duties of Principal

The CBA Sections support commentary to s. 6.2-2 of the Model Code. While law schools certainly have their part to play in creating competent students, a large part of a lawyer's competence is built through articling and practice. It is exceedingly important that an articling principal or supervising lawyer place careful attention to the type of training and guidance necessary for

future lawyers to competently serve vulnerable clients. Our suggested revisions are relegated to clarifying what this responsibility entails.

We suggest clarifying that attention should first be paid to giving students "appropriate roles", especially when dealing with vulnerable clients.

Second, we suggest that the attention required be articulated more strongly. We understand that the purpose of this proposed change is to place further duty on the principal. However, the wording does not specify that the principal will determine when additional training is necessary, and potentially arrange for that training. Therefore, we suggest that principals "will" be required to give special "attention" in discerning the skills necessary for these roles, and through that attention "may" determine that additional supervision or training is required.

Lastly, while we appreciate that the commentary is specific to situations involving "vulnerable clients", it may be unclear which other situations this commentary is intended to address. The term "specialist areas of practice" could arguably apply to any area of practice, and this term does not appear to be used in any other context in the Model Code or Proposed Amendments. We question whether the term is too vague to address the purpose of the proposed amendments. As such, we suggest amending the term "specialist areas of practice" to something like "areas of practice affecting vulnerable people."

We have bolded our suggested changes below:

6.2-2 Duties of Principal

6.2-2 A lawyer acting as a principal to a student must provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

Commentary

[1] A principal or supervising lawyer is responsible for the actions of students acting under his or her direction.

[2] A principal or supervising lawyer is responsible for ensuring that students **are given appropriate roles** and have the required skills necessary to fulfill their role. This ~~may~~ **will**

require additional attention **and may require** supervision and training when working with vulnerable clients or in ~~specialis~~t areas of practice **affecting vulnerable people.**

6.3-1 Discrimination

We strongly support the deletion of the word "may" in favour of a stronger statement in s. 6.3-1 of the Model Code.

While there may be a lot more than can be said under the heading of Discrimination, this section seems to be targeting knowing and reckless discrimination and it may be most effective to keep to that point. Actions that address systemic discrimination are better left to the other sections described in the Draft Amendments.

Proposed Amendment with CBA Revisions (strikeout):

6.3-1 Discrimination

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

Commentary

[1] Lawyers are uniquely placed to advance the administration of justice, requiring lawyers to commit to equal justice for all within an open and impartial system. Lawyers are expected to respect the dignity and worth of all persons and to treat all persons fairly and without discrimination. A lawyer has a special responsibility to respect and uphold the principles and 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] In order to reflect and be responsive to the public they serve, a lawyer must refrain from all forms of discrimination and harassment, which undermine confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful, accessible, and inclusive, and should strive to recognize their own internal biases and take particular care to avoid engaging in practices that would reinforce those biases, when offering services to the public and when organizing their workplace.

[3] Indigenous peoples ~~may~~ experience unique challenges in relation to discrimination and harassment as a result of the history of the colonization of Indigenous peoples in Canada, ongoing repercussions of the colonial legacy, systemic factors, and implicit biases. Lawyers should take

particular care to avoid engaging in, allowing, or being willfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples.

IV. CONCLUSION

The CBA appreciates the opportunity to offer feedback on the proposed amendments to the Model Code. These amendments are a crucial step in aligning the legal profession with the Calls to Action of the Truth and Reconciliation Commission and addressing the systemic issues that continue to affect Indigenous peoples across Canada.

We commend the Federation for its efforts in drafting these amendments. we believe additional refinements are necessary to ensure clarity, inclusivity, and practical applicability. In particular, we urge further consideration of the nuances in terminology, the importance of ongoing education in cultural competency, and the integration of Indigenous perspectives into legal practice in a meaningful and non-performative way.

Our recommendations aim to uphold the integrity of the legal profession while fostering a justice system that is respectful, equitable, and informed by the diverse cultural realities of Canada. The proposed changes should not only meet the immediate needs of reconciliation but also establish a dynamic framework that evolves alongside our collective understanding of cultural competency and Indigenous rights.

The CBA remains committed to supporting these efforts and is available for further dialogue to ensure the amendments achieve their intended impact. Together, we can build a legal profession that embodies fairness, respect, and a deep commitment to justice for all.

APPENDIX

Feedback Based on Substantive Areas of the Law

A. Family Law

We write in response to the Federation's consultation report, and particularly family law.

As lawyers we engage in family law as advocates, advisors, legislation drafters and policy makers, and then, for some, as judges, we must be mindful of the Truth and Reconciliation Calls to Action 1-4.[1]

The Truth and Reconciliation Commission (TRC) was established to respond to family law justice. Family law justice - legislation, the court system, lawyers, and judges have participated historically and currently lead most of the work done within the child welfare system.

In his Statement of Apology to former students of Indian Residential Schools, on behalf of the Government of Canada in 2008, former Prime Minister Stephen Harper confirmed:[2]

Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child".

The mandate of the TRC is included in the Settlement Agreement and is a direct response to the legacy of the Indian Residential Schools. It cannot be forgotten:

Some 150,000 Indigenous children were removed and separated from their families and communities to attend residential schools. While most of the 139 Indian Residential Schools ceased to operate by the mid-1970s, the last federally-run school closed in the late 1990s. In May 2006, the Indian Residential School Settlement Agreement was approved by all parties to the Agreement. The implementation of the Settlement Agreement began in September 2007 with the aim of bringing a fair and lasting resolution to the legacy of the Indian Residential Schools.[3]

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1 Truth and Reconciliation Commission Calls to Action (2015) found online:

2 Statement is found online.

3 Indian Residential Schools Settlement Agreement, summary, found online.

Little has changed for Indigenous parents and children, and they continue to overrepresent those who are involved in the child welfare system across Canada.[4]

In Canada, 53.8% of children in foster care are Indigenous, but account for only 7.7% of the child population according to Census 2021.

It is a stark omission to exclude the work of lawyers when engaging in family law in the Federation's proposed amendments in response to Call to Action 27 and an oversight to omit any reference to Calls to Action 1-4.

In 2021 the CBA sought the Federation's support to amend the Model Code to improve the ethical practice of family law lawyers. The proposal includes a thoughtful discussion about the TRC and the Calls to Action. We ask you to consider the proposal[5].

We also ask you to consider the following adjustments to the proposed amendments to the Model Code in response to Call to Action 27:

Commentary to Rule 3.1-3

In 2019 the federal government enacted legislation to establish Canadian standards and to enable bands to develop their own approach to child welfare, child welfare law and this is captured under s.92 of the Constitution Act and, subject to this exception, child welfare is provincially and territorially regulated. While many bands across Canada are developing their own ways to protect their children, child welfare services continue to be predominately run by the provincial and territorial governments.

We appreciate the proposed amendments and the inclusion of Commentary to Rule 3.1-3, Competence Informed by Indigenous Perspectives [2](l) which requires lawyers to be aware of the experience of indigenous people and children in the child welfare system.

l) the historical and ongoing harms suffered by Indigenous peoples as a result of policies and practices of the **Canadian state**:

   i. the history and impact of exploitative treaty negotiations;

   ii. the imposition of European-style governance mechanisms;

   iii. the residential school system;

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4 Reducing the number of Indigenous children in care, Canadian government website, online.

5 Model Code of Professional Conduct - Proposed Amendments for Family Law Lawyers (2021), online.

iv. the day school system;

v. the 60's Scoop;

vi. the overrepresentation of Indigenous children in child welfare systems;

vii. the disproportionate victimization of Indigenous people (including missing and murdered Indigenous women, girls, and two-spirit folks); (Emphasis added).

However, there is no reference to "legislation", and reference to "the Canadian state" in [2](l) is misleading to those who are not informed about the jurisdiction to make legislation that has and continues to impact Indigenous people and their children including the child welfare system.

For this section it would be more accurate and likely educational to say to replace 1) noted above with the following:

1) The historical and ongoing harms suffered by Indigenous peoples as a result of legislation, policies and practices of the Canadian, Provincial and Territorial governments:

5.1 The Lawyer as Advocate

As participants in the family law justice system every lawyer must be mindful of the Truth and Reconciliation Calls to Action, in particular, Calls to Action 1-4. Family law legislation, the court system, lawyers, and judges have participated historically and currently in the child welfare system. This system contributed to establishment and continuation of the residential school system, the establishment of the Truth and Reconciliation Commission, and the ongoing discrimination of Indigenous parents and children.

We appreciate the Federations suggested inclusion to 5.1 The Lawyer as Advocate – Commentary [1]. For ease of reference the following is taken from the Federation's consultation report:

5.1 The Lawyer as Advocate

59. Rule 5.1-1 states that "[w]hen acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect."

60. The Commentary to this Rule notes the need for legal professionals to be fearless while establishing some necessary limits to the role of the advocate. The Standing Committee proposes an additional caveat to the scope of this role, as follows:

Commentary

[1] Role in Adversarial Proceedings - In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. **However, in doing so, the lawyer should consider the arguments and questions advanced and be mindful that they are not exploitative and do not reinforce systemic discrimination or stereotypes based on grounds protected by human rights legislation and the legacy of the residential school system on adults and children**. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected. **[The Federation's proposed amendment is noted in bold. The CBA's recommended addition is underlined].**

We agree with the proposed amendment. However, to limit consideration to "grounds protected by human rights legislation" fails to capture the impact of the lawyer's work for Indigenous people and children and the child welfare system. This is an opportunity to respond to Calls to Action 1-4 and the Federation may do so with the following addition:

[1] Role in Adversarial Proceedings - In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. **However, in doing so, the lawyer should consider the arguments and questions advanced and be mindful that they are not exploitative and do not reinforce systemic discrimination or stereotypes based on grounds protected by human rights legislation and the legacy of the residential school system on adults and children**. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes

the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected. [**The Federation's proposed amendment is noted in bold and the CBA's recommended addition is underlined**].

We ask you to kindly consider the CBA's prosed amendments to the Model Code from 2021. The reasons and concerns which brought about the report continue to impact the profession.