



APPENDIX A

6.3 HARASSMENT AND DISCRIMINATION

6.3-1 ~~The principles of human rights laws and related case law apply to the interpretation of this rule.~~ A lawyer must not discriminate against a colleague, employee, client or any other person.

Commentary

[1] A lawyer has a special responsibility to respect 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 ~~human rights~~ 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.

[3] Discrimination 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.

[4] Types of behavior that constitute discrimination may include, but are not limited to:

- a. Refusing to employ or to continue to employ any person for reasons related to any personal characteristic protected by applicable law;
- b. Refusing to provide legal services to any person for reasons related to any personal characteristic protected by applicable law;
- c. Charging higher fees for reasons related to any personal characteristic protected by applicable law;
- d. 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. Failing to provide reasonable accommodation to the point of undue hardship.

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

6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation. 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 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.

[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 behavior that constitute harassment may include, but are not limited to:

- a. Behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;
- b. Bullying;
- c. Verbal abuse;
- d. 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;
- e. 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 includes:

- 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.

[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 harass any person.~~ A lawyer must not sexually harass a colleague, employee, client or any other person.

Commentary

[1] 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

- a. When such conduct might reasonably be expected to cause insecurity; discomfort, offence, or humiliation to the recipient(s);
- b. When submission to such conduct is made implicitly or explicitly a condition for the provision of professional services;
- c. When submission to such conduct is made implicitly or explicitly a condition of employment;
- d. When submission to 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;
- 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.

[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.

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

- a. Displaying sexualized 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;
- 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.

[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 must not engage in any other form of harassment of any person.~~ **A lawyer is prohibited from engaging or participating in reprisals against a colleague, employee, client or any other person who has**

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

Commentary

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

- a. Refusing 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.

~~6.3-5 A lawyer must not discriminate against any person.~~

APPENDIX B

Proposed Rules and Commentary

5.2-1A *Ex Parte* Proceedings

In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, even if the information is adverse to the client's interest.

Commentary

[1] *Ex parte* proceedings are exceptional. The obligation to inform the tribunal of all material facts includes an obligation of full, fair and candid disclosure to the tribunal (see also Rules 5.1-1, 5.1-2).

[2] The obligation to disclose all relevant information and evidence is subject to a lawyer's duty of confidentiality (see Rule 3.3).

[3] Before initiating *ex parte* proceedings, a lawyer should ensure that the proceedings are permitted by law and are justified in the circumstances. Where no prejudice would occur, a lawyer should consider giving notice to the opposing party or their lawyer (where they are represented), notwithstanding the right to proceed *ex parte*.

5.2-1B Communicating with the Tribunal

Except where permitted by law or the tribunal, a lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (where they are represented) concerning any matter of substance, unless 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 a tribunal or discuss a matter with or make submissions to a tribunal without the knowledge of the other party or the lawyer for the other party, if they are represented.

[2] When a tribunal invites or requests a communication from a lawyer, the lawyer should consider whether to inform the other party or their lawyer. As a general rule, the other party or their lawyer, should be copied on communications to the tribunal or given advance notice of the communication.

[3] This rule does not prohibit communication with a tribunal on routine administrative matters, such as scheduling hearing dates or appearances. A lawyer should consider notifying the other

party or their lawyer of administrative communications with the tribunal. Routine administrative communications should not include any submissions dealing with the substance of the matter or its merits.

[4] A lawyer may communicate with a tribunal *ex parte* where permitted by law or the tribunal; notwithstanding that right, where no prejudice would occur, a lawyer should consider giving notice to the opposing party or their lawyer.

