



LIANS / NSBS 2023

Solo and Small Firm Virtual Conference

Rule 6.3 of the Code of Conduct: Understanding Your Anti-Harassment and Discrimination Obligations

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Federation of Law Societies of Canada

Model Code of Professional Conduct

The Model Code of Professional Conduct was developed by the Federation of Law Societies of Canada to synchronize as much as possible the ethical and professional conduct standards for the legal profession across Canada. First adopted by the Council of the Federation in 2009, the Model Code has now been adopted by 13 of the 14 provincial and territorial law societies.

Review of Rule 6.3 Harassment and Discrimination

Beginning:

The Law Societies Equity Network (“LSEN”): provided the initial impetus for the examination of Rule 6.3 on Harassment and Discrimination. They advised the Standing Committee that in their opinion, the existing rules and commentary may not adequately reflect the importance of preventing discrimination and harassment.

The Standing Committee agreed that it was essential to clarify the harassment and discrimination provisions of the Model Code and to include specific guidance on bullying.

2020 National Consultation

In January of 2020, the Standing Committee issued its Consultation Report addressing duties related to non-discrimination and harassment and *ex parte* communications with courts and tribunals.

It is important to note that in the months following the release of the Standing Committee's 2020 Consultation Report, the Federation formally committed to reconciliation with Indigenous peoples and adopted Guiding Principles for Fostering Reconciliation that inform all aspects of Federation work.

The response to the Standing Committee's 2020 Consultation Report was significant, complex and lengthy. The Standing Committee took great care in reviewing and understanding all the feedback received and is now recommending further changes to the discrimination, harassment, and proposed *ex parte* language.

2021 Consultation

In July 2021, the Standing Committee circulated a second consultation report regarding the proposed rule changes. This document included a summary of the feedback that had been received on the first consultation in an effort to ensure that there was an explanation for any recommendations that were not accepted for the updated draft.

The Standing Committee was very grateful for the thoughtfulness of the law societies in responding to its work. The second consultation process was an unusual step, but was meant to assure law societies and other stakeholders that their feedback is critical to inform future conversations about responsibilities towards First Nations, Inuit and Métis peoples, systemic barriers in the profession, and professionalism generally.



6.3 EQUALITY, HARASSMENT AND DISCRIMINATION

Previous Rules:

6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule.

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

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.

Amended Rules (Jan. 2023)

Discrimination

6.3-1. A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.

Commentary:

1. expresses the special responsibility to refrain from discrimination and harassment, and to avoid engaging in practices that reinforce harmful biases;
2. affirms that the principles respecting human rights and workplace safety legislation, and case law, apply to the interpretation of the Model Code, and that lawyers need to “reflect and be responsive to the public they serve”.
3. draws attention to the unique challenges facing Indigenous peoples in Canada, and the particular care necessary to avoid engaging in, allowing, or being willfully blind in this area;
4. describes adverse effect and systemic discrimination, and unconscious bias;
5. provides a definition of harassment and discrimination for the purposes of the Rule;
6. provides that the principles of human rights and workplace health and safety legislation, including applicable case law, apply to the interpretation of these Rules;
7. provides a non-exhaustive list of behaviours which amount to discrimination, many drawn from SCC case law or human rights legislation, others from the IBA and Law Society Reports;
8. advises that providing ameliorative programs, services or activities is not discrimination; and,
9. reminds lawyers that, “the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer’s office or in legal practice.”



Harassment

6.3-2 A lawyer must not harass a colleague, employee, client or any other person.

Commentary:

1. defines “harassment” for the purposes of this Rule;
2. provides a non-exhaustive list of behaviours which amount to harassment, which includes bullying;
3. clarifies that bullying is a form of harassment and provides a non-exhaustive list of behaviours which amount to bullying; and,
4. reminds lawyers that, *“the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer’s office or in legal practice.”*



Sexual Harassment

6.3-3 A lawyer must not sexually harass a colleague, employee, client or any other person.

Commentary:

1. defines “sexual harassment” for this Rule and then a non-exhaustive list of circumstances in which conduct could result in sexual harassment;
2. provides a non-exhaustive list of behaviours which amount to sexual harassment.
3. specifies that lawyers must avoid condoning, or being wilfully blind to sexual harassment in their workplace; and,
4. reminds lawyers that, *“the provisions of this Rule do not only apply 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. is prohibited from engaging or participating in reprisals against a colleague, employee, client or any other person because that person 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 or proceeding related to a complaint of discrimination, harassment or sexual harassment.

Commentary:

- the purpose of the Rule is to enable people to exercise their rights without fear of reprisal, and provides a non-exhaustive list of behaviours which amount to reprisal.



What is missing?

Duty to Report

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

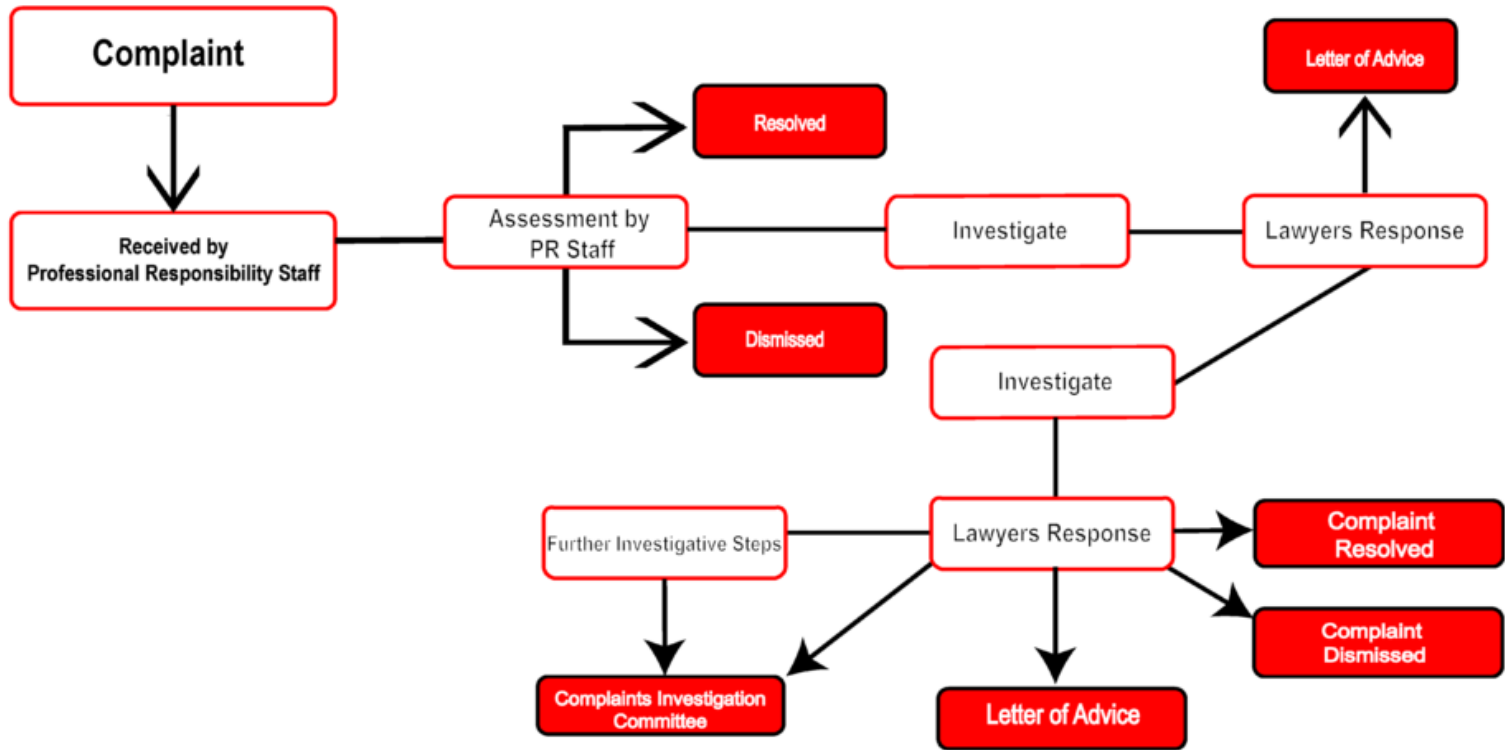
- (a) the misappropriation or misapplication of trust monies;
- (b) the abandonment of a law practice;
- (c) participation in criminal activity related to a lawyer's practice;
- (d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competence as a lawyer;
- (e) conduct that raises a substantial question about the lawyer's capacity to provide professional services; and
- (f) any situation in which a lawyer's clients are likely to be materially prejudiced.

There is currently no specific duty to report a lawyer's violation of the rules in section 6.3

Rule 7.1-3 does not include a duty to report the conduct of other lawyers that harms persons other than clients (such as staff, articled clerks, associates, or others)

COMPLAINTS PROCESS

 NOVA SCOTIA
BARRISTERS' SOCIETY **Professional Responsibility—Complaints Process**





RESOURCES

- We provide resources, tools and training to support lawyers and law firms as they develop an equity strategy in the workplace. The Society's **practice resource search** will help you find websites, articles, webinars, podcasts, videos and more to support you in your legal practice. The [Equity and Cultural Competence category](#) includes resources focused on 2SLGBTQIA+ and gender issues, anti-racism, trauma-informed lawyering, restorative approaches, implicit biases, African Nova Scotian issues, TRC resources and more.

<https://nsbs.org/about/equity-access/>