Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique
c/o Professor Stephen G.A. Pitel, Faculty of Law, Western University
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Federation of Law Societies of Canada
Constitution Square
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Ottawa, Ontario
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Sent by e-mail to consultations@flsc.ca

Dear members of the Standing Committee on the Model Code of Professional Conduct,

Re: Consultation Report – Draft Amendments in Response to Call to Action 27

The Canadian Association for Legal Ethics/Association canadienne pour l'éthique juridique (CALE/ACEJ) is a federal not-for-profit corporation whose members are academics, lawyers and regulators interested in topics related to ethics and professionalism in the Canadian legal profession. CALE/ACEJ seeks to encourage and facilitate debate on issues of ethics and professionalism in Canada and to increase awareness about those issues in the public, the profession and the judiciary.

In your above-referenced Consultation Report you have asked for feedback on draft amendments to the Model Code (page 4, para. 7). CALE/ACEJ appreciates having been consulted and we are pleased to respond. We note that two of CALE/ACEJ's directors, Richard Devlin and Pooja Parmar, have previously been involved in providing input to you as these amendments were developed (page 6, note 5), though in their personal capacities and not in an official capacity on our behalf.

Overall, we are quite supportive of the proposed changes relating to Call to Action 27. We commend you for developing them and we look forward to them being adopted after the consultation period has ended. We urge you not to yield to feedback calling on you to reduce the attention in the Model Code paid to Indigenous issues.

As a semantic matter, we question the repetition proposed in Commentary 2 to Rule 2.1-1 (page 10) of the words "the confidence, respect and trust". A clearer expression of the proposed point would be "…and of the community, including of Indigenous peoples, and avoid…".

In Commentary 1 to Rule 2.1-2 we are concerned about the restricted scope that is suggested by the limiting words "within the lawyer's community" (page 11). There is value in all learning about Indigenous peoples, including about those who are beyond that community. If these words

are to be retained, we suggest modifying them as follows: "…learning about Indigenous peoples, particularly those within the lawyer's community, and…".

We note with enthusiasm the new requirement that a competent lawyer will employ "trauma-informed and culturally-informed practices as appropriate" (page 12). Like you (page 13, para. 35) we consider this to have implications well beyond Call to Action 27, for example as relating to legal professionals who encounter people who may have experienced sexual violence or intimate partner violence. In our view, it will be very important for legal regulators to explain to legal professionals the meaning and content of trauma-informed practices in some detail if this requirement is to achieve its objectives. Many lawyers will not be familiar with trauma-informed practices and will need assistance to implement them as part of their obligations under the Model Code. In addition, we request that you consider discussions between the FLSC and the legal academy about skills development related to trauma-informed lawyering.

As a semantic matter, we wonder whether in Commentary 2 to Rule 3.1-1 (page 12) it would be better to refer to competence as something lawyers will have "developed" rather than "built".

In new Rule 3.1-3 (page 18), in Commentary 2 to the rule (page 19) and in new Rule 3.1-4 (page 20) you propose to use the term "working knowledge". This term is not currently used anywhere in the Model Code. We question the value of using it in this context. In other contexts, lawyers are required to know, or have knowledge, or be aware. The use of different gradients of knowledge creates unwelcome complexity and confusion.

As part of your discussion of new Rule 3.1-3 (page 18) you ask "whether a period of transition upon adoption of the Rule might be necessary to allow for the acquisition of this knowledge by already practising legal professionals". In our view, the better approach would be for each regulator to establish a date on which the rule will come into effect and thereby require legal professionals to acquire the competence by that date. It is inadvisable to allow some legal professionals to lack this competence while it is otherwise generally required by others. We are not aware of a transition or grace period being used for other developments relating to competence such as technological competence requirements.

In Commentary 2 to new Rule 3.1-3 (page 19) you set out a detailed list of items about which you recommend lawyers have knowledge. We question whether this degree of detail is suitable for direct inclusion in the Model Code. Other important concepts and topics in the Model Code are not addressed in this way. We think that it is important to maintain a consistent approach to how provisions in the Model Code are formulated.

We wonder whether new Rule 3.1-4 (page 20) is appropriate in the context of acting against an Indigenous self-represented litigant. The use of the term "parties" appears to include adverse parties to a lawyer's own client. The listing of required knowledge items is extensive, including "regionally significant information and events, including region-specific ceremonies and protocols". This might be considered an undue obligation to impose in this context. It strikes us as unusual that the obligation is framed at the same level for both clients (for whom a higher expected level of knowledge appears warranted) and adverse parties.

We note that while changes to the commentaries under Rule 3.1-2 use the somewhat awkward phrase “various cultures” (page 16), new Commentary 3 to Rule 3.2-1 (page 21) refers to “cultural differences”. If the latter phrase is acceptable, the earlier references would be clearer if replaced with “different cultures”. If not, the latter phrase should be reworded.

In Commentary 1 to Rule 5.1-1 we are unclear what you mean by “exploitative” (page 22). In part this stems from a lack of clarity as to what might be being exploited, such as a person or an opportunity. This language may be insufficiently clear to provide the necessary assistance to legal professionals or to indicate what is being added to the commentary that is not already capture by the sentence that follows.

In Commentary 1 to Rule 5.1-1 we are concerned about the parameters of the prohibition on reinforcing “systemic discrimination or stereotypes”. While welcome and important, it may be that to be workable, such a preclusion needs to be linked to specific myths and stereotypes that have been judicially or legislatively rejected. If a broader scope is given to these concepts, it could become difficult for advocates to strike the appropriate balance between their obligations to their client and to the administration of justice.

If it would assist you in your work, we would be pleased to further explain and discuss these submissions.

Yours truly,

Prof. Stephen G.A. Pitel
President, CALE/ACEJ