



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## **Model Code of Professional Conduct - Proposed Amendments for Family Law Lawyers**

## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 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 Family Law and Child and Youth Law Sections, and the Ethics and Professional Responsibility Subcommittee, with assistance from the Advocacy Department at the CBA office. The submission has been reviewed by the Law Reform Subcommittee and approved as a public statement of the CBA Family Law and Child and Youth Law Sections, and Ethics and Professional Responsibility Subcommittee.

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# Model Code of Professional Conduct

## Proposed Amendments for Family Law Lawyers

### I. INTRODUCTION

In recognition of the evolution of Canadian family law practice and ethics and professionalism, as well as changes in the law related to divorce in Canada, the CBA Family Law and Child and Youth Law Sections and the Ethics and Professional Responsibility Subcommittee (CBA Sections) propose to the Federation of Law Societies of Canada two amendments to its Model Code of Professional Conduct<sup>1</sup>:

- 1) The addition of a new Commentary [1.1] “Role in Non-Adversarial Family Law Proceedings” to Rule 5.1-1 “Advocacy” of the Model Code; and
- 2) The addition of a new Rule 2.2 “Standards for Family Law Lawyers” to the Model Code, to consolidate standards for family law lawyers at Chapter 2 “Standards of the Legal Profession”.

The CBA is a national association representing 36,000 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. The CBA Family Law Section consists of lawyers from across Canada who specialize in family law, and act for all parties in family law disputes. The CBA Child and Youth Law Section coordinates activities, provides advice and responds to law, policy and legal research developments on matters affecting children in Canada. The CBA Ethics and Professional Responsibility Subcommittee is dedicated to fostering and advancing ethical and professional conduct and standards in the legal profession.

To protect the public interest, the Model Code must evolve. In its present state, it does not accurately reflect the contemporary duties and practices of Canadian family law lawyers. The changes we propose are intended to align with contemporary practice<sup>2</sup> as codified in amendments to the federal *Divorce Act*,<sup>3</sup> recent and anticipated amendments to provincial and territorial family

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<sup>1</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct* (2017), [online](#).

<sup>2</sup> See, for example, Deanne Sowter, “Professionalism and Ethics in Family Law: The Other 90%” (2016) Vol. 6(1) *Journal of Arbitration and Mediation*, available [online SSRN](#), and Serena Patel, “Cultural Competency training: Preparing Law Students for Practice in Our Multicultural World” (2014) *U.C.L.A. Law Review*, available [online](#).

<sup>3</sup> [Divorce Act R.S.C. 1985, c.3\(2<sup>nd</sup> supp\)](#), in force March 1, 2021, (the *Divorce Act*) [www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=9868788](http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=9868788)

laws,<sup>4</sup> Canada's ratification of the United Nations Convention on the Rights of the Child (UNCRC)<sup>5</sup> and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>6</sup> and existing practice guidelines.<sup>7</sup> The proposed amendments also reflect the family law lawyer's duty to be informed and educated about children's rights,<sup>8</sup> Indigenous people's rights,<sup>9</sup> and the rights of Canada's culturally and racially-diverse population.<sup>10</sup>

## II. BACKGROUND: EVOLUTION AND CHANGE IN FAMILY LAW

### A. Contemporary Practice of Canadian Family Law

Non-adversarial approaches to practicing family law have developed over the last two decades, largely due to recognition by Canadian family law lawyers of the inadequacies of adversarial approaches for many families.<sup>11</sup> Lawyers who primarily practice family law have shifted their work to promote consensual dispute resolution methods such as negotiation, mediation and

<sup>4</sup> See, for example, family laws: *Family Law Act* S.A. 2003 c. F-4.5; *Family Law Act* S.B.C. 2011 c.25; *Family Law Act* R.S.O. 1990 c. F.3; and *The Children's Law Act*, 2020 S.S. 2020, c. 2, s. 10.

<sup>5</sup> *Convention on the Rights of the Child*, 1989, C.T.S. 1992/3; 28 I.L.M. 1456; 3 U.N.T.S. 1577; G.A. Res. 44/25. Ratified by the Canadian government on December 13 1991 (UNCRC), and referenced in family laws, for example, *An Act respecting First Nations, Inuit and Métis Children, Youth and Families* S.C. 2019 c. 24, preamble, *Child and Family Services Act* S.Y. 2008, c. 1, preamble, *Child and Family Services Act* S.N.W.T. 1997, c. 13, s. 2 (n), Ontario's *Child, Youth and Family Services Act*, SO 2017 c.14, preamble. Connected to the UNCRC are its Optional Protocols, namely the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, and the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure*, as well as documents to aid in its interpretation and implementation, such as the General Comments and Concluding Observations issued by the UN Committee on the Rights of the Child. More information can be found here: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. c.14, incorporates UNDRIP as a universal international human rights instrument with application in Canada. UNDRIP is currently referenced in family laws, for example, *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*, *ibid*, see the preamble and s.8(c); and the *Ontario Child Youth and Family Services Act*, *ibid*, see the preamble.

<sup>7</sup> Law Society of British Columbia, "Best Practice Guidelines for Lawyers Practicing Family Law" (2011) ("Guidelines"), available [online](#). See also Lawyers Insurance Association of Nova Scotia, "Family Law Standards" (2018), available [online](#). These standards are consistent with the Guidelines and extend to other family law practice areas. The Law Society of Alberta has recently called for volunteers to develop competency standards for family law lawyers in Alberta. See <https://www.surveymonkey.com/r/NJCMYDX>

<sup>8</sup> UNCRC, *supra* note 5, the *Divorce Act*, *supra* note 3, and family laws referred to herein.

<sup>9</sup> We use 'Indigenous people' collectively.

<sup>10</sup> Patel, *supra* note 2.

<sup>11</sup> Nicholas Bala, Rachel Birnbaum, Donna Martinson, "One Judge for One Family: Differentiated Case Management for Families and Continuing Conflict" (2010) *Canadian Journal of Family Law* p. 395. Action Committee on Access to Justice in Civil and Family Matters, "Meaningful Change for Family Justice: Beyond Wise Words; Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters" (April 2013) at pp. 6, 14, 20-23, available [online](#).

collaborative law.<sup>12</sup> Judges presiding over family law proceedings are more likely to engage in case management and judge-led dispute resolution than hear a trial.<sup>13</sup>

The proposed amendments seek to embed in the Model Code this modern shift from litigation to the resolution of family law disputes through consensual dispute resolution methods in appropriate circumstances.

## **B. Recent Amendments to Family Law**

Recent amendments to the *Divorce Act* reflect many of the contemporary practices of family law lawyers and aim to better meet the needs of Canadian families.<sup>14</sup> Provincial and territorial family laws have already been amended, or changes are under consideration, to better align with these changes to the *Divorce Act*.<sup>15</sup>

The range of amendments to family laws have codified and confirmed the contemporary family law lawyer's duties, including the obligation of the family law lawyer to make inquiries about the presence of family violence and its impact. The legislative direction regarding the issues a lawyer must discuss with their client and the processes they must consider and promote, when appropriate, to help resolve their client's dispute goes to the heart of the solicitor-client relationship.

### **i) Codification of a Family Law Lawyer's Duties**

The *Divorce Act* imposes the following new duties on family law lawyers:

- when appropriate, counsel must encourage persons to attempt to resolve certain matters through an out of court family dispute resolution process,<sup>16</sup>
- counsel must inform persons of family justice services that might assist them in resolving certain matters and in complying with orders or decisions made under the *Divorce Act*,<sup>17</sup>
- counsel must inform persons of their duties under the *Divorce Act*, which include:
  - 1) to try to resolve matters through a family dispute resolution process to the extent that it is appropriate;

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<sup>12</sup> *Supra*, note 2 Sowter, and "An Evaluation of the Cost of Family Law Disputes: Measuring the Cost Implication of Various Dispute Resolution Methods", available [online](#), and Justice Canada "The Child-centered Family Justice Strategy: Baseline Information from Family Law Practitioners" (2015), available [online](#).

<sup>13</sup> *Ibid*, and in Ontario, for the period 2018/19, only 8% to 10% of court appearances at family court were part of a trial: Office of the Auditor General of Ontario "Chapter 4 Family Court Services" (2019), found in the 2019 Annual Report Vol. 3: Reports on Correctional Services and Court Operations, at Chapter 4, p.9, available [online](#).

<sup>14</sup> "The *Divorce Act* Changes Explained" (2019), available [online](#).

<sup>15</sup> *Supra*, note 4.

<sup>16</sup> *Divorce Act* s. 7.7(2)(a).

<sup>17</sup> *Divorce Act* s.7.7(2)(b).

- 2) to act in a manner that is consistent with the best interests of the child; and
- 3) to protect any child of the marriage from conflict arising out of a matter commenced under the *Divorce Act* to the best of their ability.<sup>18</sup>

Incorporating these duties into professional standards for family law lawyers in the Model Code will help ensure that the family law lawyer's ethical practice is consistent with family laws.

## ii) Family Violence and Parental Conflict

Amendments to the *Divorce Act* reflect improved understanding of family violence and its impact on families. Family violence under the Act means conduct by one family member against another family member that is violent or threatening, or that constitutes a pattern of coercive and controlling behaviour, or that causes fear about one's own personal safety or the safety of another person. Children may be exposed to violence by a parent either directly or indirectly.<sup>19</sup>

Canadian family law lawyers must now identify and respond to family violence as a key requirement of the solicitor-client relationship,<sup>20</sup> and judges are now required to prioritize a child's safety and security and to consider family violence when deciding a child's best interests.<sup>21</sup> To respond to judicial inquiries and to inform their advocacy, family law lawyers must ask their clients about family violence, including their client's behaviours and experiences, and discuss the impact of violence on their children. To assist lawyers and their clients, Justice Canada will publish a guide about family violence later this year to help inform family law lawyers about the complex nature of family violence, and to explain their new responsibilities.<sup>22</sup>

A growing appreciation of the impact of parents' conflict on children requires family law lawyers to be better informed about and understand how to respond to conflict between parents.<sup>23</sup> To reduce the impact of a family law dispute on their client's children, amended family laws oblige

<sup>18</sup> *Divorce Act* ss. 7.1-7.3 and 7.7(2)(c). Many provinces and territories have family laws or are considering or amending legislation to include these or similar duties, see, *supra* note 4.

<sup>19</sup> Family violence is defined broadly in *Divorce Act* s. 2(1) "family violence", followed by examples; reflected in *The Children's Law Act*, 2020 S.S. 2020, c. 2, s. 2(1). See also *supra* note 14 "Divorce Act Changes Explained" at p. 32-34.

<sup>20</sup> *Divorce Act*, in particular s. 7 and 16.

<sup>21</sup> *Divorce Act* ss. 16(2), 16(3)(j) and (k).

<sup>22</sup> Justice Canada "HELP Toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisors". (forthcoming).

<sup>23</sup> See Justice Canada publications: "Family Law, Just Facts" (2016) [online](#); "High Conflict Separation and Divorce: Options for Consideration" (2004), [online](#). "Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices" (2005) [online](#), "Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to Make Consequential Changes to another Act (Bill C-78 in the 42<sup>nd</sup> Parliament)" (2019) [online](#).



family law lawyers to help their clients better manage conflict during the dispute resolution process, including court processes, and to advocate for outcomes to help reduce the continuation of family violence after an agreement or court order is in place.<sup>24</sup>

Including guidance in the Model Code on the duties of family law lawyers when representing clients affected by family violence is consistent with the objective of protecting vulnerable clients in the public interest and with the family law lawyers' legislative and ethical duties.

### C. Rights of Children and Youth in Family Law

Public and professional awareness of the rights of children and youth has grown in recent years and many lawyers practice in areas of the law that engage young people as rights-bearers. Family laws and the common law, especially dealing with domestic disputes between individuals and child protection, increasingly acknowledge young people as agents in their own lives.<sup>25</sup>

Canada ratified the UN Convention on the Rights of the Child (UNCRC) in December 1991.<sup>26</sup> Article 12 of the UNCRC states that a child who is capable of forming their own views has the right to express those views freely in all matters affecting them. Most Canadian family laws have enshrined a child's right to be heard when decisions are made that affect their lives.<sup>27</sup> The right to be heard includes all relevant procedures concerning children without restriction, including conciliation, mediation and arbitration processes.<sup>28</sup> Methods for learning the views of young people vary across the country.

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<sup>24</sup> *Divorce Act* s. 7.2, 7.7, and *supra* note 14 "Divorce Act Changes Explained" at p. 60.

<sup>25</sup> *Divorce Act* s.16(3)(e), and similar provincial and territorial amendments discussed herein at *supra* note 4. Child's rights are confirmed in child protection legislation across Canada. Recent amendments to child protection legislation, for example, Ontario's *Child, Youth and Family Services Act*, Part II, *supra* note 5, expands the scope of these rights. For common law examples, see *Michel v. Graydon*, 2020 SCC 24, at para. 77; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* 2018 ONCA 556, at paras. 62-67; *MAA v. DEME*, 2020 ONCA 486, at para. 46; *S.S. v. R.S.*, 2021 ONSC 2137; *Medjuck v. Medjuck*, 2019 ONSC 3245; *G(B.J.) v. G. (D.L.)*, 2010 YKSC 44.

<sup>26</sup> The UNCRC is incorporated in the preamble to Ontario's *Child, Youth and Family Services Act*, "In furtherance of these principles, the Government of Ontario acknowledges that the aim of the *Child, Youth and Family Services Act, 2017* is to be consistent with and build upon the principles expressed in the United Nations Convention on the Rights of the Child", *supra* note 5.

<sup>27</sup> UNCRC Article 12, *the Divorce Act* s.16(3)(e). See also *Family Law Act* S.A. 2003 c. F-4.5 s.18(2)(b)(iv); *Family Law Act* S.B.C. 2011 c.25 s.27(2)(b); *Family Law Act* R.S.O. 1990 c. F.3 s.24(4)(b); and *The Children's Law Act*, 2020 S.S. 2020, c. 2, s. 10., *Parenting and Support Act* 1989, c.160 s.18(6)(f).

<sup>28</sup> Committee on the Rights of the Child, General Comment No. 12 (2009): The right of the child to be heard, UN Doc. CRC/C/GC/12 (2009), at paras. 32, 51 and 52; Committee on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013), at para. 27.

Lawyers are required by family laws and the UNCRC to recognize, acknowledge and support the rights of children and youth, and will need training to achieve this competency. The proposed amendments to the Model Code seek to align the Code's professional standards and ethical duties with these legislative requirements.

#### **D. Indigenous People and Family Law**

Family law lawyers need to be informed about the rights of Indigenous people in Canada. Indigenous people work with family law lawyers for issues arising from a separation or divorce, or child protection. In child protection cases, family law lawyers act for parents, for their children, or as the representative of the state or band.

The 2015 Truth and Reconciliation Commission's (TRC) final report included Calls to Action (CTA).<sup>29</sup> CTA 27 calls on the Federation, on behalf of the provincial and territorial law societies, to:

...ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal-Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Further, CTA 1 specifically pertains to duties of family law lawyers working in child protection:

1. We call upon the federal, provincial, territorial, and Aboriginal governments to commit to reducing the number of Aboriginal children in care by:

...

v. Requiring that all child-welfare decision makers consider the impact of the residential school experience on children and their caregivers.<sup>30</sup>

The Federation responded to CTA 27 through the work of an Advisory Committee which released its report in June 2020. The report makes recommendations for how the Federation can support and promote the path of reconciliation, but leaves the enactment of rules requiring Indigenous cultural competency training up to the individual law societies.<sup>31</sup>

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<sup>29</sup> Truth and Reconciliation Commission of Canada, "[Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada](#)" (2015) and "[Truth and Reconciliation Commission Calls to Action](#)" (2015). See also, the CBA's commitment to respond to the CTA, available [online](#).

<sup>30</sup> Here 'decision makers' include lawyers who have an administrative role in child welfare for government and who give advice to those who are decision makers (e.g. lawyers who represent child protection agencies in child protection proceedings) as opposed to lawyers representing children and youth in these proceedings.

<sup>31</sup> Federation of Law Societies of Canada "Report of the Truth and Reconciliation Calls to Action Advisory Committee" (June 2020), available [online](#).

For federal, provincial and territorial governments, the process of reconciliation is ongoing. The federal *United Nations Declaration on the Rights of Indigenous Peoples Act*<sup>32</sup> incorporates UNDRIP as a universal international human rights instrument with application in Canadian law. British Columbia has acknowledged UNDRIP in its Declaration.<sup>33</sup> For family law lawyers, UNDRIP is referenced in some child protection legislation.<sup>34</sup> Developments may be seen in other provinces and territories as the process of reconciliation continues.

Family law lawyers must be informed about the legacy of Indian Residential Schools and our shared history in order to promote, through their work, the human rights of Indigenous people. The legacy of Indian Residential Schools continues. For example, according to the Manitoba Families 2019-20 annual report, as of March 31, 2020, there were 9,849 children in care, 90 per cent of whom are Indigenous.<sup>35</sup> The 2016 Canadian census concluded that 7.7% of children under 15 years of age in Canada are Indigenous. At that time, Indigenous children represented 55% of the total number of children in foster care in Canada.<sup>36</sup>

Cultural competency is critical for lawyers working in child protection and family law. To improve representation and outcomes for Indigenous people, families and their children in the area of child protection and family law, we propose that direction be added to the Model Code for family law lawyers (and ideally all lawyers) to undertake Indigenous cultural competency training, including skills-based training in ‘intercultural competency, conflict resolution, human rights, and anti-racism’ as called for by TRC.

## **E. Diversity and Inclusion**

Family law lawyers need the skills to effectively serve clients with diverse characteristics including age, gender, race, place of origin, colour, disability, sexual orientation, gender identity, socioeconomic

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<sup>32</sup> *Supra*, note 6. See also United Nations Declaration on the Rights of Indigenous Peoples, available [online](#).

<sup>33</sup> [Declaration on the Rights of Indigenous Peoples Act](#), SBC 2019, c 44

<sup>34</sup> See, for example, *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*, the preamble and s.8(c), *supra* note 5; and the Ontario’s *Child, Youth and Family Services Act*, preamble, *supra*, note 5.

<sup>35</sup> Reducing the number of Indigenous Children in Care, Government of Canada, online <https://www.sac-isc.gc.ca/eng/1541187352297/1541187392851online>; and Still Waiting: Investigating Child Maltreatment after the Phoenix Sinclair Inquiry. A Special Report of the Manitoba Advocate for Children and Youth June 2021 online at, available [https://manitobaadvocate.ca/wp-content/uploads/Maltreatment\\_Report.pdfonline](https://manitobaadvocate.ca/wp-content/uploads/Maltreatment_Report.pdfonline).

<sup>36</sup> *Ibid.*

status, religious beliefs, marital status, family status and culture.<sup>37</sup> These differences may be reflected in a person's values, experience, language and communication skills.<sup>38</sup>

Appreciating diversity is critical to effective communication between a lawyer and their client and to building trust essential to the lawyer-client relationship.<sup>39</sup> Lawyers with less awareness of the impact of diverse characteristics may make recommendations that are inconsistent with the client's experience and detrimental to the client's interests. Lawyers may pass judgment or interpret behaviour through the lens of their personal norms, not recognizing that people from other backgrounds and with very different experiences often view and respond to things differently.

These considerations are not exclusive to family law lawyers but are critical to competency in family law practice. Family law lawyers must understand the emotional, social, safety, and financial consequences of family breakdown, and appreciating the impact of diverse characteristics is key. We propose that direction be added to the Model Code for family law lawyers (and, again, ideally all lawyers) to undertake skills-based training in intercultural competency recognizing the diversity of people who live in Canada, conflict resolution, human rights and anti-racism.

### III. WHY CHANGE IS NEEDED

#### A. Adversarial and Non-Adversarial Proceedings

Amendments to the *Divorce Act* and other family laws promote alternative dispute resolution processes and are consistent with the contemporary practice of family law lawyers. Family law lawyers often move between court proceedings and less adversarial processes over the course of a proceeding. For example, they may begin a file by engaging in a negotiation with the other party. If the other party fails to make required financial disclosure, the lawyer may commence an adversarial process with a court application. This may prompt the other party to provide the required financial disclosure, or result in an interim hearing and court order, or upon receipt of the disclosure, negotiations may continue. The matter may be resolved with a separation agreement or consent court order. If not, the lawyer may return the proceeding to court to

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<sup>37</sup> The focus of this submission is on the work of family law lawyers, but here, as in other places, changes to the Model Code may equally assist lawyers who work in other areas of the law and their clients.

<sup>38</sup> "Diversity Defined": Canadian Centre for Diversity and Inclusion online at, available <https://ccdi.ca/our-story/diversity-defined/>.

<sup>39</sup> Patel, *supra* note 2. This paper includes an excellent roadmap to explain why lawyers need cultural competency and how this may be achieved.

participate in a judge-led settlement conference. The proceeding may be resolved with or without a trial.

The terms “adversarial” and “non-adversarial” are problematic because they suggest a bright line between the two categories and might imply that the lawyer is not primarily an advocate for their client regardless of the resolution process. They also are not terms used in family laws. They are used in our proposals because they reflect the language used throughout the Model Code, to allow for the simplest solution to effect needed changes. However, the Federation may want to consider a more thorough overhaul of the language and overall framework longer term.

Model Code Rule 5.1-1 states:

When 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.

The commentaries under Rule 5.1-1 clarify a lawyer’s role in adversarial proceedings. The first two paragraphs in the Commentary under Rule 5.1-1[1] state:

[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. 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.

[2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

This second paragraph does not distinguish if these other types of appearances and proceedings are considered “adversarial”. Absent from the Model Code is both a definition of a “non-adversarial” proceeding or process, and the ethical standard for a lawyer who advocates for and represents a client in a “non-adversarial” proceeding or process.

Further, while Rule 5.7 discusses the role of a lawyer who acts as mediator; Rule 5.7 does not address the role of a lawyer. Instead, lawyers who represent a person in a mediation must look to 5.1-1[1] and the two Commentaries reproduced above. The direction of ‘resolute advocacy’ is the

same for all processes set out in Commentary 2. The practice of family law has evolved such that family law lawyers advocate on behalf of their clients in non-adversarial processes such as negotiation, mediation and collaborative process, as well as judge-led dispute resolution and settlement conferences, but not in the manner prescribed in Commentary 1.

The *Divorce Act* and other family laws place duties on family law lawyers to promote “family dispute resolution processes” where appropriate<sup>40</sup> and to inform their clients of their own duties, including their duty, to the extent possible, to protect their child from conflict arising out of the proceeding. This is because people generally fare better when they work together to resolve their disputes, and the resolutions they make for themselves tend to be more durable than resolutions imposed on them by judges and arbitrators.<sup>41</sup> The direction under the *Divorce Act* and other family laws requiring a family law lawyer to engage in non-adversarial processes, if appropriate, and protect their children from conflict are arguably in contrast with the role described under Rule 5.1-1 and its Commentary with respect to a lawyer’s role in adversarial proceedings. To address this potential conflict and concern, we propose amendments to the Commentary to Rule 5.1-1 to describe the role of the family law lawyers in non-adversarial proceedings.

### **B. Standards for Family Law Lawyers**

Lawyers play a unique role when assisting in the resolution of family law disputes. In addition to traditional tasks related to advising clients of their legal rights and obligations, family law lawyers have broader responsibilities to understand the emotional, social, safety and financial consequences of the breakdown in a relationship and its critical impact on the next generation.

Several law societies have recognized this unique role with practice standards or guidelines for those who practice family law. In proposing changes to align with the evolving practice of family law, we have drawn on the Law Society of British Columbia’s (LSBC) “Best Practice Guidelines for Lawyers Practising Family Law” (Guidelines).<sup>42</sup> The Guidelines were endorsed by the LSBC Benchers on July 11, 2011 as aspirational standards for lawyers practising family law.

However, in our view, mandatory guidelines for family law lawyers are needed to protect the public interest. We propose a national standard for family law lawyers in the Model Code which

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<sup>40</sup> *Divorce Act*, s. 7.7 (2)

<sup>41</sup> See *supra* note 14 at p.61, and *supra* note 11 Bala et. al.

<sup>42</sup> Best Practice Guidelines for Lawyers Practicing Family Law, [online](#) (July 11, 2011)

reflect duties imposed by family laws and mandates education on developments in family law, the rights of children and youth, Indigenous cultural competency and diversity training.

This proposal builds on the B.C. Guidelines to include education and practice standards that reflect the contemporary practice of family law, including: recent amendments to family laws; legislative duties that have been placed on lawyers including an appreciation of the impact of family violence, the rights of children and youth, mandatory education on Indigenous human rights and the legacy of the Indian Residential Schools as recommended by the TRC and CTA; and cultural competency to equip lawyers to work with Canada's diverse population.

#### **IV. PROPOSED AMENDMENTS**

##### **A. Rule 5.1 - New Commentary Clarifying the Role of Family Law Lawyers in Non-Adversarial Proceedings**

The CBA Sections propose a new commentary to Model Code Rule 5.1 to outline the duties of a lawyer in non-adversarial family law proceedings.

We propose the following text for this commentary:

##### 5.1 The Lawyer as Advocate

##### Commentary to Advocacy 5.1-1

**[1.1] Role in Non-Adversarial Family Law proceeding:** In non-adversarial family law proceedings such as negotiation, mediation and collaborative process as well as judge-led dispute resolution and settlement conferences, the lawyer has a duty to consider not only the legal rights and obligations of their client, but also the broader interests of the client, the other party[ies], and the children. The lawyer is encouraged to problem-solve, and attempt to reach a consensual resolution to the parties' conflict.

##### **B. Chapter 2 - New Standard for Family Law Lawyers**

The CBA Sections propose a new standard for family law lawyers which could be titled "2.2 Standards for Family Law Lawyers" and appear at the end of the current Chapter 2 "Standards of the Legal Profession".

The proposed standards consolidate existing Model Code Rules and Commentaries with references to legal duties arising from changes to family laws and the ethical obligations impacting the direct and indirect work of family law lawyers. The source of each proposed standard is referenced, illustrating that the proposed standards capture and consolidate many

existing ethical standards for family law lawyers. Some of the standards below, while critical for family law lawyers, could or should apply to lawyers practicing other areas of law, which the Federation can consider when undertaking needed changes to the Model Code overall.

The CBA Sections propose the following text for this Rule:

## 2.2 Standards for Family Law Lawyers

- a) Family law lawyers must be courteous and civil toward all persons with whom they have dealings in the course of a family law proceeding, including other parties and other lawyers, and must advise and encourage their clients to behave similarly.<sup>43</sup>
- b) Family law lawyers must provide objective professional advice to clients, and should not be influenced by ill feelings and emotional factors that hinder a reasonable resolution of the proceeding.<sup>44</sup>
- c) Family law lawyers must avoid using inflammatory language in spoken or written communications, and must advise and encourage their clients to behave similarly.<sup>45</sup>
- d) Family law lawyers must avoid actions that have the sole or predominant purpose of hindering, delaying or bullying an opposing party, and must advise and encourage their clients to refrain from behaving similarly.<sup>46</sup>
- e) Family law lawyers cannot participate in, and must caution their clients against, any actions that are dishonest, misleading or undertaken for an improper purpose.<sup>47</sup>
- f) When acting on behalf of a person seeking rights to and responsibilities regarding a child, the family law lawyer must make appropriate inquiries to determine if there is family violence, and assess its impact on an appropriate parenting arrangement.<sup>48</sup>
- g) Family law lawyers must advise and encourage their clients to reduce conflict and resolve disputes on a reasonable basis. A lawyer must advise a client who is seeking

<sup>43</sup> This is consistent with Model Code: 3.2-4 – Encouraging Compromise or Settlement, 7.2-1 - Courtesy and Good Faith, 7.2-2 – Sharp Practice. See also, “Guidelines 1 including the footnote to the Guideline “Lawyers are not obliged to assist persons who are disrespectful or abusive”.”, *supra*, note 6, for ease of reference Best Practice Guidelines for Lawyers Practicing Family Law, [online](#) (July 11, 2011)

<sup>44</sup> This is consistent with Model Code 7.2-1 – Commentary 2. See also “Guidelines” 2.

<sup>45</sup> This is consistent with Model Code Communications – 7.2-4 , Courtesy – 5.1-5 , See also “Guidelines” 3

<sup>46</sup> See Model Code 5.1-2 – When acting as an advocate, lawyer must not – (m) needlessly abuse, hector or harass a witness. 6.3-4 – Harassment and Discrimination, 6.3-5 – Harassment and Discrimination, 7.1-3 – Duty to Report Misconduct : (d) conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competence as a lawyer. 5.1-1 – The Lawyer as Advocate – and Commentary 8 . See also “Guidelines” 5.

<sup>47</sup> See Model Code 3.2-7 – Dishonesty, Fraud by Client –Commentary 1 , 5.1-1 – The Lawyer as Advocate - Commentary 8, 5.1-2 which may be summarized: when acting as an advocate, lawyer must not (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party; (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable; (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying on a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct. See also “Guidelines” 5.

<sup>48</sup> See for example, *Divorce Act* s. 2(1) *family violence*, s.7 and s.16(2), s. (3) (j) and (k).



rights to and responsibilities regarding a child that they must, to the best of their ability, protect the child from conflict arising from the family law proceeding.<sup>49</sup>

- h) Family law lawyers must keep their clients advised of, and encourage their clients to consider, at all stages of the dispute:
- the risks and costs (emotional, relational and financial) of any proposed actions or communications;
  - the consequences for children involved; and
  - the importance of following court orders or agreements.<sup>50</sup>
- i) Family law lawyers must advise clients who are seeking rights to or responsibilities for children that they are in a position of trust in relation to the child, and that it is important to place the child's interests before their own, and failing to do so may have a significant impact on both the child's wellbeing and the client's proceeding.<sup>51</sup>
- j) Family law lawyers must advise their clients of, and encourage them when appropriate, to consider at all stages of the dispute, all available and suitable resources for resolving the dispute, in or out of court.<sup>52</sup>
- k) Family law lawyers have a duty to educate themselves about family violence and its impact upon the client and any child involved in the family law proceeding.<sup>53</sup>
- l) Family law lawyers have a duty to educate themselves and act in accordance with:
- the *United Nations Convention on the Rights of the Child*, including its general principles through which all articles of the Convention should be interpreted and implemented,<sup>54</sup> Optional Protocols, General Comments and Concluding Observations;
  - the *United Nations Declaration on the Rights of Indigenous Peoples*;

and to participate in:

- training on the *United Nations Convention on the Rights of the Child*, its Optional Protocols, General Comments and Concluding Observations;
- cultural competency training, including the history and legacy of residential schools, Treaties and Indigenous rights, Indigenous law, and Indigenous/Crown relations; and

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<sup>49</sup> This is consistent with Model Code Advocacy 5.1-1 commentary 4.

<sup>50</sup> See Model Code 3.2 Quality of Service and 3.2-2 Honesty and Candour, and Guidelines 7, and *Divorce Act* Duties s.7.5.

<sup>51</sup> See Model Code 5.1-1 and Commentary 4, and 3.2 Quality of Service. See also "Guidelines" 8.

<sup>52</sup> See Model Code 3.2 Quality of Service and Commentary 5 (k), 3.2-4 Encouraging Compromise or Settlement, and 5.1-1 The Lawyers as Advocate and Commentary 2. See also "Guidelines" 9.

<sup>53</sup> *The Divorce Act* and family laws discussed herein.

<sup>54</sup> Articles 2 (non-discrimination); article 3(1) (best interests of the child); article 6 (right to life, survival and maximum development); article 12 (the child's right to be heard).

- skills-based training in intercultural competency, including conflict resolution, human rights and anti-racism, recognizing the diversity of people who live in Canada.<sup>55</sup>
- m) Family law lawyers have a duty to educate themselves about the residential school experience. Family law lawyers must make appropriate inquiries to determine if the client is potentially impacted by the residential school experience and to discuss with the client its impact on the proceeding.<sup>56</sup>

## V. CONCLUSION

The proposed amendments to the Model Code recognize and support the crucial role that family law lawyers play in the justice system, and the experience of the parties and their children during and after a family law proceeding. They reflect developments in the practice of family law including recent and ongoing amendments to family laws, the rights of children and youth, the application of human rights treaties, the TRC report and CTAs, and the conclusions of experts in the field.

Some of the proposed changes could be applied to other kinds of lawyers engaged in collaborative law or less adversarial proceedings; and some of the standards, such as the need for cultural competency, while essential for family lawyers, are clearly a competency needed by all lawyers. While the CBA Sections are focused in this submission on needed changes to the Model Code to reflect evolving legal expectations of family law lawyers, we encourage the Federation to consider their broader application. We also anticipate further consideration may be needed to customize the standards for lawyers who are representing a child. We would be pleased to consult with you further on these issues.

We look forward to the Federation's direction to help maintain the standard of ethical practice for family law lawyers, consistent with the public interest.

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<sup>55</sup> This is consistent with the CTA 27.

<sup>56</sup> See TRC and CTA.