



September 24, 2013

Via email: ghume@harrisco.com

Gavin Hume, Q.C.
Chair, Standing Committee on the Model Code of Professional Conduct
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Dear Mr. Hume:

Re: Feedback on Draft Language Rights Rules

Thank you for seeking the feedback of the Canadian Bar Association on the Federation's draft Language Rights Rules. The Ethics and Professional Responsibility Committee and the Conference of French Speaking Common Law Members have reviewed the draft and have the following suggestions for clarifying and strengthening the proposed Language Rights Rules.

FLSC Draft Rule	Recommended Change	Explanation
3.2-2A "A lawyer must, where appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice."	Amend Rule 3.2-2A to read: "The lawyer must be cognizant and knowledgeable of the client's language rights in the lawyer's areas of practice. When it is reasonable for the lawyer to think that language rights apply to the client, in the circumstances, the lawyer must advise the client of the client's right to proceed and be represented in the official language of the client's choice."	The Rules should emphasize the lawyer's duty to be knowledgeable of the client's language rights and clearly state the lawyer's obligation once it is determined that a language right applies to the client. While emphasis and more detail is found in the Commentary, the recommended rewording of Rule 3.2-2A is intended to clearly state the lawyer's obligations in the Rule itself. Providing that the lawyer must advise the client where it is "reasonable" to think that language rights apply, instead of simply "where appropriate", more carefully defines the

FLSC Draft Rule	Recommended Change	Explanation
		<p>lawyer's duty (CBA Code also uses "where appropriate", but more definition is recommended).</p> <p>The client's right to "proceed and be represented" in the chosen language more accurately describes the scope of the client's rights.</p>
<p>3.2-2B</p> <p>"Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is capable of providing the required services in that language."</p>	<p>Amend Rule 3.2-2B to read:</p> <p>"Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer reasonably believes that the lawyer is competent to provide the required services in that language."</p>	<p>The Language Rights Rules should make specific reference to "competence", to connect these Rules with the general duty in Rule 3.1-2 of the Model Code to provide services to the standard of a competent lawyer. Further the reasonable belief of a lawyer in the lawyer's own competence, rather than a requirement that the lawyer "is capable" better reflects the expectation in Commentary 5 to Rule 3.1-2 of the Model Code.</p>
<p>French version of 3.2-2B</p> <p>"Lorsqu'un client désire engager un juriste pour le représenter dans la langue officielle que le client choisit, le juriste doit entreprendre le mandat uniquement s'il est en mesure de fournir les services requis dans cette langue."</p>	<p>Amend French wording in Rule 3.2-2B to:</p> <ul style="list-style-type: none"> • replace "désire" with "souhaite" • replace "engager un juriste" with "retenir les services d'un juriste" • replace "entreprendre le mandat" with "accepter le mandat" 	<p>In our view, the French expressions recommended are more appropriate in the context.</p>
<p>Commentary [1]</p> <p>"The choice of official language is up to the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the Canadian Charter of Rights and Freedoms, s. 19(1) and Part XVII of the Criminal Code regarding language rights in</p>	<p>Amend Commentary [1] to read:</p> <p>"The choice of official language in which legal services will be rendered is up to the client, not the lawyer. The lawyer should be aware of language rights arising from the <i>Canadian Charter of Rights and Freedoms</i>, s. 19(1), Part XVII of the <i>Criminal Code</i> and</p>	<p>We have added a reference to language rights in courts under provincial and territorial jurisdiction and made a couple of minor wording suggestions.</p>

FLSC Draft Rule	Recommended Change	Explanation
courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.”	linguistic obligations of the competent courts under federal, provincial or territorial jurisdiction. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including aboriginal language rights.	

We would be pleased to discuss these suggestions with you in more detail. Also, we encourage you to consult broadly with the public, the legal profession and amongst provincial and territorial regulators to ensure all relevant input is received before the Rules are adopted. Thank you again for seeking the feedback of the Canadian Bar Association.

Yours truly,

(original signed by Sarah MacKenzie for Malcolm Mercer and Louise Aucoin)

Malcolm Mercer

Louise Aucoin

Chair, Ethics and Professional Responsibility
Committee

Vice-Chair, Conference of French-Speaking
Common Law Members

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