Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Standing Committee on the Model Code of Professional Conduct

POST-JUDICIAL RETURN TO PRACTICE

DISCUSSION PAPER

May 2016

INTRODUCTION

In recent years concerns about judges retiring and returning to practice have been raised in a variety of quarters, including the legal ethics academy and the courts. In response to these concerns, the Standing Committee on the Model Code of Professional Conduct ("Standing Committee") a committee of the Federation of Law Societies of Canada ("Federation"), has undertaken a review of the provisions of the Model Code of Professional Conduct ("Model Code") dealing with post-judicial return to practice.

The Standing Committee recognizes that the return of judges to legal practice after leaving the bench has implications not only for the regulators of the legal profession, but also for sitting members of the judiciary, their representative organizations, and the Canadian Judicial Council, the body responsible for setting standards for judicial conduct. Before considering whether amendments to the provisions of the Federation's Model Code are warranted, the Standing Committee wishes to obtain the views of interested stakeholders. This paper canvases the issues associated with the return of judges to legal practice and poses a number of specific questions arising from those issues. The Standing Committee will, as is its practice, consider the stakeholder's response to those specific questions as it completes its review to determine whether or not changes to the Model Code are required.

BACKGROUND

The Federation developed the Model Code to synchronize as much as possible the ethical and professional conduct standards for Canadian lawyers and Québec notaries. Eleven of the fourteen provincial and territorial law societies have adopted the Model Code as the basis for their local codes of professional conduct, and the Model Code is under active consideration by the three remaining law societies.

To ensure that the Model Code remains relevant and current, the Federation established the Standing Committee to review the Model Code on an ongoing basis. The Standing Committee's mandate requires it to monitor changes in the law of professional responsibility and legal ethics, to receive and consider input from law societies and others on professional conduct issues, and to recommend, where appropriate, amendments to the Model Code. In fulfilling its mandate the Standing Committee engages in consultation with the law societies, the public, and other key stakeholders.

Concerns about the ethical rules governing the conduct of judges returning to legal practice, referred to in this paper as "post-judicial conduct," were first raised in a 2011 letter from a group of ethics professors to the then president of the Federation (see Appendix "A"). The matter was referred to the Standing Committee and in late 2015, after concerns about post-judicial conduct were raised with the Federation by Associate Chief Justice Frank Marrocco of the Ontario Superior Court of Justice, the Standing Committee embarked upon a review of the relevant rules in the Model Code. The Law Society of Upper Canada has also responded to the Associate Chief Justice's concerns by reconsidering and amending its rules concerning post-judicial conduct of former judges of the Superior Court.

In conducting its review the Standing Committee has considered the relevant rules in the Model Code, the corresponding rules in the provincial and territorial rules of professional conduct,

academic literature,[1] and the approaches to the regulation of post-judicial conduct adopted in other countries. The Standing Committee has not yet reached any conclusion on whether the rules in the Model Code ought to be amended, but has concluded that it is advisable to inquire further into the issues that arise when former judges returned to practice. The feedback obtained through this consultation will inform the Standing Committee's ongoing work on the issues.

MODEL CODE PROVISIONS

The Model Code contains a single rule concerning retired judges:

Rule 7.7 *Retired Judges Returning to Practice*

> A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

Although the emphasis in the rule is on former judges appearing in court, the following provisions of more general application are also relevant to retired judges returning to practice.

Rule 4.2-1 *Marketing*

> A lawyer may market professional services, provided that the marketing is:
>
> a) demonstrably true, accurate and verifiable;
> b) neither misleading, confusing or deceptive, not likely to mislead, confuse of deceive;
> c) in the best interests of the public and consistent with a high standard of professionalism.

The commentary on this rule says that "suggesting qualitative superiority to other lawyers" contravenes this rule.

Rule 5.1-2 (c) *The Lawyer as Advocate*

> When acting as an advocate, a lawyer must not: … appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice.

[1] In preparing this discussion paper, the Standing Committee relied heavily on the comprehensive analysis of the issues set out in *Revising Canada's Ethical Rules for Judges Returning to Practice*, Dalhousie Law Journal Vol. 34, No. 2, pp. 483-527 (2011), by Stephen G.A. Pitel and Will Bortolin, available online at: https://ssrn.com/abstract=2161909.

CANADIAN LAW SOCIETY RULES

The rules of professional conduct of Canadian law societies adopt — in wording or at least substance — the approach of the Model Code to post-judicial conduct. The rules of eight of Canada's law societies — British Columbia, Manitoba, Newfoundland and Labrador, the Northwest Territories, Nova Scotia, Prince Edward Island, Saskatchewan, and Yukon — have rules identical to the Model Code. The rules of the Law Society of New Brunswick, with different wording, have the same effect as the Model Code rule.

The relevant rule in the Barreau du Quebec's Code of Professional Conduct of Lawyers is narrower and more prohibitive, as, with no time limit, it prohibits a former judge from ever pleading "before the tribunal or adjudicative body of which he was a member if the situation is likely to bring the administration of justice into disrepute."

Nunavut's Code prohibits a former judge from appearing before their former court or a court of inferior jurisdiction to their former court, without the approval of the governing body, again without a time limit. Relevant to the issues discussed below, the Nunavut rule states that, "If in a given case the former judge should be in a preferred position by reason of having held judicial office, the administration of justice should suffer; if the reverse were true, the client may suffer."

The Law Society of Upper Canada Rules of Professional Conduct concerning former judges, the most comprehensive in Canada were recently amended. . In Ontario, the rules for former judges are divided into two categories, one applicable to trial level judges and the other to appellate judges. The rules for former judges of the Ontario Court of Justice, Federal Court (Trial Division) and Tax Court follow the Model Code, proscribing those former judges from appearing in court until three years after their retirement, except with the express approval of the law society "only granted in exceptional circumstances." ." For former judges of the Supreme Court, the Federal Court of Appeal, the Ontario Court of Appeal and (since January 2016) the Superior Court of Justice, there is a prohibition against appearing as counsel in any court (and with no time limit on the prohibition), subject to the governing body's approval "in exceptional circumstances."

Finally, Rule 117 of the Law Society of Alberta prohibits a former judge or Master in Chambers from appearing in any court "as a barrister and solicitor without first obtaining the approval of the Benchers which may be given with or without conditions." There is no definition of what "appearing in court" means, an omission discussed below.

In summary, while nine jurisdictions permit appearances by former judges three years after their retirement, four others prohibit, or severely limit such appearances. (See Appendix B: Provincial/Territorial Law Society Rules and Regulations on Retired Judges.)

CONTRASTING APPROACHES: ENGLAND AND WALES AND THE UNITED STATES

The United States and England and Wales take very different approaches to the question of judges returning to practice on retirement; in short, the United States is generally permissive of any activity a former judge may wish to undertake, while England and Wales is absolutely prohibitive.

The difference may be the result of the prevalence of elected (and thus, potentially not re-elected) judges in the United States and the English approach that accepting judicial appointment is a working lifetime commitment." [2] In 2006, a proposal to end the English prohibition met with such opposition that the Lord Chancellor abandoned it. Interestingly, the prohibition is by convention only, but is supported by concerns for judicial independence and quality as much as a concern about any mischief occasioned by a former judge's appearing in court. It appears to be an issue managed by the judiciary, rather than the bar.

Some American commentators do express concerns about judges returning to practice and appearing in court, but in the end, generally see the circumstances in the United States as significantly different from England, not only in the structure and character of the courts, but also in the legal profession to which former judges return.[3]

The U.S. approach seems to assume that neither the courts nor legal profession would support any prohibition, but there are ethical guidelines, for example, as set out in the American Bar Association Model Rules (adopted by most American jurisdictions) that state, in part:

Rule 1.12 *Former Judge, Arbitrator, Mediator of other Third Party Neutral*

> (a) …a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

There are some restrictions on revealing (especially in jury trials) that one of the trial counsel is a former judge,[4] but there appear otherwise to be very few limitations beyond the above rule, based as it is on a direct conflict.

OVERVIEW OF THE ISSUES

It is useful to begin with a general discussion and analysis of some aspects of the ethics of post-judicial activity to create the context for the specific issues set out below. The discussion is set out under general headings, but many issues give rise to concerns under more than one of these headings, so there is considerable inter-connection:

- Apprehension of Bias
- Conflict of Interest
- Public Perception and Confidence in the Justice System
- Qualitative Superiority
- Post-Judicial Employment

[2] The position in England and Wales is set out in: "Return to Practice by Former Salaried Judges" Consultation Paper CP 15/06, and the responses to it: "Response of the Judges' Council to … Judicial Diversity: Return to Practice by Former Judges", January, 2006, and "Report of the Judges' Council Working Group to …'Return to Practice by Former Salaried Judges'", November 30, 2006.
[3] Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 Cath. U. L. Rev. 841 (2011)
[4] For example: *Guidelines on the Practice of Law by Retired Judges,* Directive #7-04, Supreme Court of New Jersey.

Apprehension of Bias

Judges are a pillar of a justice system that is integral to a free and democratic society. They must be impartial and independent, and in return are granted deference, both as to their function and personally. That deference, if extended to a former judge, could be seen by some as a show of bias. Even when there is no deference, and in fact the court has preserved its neutrality, the simple fact that one of the counsel is a former judge could give rise to a reasonable apprehension of bias in favour of the former judge and their client.

Commentators point out that a former judge who appears in court as an advocate is appearing before their former colleagues, who may, as a matter of human nature, be inclined to listen more closely. The decision-maker may impair his or her neutrality because of a past (or even present) personal relationship with the former judge. Of course, neutrality may not in fact be compromised, but the apprehension, or the appearance of bias is still deleterious to the public (and profession's) confidence in the court system.

Former judges also have special knowledge of the inner workings of the court. It is possible they will know which arguments are more likely to find favour. There may be a preferred way to receive a case that can then be reflected in how it is submitted by that former judge. On the other hand, experienced counsel will likely also have gained those useful insights, so, as above, the real issue may be the public's perception.

Conflict of Interest

Discussions of conflict of interest generally include consideration of both professional and personal conflicts. The mischief of a professional conflict may be the divided loyalty occasioned by acting for two clients of divergent interests or may be the conflict between the duty owed to a current client and the duty of confidentiality owed to a former client.

Given the nature of judicial office there may be no concern about conflicts between the duties owed as a judge and those that would be owed upon return to practice. It has been suggested, however, that there is a potential for personal conflicts. A former judge may not, for example, be inclined to criticize or argue against one of his or her previous judgments when to do so would be in the client's interest. Another sort of personal conflict may arise where a sitting judge, who, through friendship or a continuing sense of collegiality, my shows a preference to their former colleague when that person appears as counsel.

Public Perception and Confidence in the Justice System

Many commentators — including the Judge's Council in England and Wales — raise the concern that the public's confidence in the justice system could be undermined by the perceived advantage that a former judge may have as an advocate in their former court.

The example commentators raise most often is of a self-represented litigant who finds their opposing party is represented by a former judge. There is a significant possibility that if the case goes badly the litigant will assume the former judge was favoured in their former court. Lawyers who do not achieve success in court for their clients may be inclined to the same belief. Again this may be perception only and the case decided entirely on its merits, but perception does count in preserving the public's confidence in their courts.

The Response of the Judge's Council to the proposal in England and Wales to permit former judges to return to practice expresses this strong opinion:

> 11. …if the public in general or litigants in particular know that judges may be returning to the legal marketplace, the perception of possible bias will be a constant threat. That perception will be present whenever a former judge appears as advocate before a former judicial colleague.

In short, in the English view, the only way to remove a perception that may diminish the standing of the courts is an absolute prohibition, as it is based on "an objection in principle [that cannot] be overcome by imposing safeguards and conditions."[5]

In contrast, the American commentary, while concerned about impaired neutrality in a particular case, does not often raise the standing of the courts as a whole.

Suggestion of Qualitative Superiority

Law firms (and other businesses, for that matter) expect former judges will add to their prestige. The English, somewhat wryly, note that "the track record of being a judge is commercially saleable" and that this, by itself, is an argument for prohibition. Canadian law societies do permit advertising, but disparage advertising that claims a qualitative superiority for the firm or person advertising.

Post-Judicial Employment

Former judges have skills and experience from which clients and the public can benefit. There are activities, such as acting as an arbitrator, for which the parties could agree that a former judge is ideally suited. Other former judges have become ethics commissioners, and arguably their work as judges suits them for it. In fact, much of this work by former judges does not require that they be licensed to practice law .

In addition, many former judges provide legal services pro bono, and this raises the question of whether or not this requires special consideration.

There have, however, been instances of judges casting around for job opportunities while they were still sitting. It has been suggested that this may create a conflict of interest for both the judge and the lawyer when a lawyer from a firm with which the judge is in discussions appears before the judge.

Any analysis of post-judicial activity must take into account the different kinds of judges, and their different roles in society. In many jurisdictions, some judicial work (e.g. deputy judges, justices of the peace, assessment officers, and masters) is undertaken by part-time judges who continue to carry on the practice of law.

DISCUSSION OF SPECIFIC ISSUES

The following discussion is to provide more specific background and analysis to support the specific questions on which input is sought in this consultation. The Standing Committee

[5] *Response of the Judges' Council to.. Return to Practice by Former Judges," op.cit.*

emphasizes that it has reached no conclusion beyond the desirability of conducting its review. At this stage, the Standing Committee is hoping to solicit the views and insights of those being consulted, and to do so before considering what, if anything, it should recommend concerning post-judicial conduct and the Model Code.

1. The Return to Practice of a Retired Judge

No Canadian jurisdiction prohibits the return to practice of a retired judge; however, all law societies do place some restrictions and conditions on a former judge's work as a lawyer. The Standing Committee's preliminary review suggests that concerns remain that ought to be addressed as a matter of good regulatory practice, including the promulgation of rules of professional conduct. The overall question is: what is the actual or potential mischief arising from the practice of law by a former judge? Having identified that, how could such mischief be addressed?

The English convention – prohibiting judges from returning to practice in any capacity – is based on a principle that a person who accepts a judicial appointment abandons not only their current practice, but the possibility of any future one. The issues discussed below — e.g. apprehension of bias, loss of public confidence in the courts, conflict of interest — do figure in the English analysis, and while the English bar did express its opinion, the preservation of the convention against a return to practice was at the instance of the judiciary, concerned that the prospect of a return to practice would "inevitably impair the trust and confidence which judges at all levels habitually place in in one another."

The Americans do not have the same concerns, and, of course, Canadian law societies do permit a return to practice with limits and restrictions. Given the concerns expressed in some quarters, although no Canadian law society currently imposes an absolute ban on former judges returning to practice, it is still important to consider whether or not such a ban on former judges returning to practice is required to address an actual or potential mischief.

Alternatively, can the kinds of limits and restrictions discussed below address the concerns that have been raised? That discussion will draw distinctions between a former judge providing private client services and more public activity, between appearance in the courtroom and anonymous assistance in the background, and between the way firms market former judges and their other lawyers.

Appearance in Court by Former Judges

There has been much comment on whether or not a former judge should appear in court and, if they are to appear, under what conditions and circumstances. The current rules make it clear that this question is really three questions:

1. Should a former judge ever appear in court?
2. If so, in which courts?
3. In any case, what does "appearance" mean in this context?

Four Canadian jurisdictions prohibit some or all former judges from appearing in court, subject to an allowance for "special circumstances.". Ontario's ban focuses on former judges from superior and appeal courts, and extends to appearing in any court, in part because such judges may be seen as having influence not only in their former courts, but also in those courts over which they had a power of review. Alberta has a blanket prohibition that extends even to

Masters in Chambers, and Nunavut and Quebec also have, effectively, the same blanket prohibition.

The other jurisdictions do, of course, allow appearance, but none immediately upon a judge's retirement. The three year "cooling off" period set out in the Model Code has become a standard, but it is not clear whether this is the appropriate length of time or whether it has it become the accepted standard without appropriate consideration and justification?

The intent of such time limits would appear to be to decrease the likelihood of a former judge receiving preference (or being perceived as receiving preference), as time will have elapsed since they were a colleague of the sitting judges. But the make-up of the judiciary does not change quickly, and in most cases, the current sitting judges would still be the former colleagues of the retired judge. This raises questions about whether the passage of time (three or some other number of years) is sufficient to allay concerns about a residue of collegiality. If so, is three years the appropriate time period or should something longer be considered?

In England and Wales, for example, the Lord Chancellor's Working Group proposed a five year period before providing "advocacy services." As noted above, the overall proposal to permit retired judges to return to practice met with such opposition that it was not implemented, but five years was seen as a compromise between "relaxed" and "restrictive" conditions.

The material supporting the amendment to the Ontario rules did include reference to the discomfort of sitting judges when a former colleague appears before them, such appearances often leading to recusal, and the consequent delay and inefficiency.

An Unfair Advantage?

Time limits aside, the public (and profession) might conclude a former judge appearing in their former court has advantages over other counsel. The conclusion of an unfair advantage just as easily applies if the former judge was counsel in a court over which they previously held an appeal power. What, then, is that unfair advantage, and how might it arise?

That unfair advantage could be personal or practical. On a personal level, the Model Code recognizes the possibility of influence because of a personal relationship:

> Rule 5.1-2 (c)… a lawyer must not: … appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer….

The premise underlying the rule is that a judicial officer may regard more favourably an argument made by a person with whom they have a close relationship, whether as a former colleague or a business associate. Note that the rule contemplates the possibility of actual or perceived impartiality. While there may not be an actual effect on impartiality, an unsuccessful litigant, or even a member of the public reviewing the court's decision may believe that the judge was biased in favour the former judge.

It may be that any advantage a former judge might enjoy is the result of insights they have into how best to present a case to their former colleagues. Judges, of course, seek to overlook presentation, and get to the substance of a matter, but a former judge will have had an opportunity to observe, to consult, and to discuss with other judges matters closed to other

lawyers. A losing litigant—still convinced of the merits of their case — may see the outcome as a result of some “secret” knowledge or insight the former judge gained from their time on the bench.

The Standing Committee is interested in exploring whether these concerns and possible perceptions could diminish the respect of the profession and public for the courts to an extent that a former judge should never appear, or appear only in certain courts, or only after a suitable time has elapsed.

What Does “Appearance” Mean?

The foregoing considers “appearance” in the sense of actual attendance in the courtroom, examining, cross-examining, and making submissions. Former judges, however, can and do assist litigants in other ways and without an actual appearance. Such assistance could be general advice on how best to present a case, what arguments may succeed, and, of course, analysis of the case-law from that former judge’s court. It may include specific advice on the merits or otherwise of a client’s case.

A former judge can provide this background work anonymously, refraining not only from appearing, but also from attaching their name to pleadings, factums, or written argument. Such anonymity does preclude the possibility of influence, but would still be helpful to the private client. Such anonymity is not possible in public statements, and that issue is considered below.

Neither the Model Code nor the provincial and territorial rules of professional conduct define “appearance” although actual attendance in court as counsel is implied. Less clear is whether “appearance” includes making written representations or submissions. The rules also do not address the sort of behind the scenes work discussed above. Good regulatory practice suggests that greater clarity, including a clear definition of “appearance”, might be desirable.

The New Jersey Guidelines provide one example:

> Guideline 2. A retired judge may not serve as an attorney in any contested matter in any court in the State of New Jersey. This prohibition includes participating in the actual conduct of any proceeding before the court, appearing at counsel table during the course of a court proceeding, and serving therein either as associate counsel or counsel of record.
>
> Office work in connection with pending or proposed litigation is not prohibited. Thus, pleadings may be drafted, interrogatories framed and answered, and briefs, motions and other papers may be prepared. It is not permissible, however, for the retired judge’s name to appear on any papers….

It is also worth considering whether anonymous work by former judges in support of appearances by others carries with it the same mischief that commentators identify in connection with actual appearances. The New Jersey Guideline suggests it doesn’t, as evidenced by the clear distinction made between anonymous work and work to which the name of a former judge would be attached. It would seem that the concerns with public perception are less likely to arise when former judges are working in the background. The concerns with possible deferential treatement that arise when a former judge appears in court would also appear not to be present. In any event, short of refusing a return to practice, there would appear to be no practical way of regulating such background work

Permitting Appearance in Exceptional Circumstances

There is a further issue remaining with regard to appearing in court and that is the appearance that all law societies allow in "exceptional circumstances." No jurisdiction specifies what might constitute "exceptional circumstances" and determinations are made on a case-by-case basis. Given the nature of exceptions, it may be practically impossible to provide an exhaustive list, but it is worth considering whether some useful guidance could be provided..

The Rules of Nunavut and the Barreau, refer to the possibility that attendance in court by a former judge could bring the administration of justice into disrepute. This suggests that, at minimum, the effect on the administration of justice is a relevant consideration. The Standing Committee has identified very short tenure on the bench (measured in weeks or months) as another possible factor. The fact that a former judge sat in a remote location and had very little interaction with their colleagues might also weigh in favour of granting an exception.

The Standing Committee would welcome input on these possible factors and others. In addition input is invited on whether, as is the case in Alberta, the rules ought to expressly recognize the possibility that an exception may be permitted "with or without conditions."

2. Seeking Post-Judicial Employment

Commentators have raised a variety of concerns about the negotiation of post-judicial employment. The American Bar Association rules prohibit a judge from negotiating employment with any parties to a proceeding before the judge (Rule 1.12(b)), presumably to guard against the potential for a conflict of interest. It seems clear that there may be inherent harm in such discussions while the judge is still sitting, as derogating from the judge's independence and impartiality. Some commentators have also suggested the public's perception of and confidence in a sitting judge may be adversely affected where the judge has indicated that they are seeking post-judicial employment even if they are not negotiating directly with any potential employer.

One response to these concerns might be to prohibit lawyers from discussing post-judicial employment with a sitting judge. The law societies do have regulatory authority over lawyers in that regard, but if it is possible to allay the concerns by the addition appropriate safeguards a blanket prohibition might not be necessary. An obvious safeguard would be for no lawyer from a prospective firm to appear before the judge during the discussions (and certainly not after an arrangement has been made.) At the same time, the judge could recuse themselves from cases involving a prospective firm.

The lawyer participating in such post-judicial employment discussions may also have a serious conflict of interest. Rule 5.1-2 (c) of the Model Code says that a lawyer must not appear before a judicial officer when that lawyer has "business or personal relationships … that give rise to … pressure, influence or inducement affecting the impartiality of the [judicial] officer." Clearly, employment arrangements, and the discussion of them would be considered business or personal relationships.

There may, however, be difficulties in implementing a safeguard such as recusal. If a judge is speaking to several firms, the recusals may become substantial and draw the profession's and the public's attention to the discussions. In addition, these safeguards would not address the

issue of possible loss of public confidence engendered by a judge simply letting it be known that they are looking at post-judicial employment.

This issue is, of course, also one for the Canadian Judicial Council, and the Standing Committee is seeking its views on the matter.

3. Marketing the Skills and Experience of a Former Judge

It has been suggested that the rules on advertising might also be relevant to post-judicial conduct. Although they make no specific reference to former judges, the Model Code and the provincial and territorial rules generally prohibit advertising that is misleading. The commentary following the rule in the Model Code cites "suggesting qualitative superiority to other lawyers" and "raising expectations unjustifiably" as examples of advertising that would be misleading and would thus contravene the rule. Some commentators argue that references to judicial experience might create unreasonable expectations and suggest that former judges must exercise caution in advertising their experience as a judge. In the same vein, some opinions on the comparable ABA rule have suggested that even a reference to being a former judge might suggest special influence.

The existing advertising rules may be sufficient to address any potential mischief associated with advertising by former judges who return to legal practice, but it may also be worth considering whether additional guidance would be useful.

4. Comment on Case Law by a Former Judge

Sitting judges generally avoid public comment on particular cases, other than by following or distinguishing them in their own judgments. On the rare occasions judges do comment publicly, they keep their comments general ("ground-breaking" or "important consideration of solicitor-client privilege") and avoid specific criticism or endorsement. Should a former judge be required to follow the same convention?

The law professors who signed the March 21, 2011 letter to the Federation (Appendix "A") expressed concern about the "propriety of a former judge providing legal advice about a case in which he or she participated .. [and] commenting on the work of the court on which the judge formerly sat."

A significant concern here is that the profession and public may not draw a distinction between comments made by sitting or former judges. In both cases, the gravitas of the comments derives from its association with the judiciary. If the comment is controversial or attracts considerable media attention (good or bad) it may diminish the public's view of judges and the courts. The best way to prevent this unfortunate result may be for former judges, in their public comments on cases, to continue the high level approach they followed while sitting and avoid "entering the fray."

The above covers public comment, but a former judge may be called upon, in their firm's representation of a particular client, to comment privately, and perhaps even criticize a decision that is adverse to the client's interest.

Former judges, however, should be very cautious when they comment on cases from their former court, particularly cases they decided. The temptation may be to support the correctness of such decisions, and that may not be in the client's best interests. Criticizing such judgments, even in a private opinion may raise the same concerns about undermining public confidence in the judiciary as is discussed above, particularly as clients may "go public" with the advice they receive.

Despite the above, it may be possible for a former judge to comment on specific cases — and qualification to do so can be assumed — without bringing themselves or their former court into disrepute. If so, can appropriate guidelines be set out?

The question of setting out guidelines highlights an over-riding question of how regulation of former judges is best effected. First, however, it is important to note that when a judge accepts an appointment to the bench, they are taking on a significant responsibility to uphold the proper administration of justice, and this professional obligation continues after their retirement whether or not they return to practice. If a former judge does return to practice they become subject to regulation by a law society, but there are many circumstances in which their conduct will also be guided by the ethical principles judges must meet. For example, both the law societies and the Canadian Judicial Council would likely be concerned about a judge commenting on a case based on their knowledge of the generally confidential "inner workings" of their former court.

5. Former Judges Working Pro Bono

The Model Code contains provisions intended to increase access to justice and enable pro bono work: for example, the Short Term Summary Legal Services rules 3.4-2A to 2D.

These rules, of course, cover former judges returning to practice law. In general the ethical standard lawyers must meet in working pro bono are the same as for paid work, and again this will apply to former judges. The concerns discussed above about judges appearing in their former courts are the same, whether the appearance is paid or pro bono—the issue is the appearance itself. The fact that counsel is unpaid does not diminish the appearance of bias or the potential for conflict of interest.

Pro bono work is, however, important in facilitating access to justice and former judges can make an important contribution to this valuable goal. In the circumstances is there merit in taking a more permissive approach to the appearance in court of a former judge when acting pro bono?

6. Part-time Judges Judicial Officers

Although federally appointed judges are precluded from engaging in the practice of law part-time judges do exist in some jurisdictions. Such judicial officers present unique issues as they may well be actively engaged in legal practice while sitting on the bench. In the United States, where part-time judges appear to be more common than they are in Canada, there are no prohibitions on such judges appearing as advocates in the courts in which they sit. And the interest of a part-time judge in practicing is both obvious and understandable. Yet the concerns that have been raised about former judges appearing in court - apprehension of bias and public confidence in the legal system for example - would appear to be no less present in the case of a

former part-time judge. In the case of court appearance by sitting part-time judges, the concerns might even be amplified.

The current rules do not distinguish between full-time and part-time former judges and are silent on sitting part-time judges appearing in court. In light of the concerns discussed in this paper the failure to address the circumstances of part-time sitting judges would appear to be a significant gap. Reconciling the reasonable expectations of such judges to be able to continue in legal practice with the need for a justice system that is, and is seen to be, fair and impartial presents significant challenges. The Standing Committee is particularly interested in feedback on this issue.

REQUEST FOR INPUT

The issues related to post-judicial return to legal practice are complex and involve a variety of stakeholders and interests. Given the concerns expressed by members of the judiciary and the academic community, the Standing Committee has decided that a review of the Model Code rules is warranted. The feedback received in response to this discussion paper will assist the Standing Committee in determining whether any amendments to the rules in the Model Code are necessary.

The Standing Committee welcomes any substantive discussion of any aspect of the matters that are the subject of this consultation paper. The following questions are intended to assist in preparing responses to the overall issues.

DISCUSSION QUESTIONS

The Return to Practice of a Retired Judge

1. Should a former judge be eligible for return to practice?

2. Should a former judge ever appear in court and, if so, under what conditions?

3. In particular, if a former judge should be permitted to appear in court after a time limit, what is the appropriate length of time?

4. Should there be restrictions, by definition, or otherwise, on what an “appearance in court” is?

5. If a prohibition or conditions are in place regarding appearing in court, should such prohibition or conditions be set aside in exceptional circumstances?

Discussion of Post-Judicial Employment

6. When should a law firm and a judge be permitted to discuss post-judicial employment?

Marketing the Skills and Experience of a Former Judge

7. If the current Model Code Rule 4.2-1 sufficient to govern marketing of former judges’ skills and experience, or is a specific commentary required?

Comment on Case Law by a Former Judge

8. Should former judges be permitted to comment on case law from their former court?

Former Judges Working Pro Bono

9. Should different rules apply if the retired judge works pro bono?

Part-Time Judges and Other Judicial Officers

10. Should part-time judges and other judicial officers be prohibited from practicing law while a sitting judge?

11. If not, should restrictions on their practice rights be considered, including, for example, a prohibition on appearing in the court of which they are a members?

12. In any event, should further consideration be given to guidance for part-time judges?

Mr. Ronald J. MacDonald, Q.C.
President
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

March 21, 2011

Dear Mr. MacDonald:

We are law professors committed to the teaching of professionalism and the ethics of the legal profession, including judicial ethics. Attached to this letter you will find a letter to Chief Justice McLachlin as Chair of the Canadian Judicial Council encouraging the Council to develop guidelines to assist judges in issues that arise as they exit judicial office. We believe that such guidelines are necessary to ensure public confidence in the independence of the judiciary and the impartiality of adjudication which are cornerstones of the rule of law in Canada.

We are writing to you as President of the Federation of Law Societies of Canada to encourage the Federation to consider adopting rules to govern the conduct of former judges who return to the practice of law as part of the Federation's Model Code of Conduct.

At present, very few Law Societies have rules that specifically address the situation of retired judges returning to practice. At one point, the Law Society of British Columbia had a rule that provided for a "cooling off period" of several years during which a retired judge could not appear as counsel before the court in which the judge used to be a member, or any court below. This is but one example of the sorts of rules that Law Societies should consider.

We believe that demographic and cultural changes in the judiciary over the past decade necessitate the consideration of such rules. It used to be that when judges retired at 75 or before, they enjoyed a well-deserved quiet retirement at the end of a productive legal career. However, as Canadians are living longer and enjoying more active and productive working lives, for many the judicial career has become the second career (the practice of law being the first) and many embark on a productive third career in law, public policy or business after leaving the bench. Codes of Conduct do not address this new reality.

In October 2010, members of the Canadian Association of Legal Ethics (CALE) joined with the National Judicial Institute to bring together over 100 federally-appointed judges, law professors and members of the bar to discuss selected judicial ethics issues. One of the sessions was entitled "Judicial Independence and Judicial Ethics: Ethical Issues over the Career Cycle of the Judge" and a panel discussion was specifically devoted to issues that arise when a judge retires from the bench.

In this session and over the course of the last few years, numerous issues have arisen regarding judges' actions when exiting the job and after retiring from the bench. Such issues include the propriety of a former judge providing legal advice about a case in which he or she participated, judges stepping down to run for political office, commenting on the work of the court on which the judge formerly sat, and a judge appearing as counsel before former colleagues. These are difficult and controversial issues that are in need of serious consideration.

Many of us have worked collaboratively with the Federation in the past and we stand ready to continue to do so on this issue.

Sincerely yours,

Richard F. Devlin
Professor, Schulich School of Law
University Research Professor, Dalhousie University

Adam M. Dodek
Associate Professor
Faculty of Law (Common Law Section)
University of Ottawa

Alice Woolley
Associate Professor
Faculty of Law
University of Calgary

Annalise Acorn
Lawlor Professor of Law and Ethics
Faculty of Law
University of Alberta

David Asper
Assistant Professor
Faculty of Law
University of Manitoba

Janine Benedet
Associate Professor
Faculty of Law
University of British Columbia

David Blaikie
Assistant Professor
Schulich School of Law
Dalhousie University

Jocelyn Downie
Professor, Schulich School of Law
Canada Research Chair
Dalhousie University

Trevor C. W. Farrow
Associate Professor
Director, Clinical Legal Education
Osgoode Hall Law School

Aline Grenon
Professor
Faculty of Law (Common Law Section)
University of Ottawa

Allan C. Hutchinson
Distinguished Research Professor
Osgoode Hall Law School
York University

Jasminka Kaladjzic
Assistant Professor
Faculty of Law
University of Windsor

William C.V. Johnson
Adjunct Professor of Law
Faculty of Law (Common Law Section)
University of Ottawa

Lorraine Lafferty
Assistant Professor
Schulich School of Law
Dalhousie University

John M. Law
Professor
Faculty of Law
University of Alberta

Anne McGillivray
Professor
Faculty of Law
University of Manitoba

Tammy Moore
Faculty of Law
University of New Brunswick

Chantal Morton
Adjunct Professor, 2010-11
Ethical Lawyering in a Global Community
Osgoode Hall Law School
York University

Marina Pavlovic
Assistant Professor
Faculty of Law (Common Law Section)
University of Ottawa

Stephen G.A. Pitel
Associate Professor and Goodmans LLP Faculty Fellow in Legal Ethics
Faculty of Law
University of Western Ontario

Annie Rochette
Professeure agrégée, Département des sciences juridiques
Université du Québec à Montréal

Chris Sprysak
Associate Professor of Law
Faculty of Law
University of Alberta

David Tanovich
Professor
Faculty of Law
University of Windsor

David Wiseman
Assistant Professor
Faculty of Law (Common Law Section)
University of Ottawa

Ellen Zweibel
Full Professor
Faculty of Law (Common Law Section)
University of Ottawa

c. The Rt. Hon. Beverley McLachlin, Chief Justice of Canada and Chair, Canadian Judicial Council
Mr. Rod Snow, President, Canadian Bar Association
Mr. Jonathan Herman, CEO, Federation of Law Societies of Canada

Province/Territory	Source	Relevant Rules/Regulations
Alberta	*The Rules of the Law Society of Alberta*	**Reinstatement of Retired Judges and Former Members** **116 (1)** Notwithstanding any other provision in these Rules, upon retirement from holding office as a judge of any of the courts described in section 33 of the Act, a person who was, immediately prior to that person's appointment, a member of the Society shall, without application or payment of any kind, including an annual levy: (a) be reinstated as an inactive member of the Society; and (b) be entitled to receive from the Society all notices or publications to which an inactive member whose election has been approved under Rule 69(2) is entitled. **(2)** A person referred to in subrule (1) may apply to become an active member in accordance with subrules (3) to (9) and Rules 117 and 118. **(3)** A former member who is not a disbarred person may apply to the Executive Director for reinstatement as a member of the Society. **(4)** An application under this Rule shall be in: (a) Form 4-2, where the applicant is a person referred to in subrule (1); (b) Form 4-3, in any other case. **(5)** An application under this Rule must be accompanied by: (a) payment of any amounts owing by the applicant to

		the Society, other than the amounts that must accompany the application by reason of the instructions for the completion of Form 4-2 or 4-3, as the case may be; and (b) if the applicant had been a bankrupt, payment of the amount of any debt owed by the applicant to the Society before the bankruptcy and which was extinguished as a result of the bankruptcy proceedings. **(6)** An application for reinstatement under this Rule may be accompanied by an election to become an inactive member, or an inactive member (retired) where appropriate, on being reinstated. **(7)** Subject to subrule (6), the Executive Director shall grant an application for reinstatement under this Rule if the Executive Director is satisfied that (a) the applicant has complied with the requirements in the instructions for the completion of Form 4-2 or 4-3, as the case may be, and (b) the applicant has complied with all preconditions to the applicant's reinstatement imposed by the Credentials and Education Committee, the Conduct Committee or the Practice Review Committee pursuant to Rule 118. **(8)** The Executive Director shall not grant an application for reinstatement under this Rule where the application was referred to the Credentials and Education Committee, the Conduct Committee or the Practice Review Committee under Rule 118(1) and the Committee informs the Executive Director that it objects to the granting of the application, unless the Benchers, on appeal from the Committee, approve the granting of the application.

		(9) If an application under this Rule is refused, all amounts paid in connection with the application, except the application fee, shall be refunded. **Special Provisions for former Judges and Masters in Chambers** **117** Where an application is made by a former judge referred to in Rule 116(2), or by a former master in chambers under Rule 115 or 116(4)(b), the following provisions apply: (a) the Executive Director shall not refer the application to the Credentials and Education Committee pursuant to Rule 118(1)(a) unless more than 3 years has elapsed between the date on which the applicant ceased to be a judge or master in chambers and the date on which the application is received by the Executive Director; and (b) if the applicant is reinstated as a member, it is a condition of the reinstatement that the member must not appear in chambers or in any court in Alberta as a barrister and solicitor without first obtaining the approval of the Benchers which may be given with or without conditions.
British Columbia	*Law Society Rules 2015*	**Reinstatement of former judge or master** **2-87** (1) Subject to subrules (2) and (3), a reinstated lawyer who was a judge or a master must restrict his or her practice of law as follows: (a) a former judge of a federally appointed court in British Columbia, the Supreme Court of Canada, the

		Federal Court of Appeal or the Federal Court must not appear as counsel in any court in British Columbia without first obtaining the approval of the Credentials Committee; (b) a former judge of the Provincial Court of British Columbia must not appear as counsel in that Court for 3 years after ceasing to be a judge; (c) a former master of the Supreme Court of British Columbia must not appear as counsel before a master, a registrar, a district registrar or a deputy district registrar of the Supreme Court of British Columbia for 3 years after ceasing to be a master. (2) The Credentials Committee may impose conditions or limitations respecting the practice of a former judge when giving approval for that lawyer to appear as counsel under subrule (1) (a). (3) The Credentials Committee may at any time relieve a lawyer of a practice restriction referred to in subrule (1) and may impose conditions or limitations respecting the practice of the lawyer concerned. (4) A lawyer who has served as a judge or master in any court must not use any judicial title or otherwise allude to the lawyer's former status in any marketing activity. (5) Subrule (4) does not preclude a lawyer who has served as a judge or master from referring to the lawyer's former status in (a) a public announcement that the lawyer has resumed the practice of law or joined a law firm, (b) a public speaking engagement or publication that does not promote the lawyer's practice or firm, (c) seeking employment, partnership or appointment

		other than the promotion of the lawyer's practice or firm, or (d) informal conversation or correspondence. (6) For the purpose of this rule, it is not the promotion of a lawyer's practice or firm to provide, on request, a curriculum vitae or other statement of experience that refers to the lawyer's former status as a judge or master.
Manitoba	*Rules of the Law Society of Manitoba*	**Former superior court judge** **5-28.3** Subject to rule 5-28.7, a former judge of a superior court in Manitoba who is granted the privilege of resuming the active practice of law must not appear as counsel in the court of which he or she was a member or in any court inferior to that court, for a period of three years after he or she ceases to be a judge of that court. **Former provincial judge** **5-28.4** Subject to rule 5-28.7, a former judge of the Provincial Court in Manitoba who is granted the privilege of resuming the active practice of law must not appear as counsel in that court for a period of three years after he or she ceases to be a judge of that court. **Part-time judge** **5-28.5** A member who is a part-time judge of the Provincial Court in Manitoba must not appear as counsel in the Provincial Court. **Former part-time judge** **5-28.6** Subject to rule 5-28.7, a former part-time judge of

		the Provincial Court in Manitoba must not appear as counsel in the Provincial Court for a period of one year after he or she ceases to be a part- time judge of that court. **Application to chief executive officer** **5-28.7** A former judge may apply to the chief executive officer to reduce the time period during which the judge is prohibited from appearing as counsel in court. The chief executive officer may approve an application only in exceptional circumstances and may restrict the approval as he or she sees fit.
New Brunswick	General Rules under the *Law Society Act, 1996*	**PRACTICE OF LAW BY FORMER JUDGES** **76** A former judge who is reinstated as a practising member of the Society shall not for a period of three years, unless Council approves on the basis of exceptional circumstances, appear as a counsel before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction.
Nova Scotia	Regulations made pursuant to the *Legal Profession Act,* SNS 2004, c 28	**5.4 Reinstatement of Former Judges** **5.4.1** A person who has been appointed to a judicial office, but is no longer in that office, may apply to be reinstated to membership in the Society in any category of membership except an articled clerk. **Approval by Executive Director** **5.4.2** An application under this subregulation may be approved by the Executive Director.

		Additional Information **5.4.3** The Executive Director may require the applicant to file such additional information as the Executive Director considers appropriate. **Approval of Reinstatement to Membership** **5.4.4** The Executive Director may approve the reinstatement to membership, with or without terms, and stipulate the effective date of reinstatement. **5.4.5** In the event that the approval is with terms the Executive Director shall provide written reasons for those terms and shall inform the applicant of the internal review process. **Effective Date** **5.4.5** A change in category of membership pursuant to this subregulation is effective on the date set by the Executive Director or the Committee. **Letterhead** **7.2.10** The letterhead of a lawyer or law firm shall not (a) include the name of a judge as being a predecessor or former member of the firm; or (b) list a person who is not a practising lawyer except a i) person who is retired from practice or a deceased member of the Society so designated, or

		ii) for interjurisdictional law firms, a person who is a lawyer in a foreign jurisdiction, designated as such. **[51D]**
Ontario	*Rules of Professional Conduct*	**Definitions** **Application to Supreme court of Canada, Court of Appeal, and Superior Court Judges** **7.7-1.1** Rule 7.7-1.2 applies to a lawyer who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, the Federal Court of Appeal, or the Superior Court of Justice and who (a) has retired, resigned, or been removed from the Bench; and (b) has returned to practice. **Appearance as Counsel or Advocate** **7.7-1.2** A lawyer to whom this Rule applies shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a panel of the Hearing Division of the Law Society Tribunal. This approval may only be granted in exceptional circumstances and may be restricted as the panel sees fit **Application to other Judges** **7.7-1.3** Rule 7.7-1.4, applies to a lawyer who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, or the Ontario Court of Justice and who

		(a) who has retired, resigned, or been removed from the Bench; and (b) who has returned to practice **Appearance as Counsel or Advocate** **7.7-1.4** A lawyer to whom this rule applies shall not appear as counsel or advocate (a) before the court on which he or she served as a judge or before any lower court; or (b) before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction for a period of three years from the date of their retirement, resignation, or removal, without the express approval of a panel of the Hearing Division of the Law Society Tribunal, which approval may only be granted in exceptional circumstances and may be restricted as the panel sees fit.
Prince Edward Island	*The Regulations of the Law Society of Prince Edward Island*	**<u>Firm Name</u>** 89. (2) It is improper to include the name of a Judge as being a predecessor or former member of a firm or to include the Judge's name in the firm name.
Quebec	*Code of Professional Conduct of Lawyers*	142. A lawyer who has ceased to hold the office of judge or exercise an adjudicative function must not plead before the tribunal or adjudicative body of which he was a member if the situation is likely to bring the administration of justice into disrepute.

Saskatchewan	*Rules of the Law Society of Saskatchewan*	**Reinstatement or Change in Membership Category** 175. (4) An applicant under this rule who: (a) was a judge of the Supreme Court of Canada, the Federal Court of Canada, the Court of Appeal of Saskatchewan, the Saskatchewan Court of Queen's Bench, or the Provincial Court of Saskatchewan, shall give a written undertaking not to appear as counsel in a Court in the Province for 3 years after ceasing to be a judge; or (b) served in an adjudicative capacity on an administrative tribunal shall give a written undertaking not to appear as counsel before that tribunal for 3 years after ceasing to be a member of that tribunal.
Northwest Territories	*Rules of the Law Society of the Northwest Territories*	**APPOINTMENT TO THE BENCH AND REINSTATEMENT AS A MEMBER** **86. (1)** A member who is appointed as a judge of the Supreme Court of Canada, the Federal Court of Canada, the Supreme Court, the Territorial Court or a superior, district, county, provincial or territorial court of any other province or territory automatically ceases to be a member on such appointment. **(2)** A former judge referred to in subrule (1) who again becomes a member may not appear in a court in the Northwest Territories without first obtaining the approval of the Executive.

Nunavut	*Rules of the Law Society of Nunavut*	**APPOINTMENT TO THE BENCH AND REINSTATEMENT AS A MEMBER** **75.** (1) A member who is appointed as a judge of the Supreme Court of Canada, the Federal Court of Canada, the Nunavut Court of Justice, or a superior, district, county, provincial or territorial court of any other province or territory automatically ceases to be a member on such appointment. (2) When a former judge referred to in subsection (1) re-applies for membership in the Society, he or she shall not appear in a court in Nunavut without first obtaining the approval of the Executive.
Yukon	*Rules of the Law Society of Yukon*	**151.1** (4) The Executive may impose conditions respecting the practice of a former Judge when giving approval for that member to appear as Counsel. **199.** It shall be improper for a member who was formerly a judge or to refer to the fact that he or she was formerly a judge in any advertisement after reinstatement as a member of the Society. **200.** (4) The firm name or letterhead of a firm may not include the name of a person who has become a judge.