THE CANADIAN BAR ASSOCIATION
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September 20, 2016

Via email: FWilson@flsc.ca

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

Attention: Frederica Wilson

Dear Mr. Hume:

Re: Post-Judicial Return to Practice

I am writing on behalf of the Canadian Bar Association's Ethics and Professional Responsibility Committee (CBA Ethics Committee) in response to your request for feedback on the Post-Judicial Return to Practice Discussion Paper prepared by the Federation of Law Societies of Canada Standing Committee on the Model Code of Professional Conduct (FLSC Standing Committee). We appreciate that this is a pre-consultation process. The views below are those of the CBA Ethics Committee. Should the FLSC propose amendments to the Model Code, the CBA would canvass a broader base of members on this issue.

We have provided some introductory remarks, followed by comments on the specific questions raised by the Discussion Paper.

Introduction

The return of former judges to practice is a matter of concern to courts and lawyers around the world. It is and has been controversial in Ireland, Australia, Malaya, India and elsewhere. As was evident during the lively session held at this year's joint CBA-FLSC Ethics Forum, discussions of this topic are difficult because they center on the effects of post-judicial practice on the administration of justice and the independence of the courts. However, these effects are only presumed to exist. There does not seem to be any empirical data to suggest that there is, in fact, demonstrable harm to either the administration of justice or judicial independence. This is not surprising as it would be necessary to seek data from sitting judges, an act in and of itself that may be said to interfere with the independence of the courts. Consequently, current discussion of the issue relies on the specificities of our legal tradition and judicial system, and our anecdotal experience in recent decades with an increasing number of judges returning to practice.

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Question 1 – Should a former judge be eligible to return to practice?

No Canadian jurisdiction "prohibits the return to practice of the retired judge." Many judges have returned to practice, as even a cursory review of the websites of major law firms reveals. It is probably too late to even suggest that there be such a prohibition. Indeed, the propriety of such a ban would be deeply suspect.

No person, including a former judge, should be prevented from seeking employment unless there are very strong and principled reasons for doing so. The CBA Ethics Committee suggests that no such reasons exist to support a total ban on post-judicial return to practice.

The CBA Ethics Committee believes that the principal issue is not whether former judges should be allowed to return to practice, but rather what aspects of post-judicial practice should be regulated and how. If the FLSC Standing Committee was to consider regulation, we would recommend some consideration be given to whether the new rules should consider when and to whom they would apply.

Questions 2-5 – Appearance in Court by Former Judges

Appearance in court by former judges is the topic most clearly rooted in perception. A former judge is said to have an advantage when appearing before a court of which he or she was a member. Some argue that the former judge may have better insight to pitch "an argument to better its reception by the court." Admittedly, these insights may not be confined to former judges, as counsel with long experience before a particular court may get to know "its cast of mind" and "internal dynamics." However, some suggest a former judge would have had more opportunity for direct and personal observation of the court, and hence, more accurate and reliable insights.

Despite the intuitive nature of these arguments and the questionable value of alleged judicial insights, the perception that a former judge has an advantage over other counsel is shared by many commentators. Typically, regulators seek to manage the perceived advantage through rules that prohibit appearances in court by former judges for a range of three to five years. Some would suggest this merely postpones the problem of public perception. Certainly, in the absence of empirical data, the selection of an appropriate time period is, in essence, arbitrary.

There is no way of knowing if a five year prohibition is better than a three year ban, or vice versa. Why reflect any particular time period if there is no way of determining an optimum length of time to prohibit appearances by former judges? The CBA Ethics Committee considers that it would not be advisable to eliminate the time limited prohibition entirely. The values which it seeks to protect are too important to expose to erosion for the sake of "seeing what would happen." We think public confidence would be enhanced, albeit marginally, if the ban was extended to five years.

If the premise is that the arguments of a former judge may be more influential than other counsel, there can be no justification for confining "appearances" to personal attendance in court. Written pleadings or submissions of all types made by a former judge must be considered to be appearances. In other words, when a rule speaks of "appearances," the term must be defined broadly.

A more difficult question is presented by those situations in which the former judge's name does not appear on written pleadings or submissions he or she has authored or directed. Should the time limited prohibition extend to such legal work? The CBA Ethics Committee believes that anonymous legal works should fall within the prohibition. While it would be difficult to enforce a prohibition covering such work, there is no reason why the prohibition would not be as effective as any other ethical rule. There is, however, a more practical difficulty: a large part of the employment of former judges would be severely curtailed by such a prohibition. Consequently, significant resistance could be expected.

The CBA Ethics Committee believes that there should be flexibility in any rule or prohibition to allow for exceptional circumstances. Although it would be impossible to define precisely, an effort should be made to provide some guidance on what might be considered to constitute exceptional circumstances.

Question 6 – Discussion of Post-Judicial Employment

The CBA Ethics Committee strongly believes that any discussion of post-judicial employment should only occur after a judge ceases to hold judicial office.

Question 7 – Marketing Skills of Former Judge

The CBA Ethics Committee submits that Model Code Rule 4.2-1 is not sufficient to govern marketing of the experience and skills of former judges; specific commentary is required. The commentary should make it clear that in marketing the skills of former judges, there should be no suggestion that former judges have a heightened ability to influence the courts.

Question 8 – Comment of Case Law

The CBA Ethics Committee believes that comments by a former judge on the meaning or scope of a case which he or she decided should not be permitted. You may also wish to consider whether this applies to judicial reviews or appeals from those decisions.

Question 9 – Pro Bono Work

The CBA Ethics Committee submits that pro bono work does not justify different rules.

Question 10-12 – Part-time Judges

The CBA Ethics Committee believes that a prohibition against part-time judges practicing law is not warranted. A prohibition may severely limit the number of lawyers who would be willing to serve as part-time judges to the detriment of the administration of justice. In England and Wales, the appointment of counsel to sit on cases as High Court Judges does not seem to have given rise to problems. Part-time judges may have less opportunity to form bonds or observe the dynamics of a court and its judges. The risk to the administration of justice may, therefore, be considerably less than that of a former judge who had served full-time.

Although an outright prohibition is not warranted, the CBA Ethics Committee recommends the establishment of rules that specifically address the ethical problems that may be encountered by a part-time judge.

Conclusion

The CBA Ethics Committee commends the FLSC Standing Committee for raising this timely and sensitive issue. We believe that amendments to the Model Code are warranted, and look forward to contributing to the FLSC Standing Committee's ongoing work on post-judicial practice.

Sincerely,

(original letter signed by Tina Head for Lisa Fong)

Lisa Fong
Chair, CBA Ethics Committee