



TAB 4

Report to Convocation January 28, 2016

Professional Regulation Committee

Committee Members

Malcolm Mercer (Chair)
Susan Richer (Vice-Chair)
Paul Schabas (Vice-Chair)
Robert Armstrong
Peter Beach
John Callaghan
Suzanne Clément
Cathy Corsetti
Janis Criger
Seymour Epstein
Robert Evans
Julian Falconer
Patrick Furlong
Carol Hartman
Jacqueline Horvat
Brian Lawrie
William C. McDowell
Ross Murray
Jan Richardson
Heather Ross

Purpose of Report: Decision and Information

**Prepared by the Policy Secretariat
(Margaret Drent (416-947-7613))**

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COMMITTEE PROCESS

1. The Professional Regulation Committee (“the Committee”) met on January 14, 2016. In attendance were Malcolm Mercer (Chair), Paul Schabas (Vice-Chair), Susan Richer (Vice-Chair), Suzanne Clément, Paul Cooper, Cathy Corsetti, Janis Criger, Seymour Epstein, Robert F. Evans, Carol Hartman,¹ Jacqueline Horvat, Brian Lawrie, Heather Ross (by telephone), and Jan Richardson (by telephone). Staff members attending were Lesley Cameron, James Varro, Naomi Bussin, Caterina Galati, and Margaret Drent.

¹ Ms. Hartman recused herself for the discussion regarding amendments to the Rules of Professional Conduct regarding retired judges.

FOR DECISION

RETIRED JUDGES RETURNING TO PRACTICE

MOTION

2. That Convocation approve the amendments to the Rules of Professional Conduct set out at [Tab 4.1.1](#) to:
 - a. amend Rules 7.7-1.1, 7.7-1.2, 7.7-1.3 and 7.7-1.4 to
 - i. provide that former judges of the Superior Court of Justice who decide to return to the practice of law are required to apply for approval to appear as counsel or advocate in any court, in chambers, or before an administrative board or tribunal;
 - ii. replace the phrase “committee of Convocation appointed for the purpose” with “panel of the Hearing Division of the Law Society Tribunal”;
 - b. amend Rule 7.6-1.1 to replace the phrase “committee of Convocation appointed for the purpose” with “panel of the Hearing Division of the Law Society Tribunal”.¹

Nature of the Issue

3. Under current Rule 7.7-1.2 of the *Rules of Professional Conduct*, judges who previously served on the Supreme Court of Canada, Ontario Court of Appeal, or Federal Court of Appeal who have retired, resigned, or been removed from the Bench, and have returned to practice are not permitted to appear any court, or in chambers, or any administrative board or tribunal without the express approval of a committee of Convocation appointed for that purpose. This approval may only be granted in exceptional circumstances.
4. Under current Rule 7.7-1.4, retired judges who previously served on the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario (Trial Division), a County or District Court, the Ontario Court of Justice, and the Superior Court of Justice are permitted to appear in Court after a three year “cooling off” period. Those who wish to appear in Court before the end of the three year period must apply to a committee of Convocation or approval, also requiring exceptional circumstances.

¹ A version of the Rules with changes incorporated is shown at [Tab 4.1.2](#).

5. A request has been made to the Law Society for an amendment of current Rule 7.7-1.2 by Associate Chief Justice Frank Marrocco on behalf of the Senior Executive of the Superior Court of Justice.
6. The following issues about the institutional integrity of the Court have been considered in respect of the proposed amendment:
 - a. Judges who have served on the court during the same period as a retired judge have indicated that they are not comfortable presiding over matters in which a retired judge is counsel. In some cases, judges have recused themselves when a former judge appears in their court. Judges also indicated that they intended to recuse themselves in future in any matter in which a former judicial colleague appears as counsel. Newer judges, who did not serve on the court with a former judge, have expressed concerns that regardless of any professional or personal relationship with the judge the appearance of fairness and impartiality of a former judge appearing before them as counsel is very problematic. Newer judges have indicated that they are uncomfortable with raising the issue with a former judge who appears in their court and counsel may be reluctant to appear before a judge who is willing to preside in these circumstances.
 - b. Parties know, or can easily find out, that an opposing judge is a former judge of the court. This may create the impression that the presiding judge, and the court as a whole, cannot be impartial. Parties, and particularly self-represented litigants, may feel intimidated or hesitant to voice their concerns to the presiding judge. In one instance, opposing counsel referred to a retired judge who was appearing as counsel as “His Honour” when commenting on the former judge’s submission. In another instance, a former judge’s advertisements for his practice specifically referred to his former position as a Judge of the Superior Court, ostensibly as an advantage to his clients.
 - c. It is unseemly for a former judge to cite their own case law precedents during argument. A former judge’s clients’ interests may suffer if the former judge is required to argue a position that is contrary to their judicial decisions.
 - d. In some cases, there are delays resulting from judicial recusals, which have a negative impact on opposing parties and their counsel.
7. In summary, notwithstanding the three year “cooling off” period, court appearances by former Superior Court justices raise the following issues:
 - a. A former judicial colleague may feel that they have to recuse themselves when a retired Superior Court judge appears as counsel before them.
 - b. The appearance of fairness, or impartiality, when a former judge appears as counsel may be affected; and
 - c. The interests of a former judge’s clients may be detrimentally affected if a former judge is required to argue a position contrary to his or her judicial decisions.

8. Superior Court judges exercise appellate jurisdiction in all three areas of the court's work – criminal, civil and family. All judges on the Superior Court are also judges of the Divisional Court, which serves also serves as an appellate court, and are *ex-officio* judges of the Court of Appeal.

Proposed Amendments

9. The Committee agreed that amendments to address these issues are required. Rule 7.7-1.1 should be amended to provide that a lawyer who was formerly a judge of the Superior Court of Justice, in addition to a lawyer who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, and the Federal Court of Appeal, should be required to apply to a panel of the Hearing Division of the Law Society Tribunal to appear as counsel or advocate in any court.
10. The Committee also proposes to amend Rule 7.7-1.3 by removing the reference to “Superior Court of Justice”.
11. The issues described above, and other related matters, may also be of concern to the Ontario Court of Justice and to the Federal Court. The Committee plans to make inquiries of the Ontario Court of Justice and the Federal Court to invite comment on Rules 7.7-1.3 and 7.7-1.4 if the Courts wish to do so.

Other Related Amendments

12. As a matter of clarification, the Committee recommends the removal of references to a “committee of Convocation appointed for the purpose” in Rules 7.7-1.2 and 7.7-1.4 and their replacement by references to a “panel of the Hearing Division of the Law Society Tribunal”. The Hearing Panel has previously been designated by Convocation as the committee of Convocation for these purposes.² This change is also shown in the blackline at **Tab 4.1.1**.
13. The Committee also recommends the amendment of Rule 7.6-1.1 (Working With or Employing Unauthorized Persons). The phrase “committee of Convocation appointed for the purpose” should be replaced by “panel of the Hearing Division of the Law Society Tribunal”. This amendment also is shown in **Tab 4.1.1**.

² See Professional Regulation Committee Report to Convocation, May 25, 2007, online at http://www.lsuc.on.ca/media/convmay07_prc.pdf, paragraph 52-55.

SECTION 7.6 PREVENTING UNAUTHORIZED PRACTICE

(...)

Working With or Employing Unauthorized Persons

7.6-1.1 Without the express approval of a panel of the Hearing Division of the Law Society Tribunal~~committee of Convocation appointed for the purpose~~, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had their licence to practise law or to provide legal services revoked, has been suspended, has had their licence to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender their licence to practise law or to provide legal services, and has not had their licence restored.

(...)

SECTION 7.7 RETIRED JUDGES RETURNING TO PRACTICE

7.7-1 [FLSC – not in use]

Definitions

~~**7.7-1.1**~~ ~~In rule 7.7-1.2~~ “retired appellate judge” means a lawyer

(a) — who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, ~~or the Federal Court of Appeal;~~

[Amended—January 2009]

(b) — who has retired, resigned, or been removed from the Bench; and

(c) — who has returned to practice.

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 referred to in Rule 7.7-1, to whom this Rule applies~~ ~~1 A retired appellate judge~~ 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 ~~committee of Convocation appointed for the purpose~~. This approval may only be granted in exceptional circumstances and may be restricted as the ~~committee of Convocation~~ panel sees fit.

~~7.7-1.3 In rule 7.7-1.4, “retired judge” means a lawyer~~

~~(a) — 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, the Ontario Court of Justice, or the Superior Court of Justice;~~

~~[Amended — January 2009]~~

~~(b) — who has retired, resigned, or been removed from the Bench; and~~

~~(c) — who has returned to practice.~~

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 referred to in Rule 7.7-1.3~~ to whom this Rule applies ~~retired judge~~ shall not appear as counsel or advocate

(a) before the court on which he or she served as a judge ~~the judge served~~ or before any lower court; ~~and~~ 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 ~~committee of Convocation appointed for the purpose~~, which approval may only be granted in exceptional circumstances and may be restricted as the ~~committee of Convocation~~ panel sees fit.

[Amended – October 2014]

SECTION 7.6 PREVENTING UNAUTHORIZED PRACTICE

(...)

Working With or Employing Unauthorized Persons

7.6-1.1 Without the express approval of a **panel of the Hearing Division of the Law Society Tribunal**, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had their licence to practise law or to provide legal services revoked, has been suspended, has had their licence to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender their licence to practise law or to provide legal services, and has not had their licence restored.

SECTION 7.7 RETIRED JUDGES RETURNING TO PRACTICE

7.7-1 [FLSC – not in use]

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) has retired, resigned, or been removed from the Bench; and
- (b) 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.

FOR INFORMATION

LETTER TO THE ONTARIO SECURITIES COMMISSION

14. On January 15, 2016, the Law Society provided a response to the Ontario Securities Commission (OSC) request for comment regarding its proposed Policy 15-601 (Whistleblower Program), launched on October 28, 2015.
15. Information regarding the request for comment appears on the OSC website at http://www.osc.gov.on.ca/en/SecuritiesLaw_rule_20151028_15-601_rfc-whistleblower-program.htm. As indicated on the website, the purpose of the Program is to encourage individuals to report information on securities or derivatives-related misconduct. The Program provides that individuals who meet certain eligibility criteria and who voluntarily submit information to the OSC regarding a breach of Ontario securities law may be eligible for a financial incentive (whistleblower award) if it is determined that the information submitted was of meaningful assistance to staff in investigating the matter.
16. A specific question for comment was whether in-house counsel should be eligible for a whistleblower award.
17. Section 15 of the proposed policy provides that excluded from eligibility for a whistleblower award are
 - (c) those who obtained information in connection with providing legal services to, or conducting the legal representation of, a client that is, or that employs, the subject of the whistleblower submission, unless disclosure of that information would otherwise be permitted by a lawyer under applicable provincial or territorial barreau or law society rules.
18. The letter describes the Law Society's answer to the specific question, and concern about the possibility that lawyers, who are subject to the "up the ladder" reporting and confidentiality requirements in the Rules of Professional Conduct, may believe that they can "whistleblow" on their client, contrary to the Rules, and reap a reward. The letter also describes concerns arising from the Program regarding the lawyer's obligation to maintain solicitor-client privilege.
19. A copy of the letter is attached as **Tab 4.2.1**.



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January 15, 2016

Email: comments@osc.gov.on.ca

Ms Josée Turcotte
Secretary
Ontario Securities Commission
20 Queen Street West
22nd Floor
Toronto, ON M5H 3S8

Dear Ms. Turcotte,

Re: Proposed OSC Policy 15-601 - Whistleblower Program

The Law Society of Upper Canada appreciates the opportunity to comment on the proposed OSC Policy (“the Policy”) that would institute a Whistleblower Program, and in particular consultation question 1, which is “do you agree with in-house counsel being eligible for a whistleblower award? If not, why?”

The Law Society supports the purpose of the OSC’s Policy and its efforts to address serious securities misconduct in the marketplace. We also note that the Policy reflects an acknowledgement that solicitor and client privileged information and information obtained in course of the provision of legal advice requires specific treatment in the operation of the Policy. However, the Law Society does not support in-house counsel being eligible for a whistleblower award. Our view is that this would create uncertainty for lawyers in fulfilling obligations to maintain confidentiality of client information and protect privileged information, and may offend the lawyer’s duty of commitment to the client’s cause.

Our comments focus on three aspects that relate to the operation of the Policy and lawyer’s duties.

First, lawyer’s ethical rules include requirements to protect the confidentiality of client information, which is broadly defined. This concept is distinguished from solicitor and client privilege, and our *Rules of Professional Conduct* explain that the ethical rule is wider and applies without regard to the nature or source of the

information or the fact that others may share the knowledge. We find it hard to conceive when the confidentiality rules would permit disclosure of confidential client information in a whistleblowing context. The same is equally true with respect to information protected by solicitor-client privilege. It may be very difficult for a lawyer to disclose information under the Policy without offending the professional standard that obliges a lawyer to maintain the confidentiality of client information and without breaching solicitor-client privilege where applicable.

We note that the description of the Policy states

... the Proposed Policy adds that external counsel and in-house counsel may be considered eligible for a whistleblower award where disclosure of the information would otherwise be permitted by a lawyer under applicable provincial or territorial barreau or law society rules.

The Law Society believes that this concept would create a real risk of confusion and possible error, as the Policy would suggest that there could be circumstances where lawyers can ‘blow the whistle’ on their clients and receive a reward, when permitted by Law Society Rules. But as noted above, the Law Society Rules and solicitor-client privilege do not permit lawyers to ‘blow the whistle’ on their clients. In the context of an organizational client, the Rules provide that when the lawyer acting for the organization knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally, which may include serious securities misconduct, then the appropriate step would be reporting up the chain of command within the organization, and ultimately withdrawing from representation if necessary. However, the Rules do not ordinarily permit or require disclosure of confidential information to third parties, including the Ontario Securities Commission, in such circumstances.¹

The rule in Ontario is based on the Federation Model Code of Professional Conduct, and similar provisions are found in other Canadian jurisdictions. Information protected by solicitor-client privilege would not be properly disclosed in such circumstances unless one of the very limited exceptions to solicitor-client privilege applies which is difficult to imagine in this context. Second, including in-house counsel as individuals eligible for a whistleblower award as described may create a serious conflict between the lawyer’s self-interest and the lawyer’s duty of commitment to the client’s cause. The Supreme Court of Canada recently stated that lawyers’ duty of commitment to their clients’ causes is a principle of fundamental justice, and is essential to maintaining confidence in the integrity of the administration of justice.²

Third, the Law Society is of the view that if lawyers are to be included in the operation of the Policy, whistleblowing in breach of solicitor-client, litigation and other legal privileges should be expressly ineligible. We note that the definition of

¹ *Rules of Professional Conduct*, Rule 3.2-8 and Rules 3.3-1 to 3.3-4.

² *Attorney General of Canada v. Federation of Law Societies of Canada*, 2015 SCC 7, paragraph 91.

"original information" which would be the subject of the whistleblowing report only speaks to the exclusion of information that is obtained through a communication that is solicitor-client privileged.

We would be happy to meet with you to discuss these issues further and thank you for your consideration.

Yours truly,



Janet E. Minor
Treasurer