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Revising Canada's Ethical Rules for Judges Returning to Practice

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It has recently become more common for retired Canadian judges to return to the practice of law. This development raises an array of ethical considerations and potential threats to the integrity of the administration of justice. Although most codes of legal ethics contemplate the possibility of former judges returning to practice, the rules on this particular topic are dated, under-analyzed, and generally inadequate. This article reviews the Canadian ethical rules that specifically relate to former judges and identifies their shortcomings. In doing so, the authors consider, for comparative purposes, Canadian ethical rules directed at former public officers who return to practice and American rules directed at former judges. These rules have been developed in a different context, but involve many of the same issues and are more comprehensive. Following this analysis, the authors propose a series of new rules for judges who return to practice. These rules are not intended as the final word on the subject, but rather as starting points for further discussion of the issues involved. They illustrate the competing considerations with which law societies need to grapple as more judges return to practice.

Il est récemment devenu de plus en plus fréquent pour les juges canadiens à la retraite de retourner à la pratique du droit. Cette nouvelle situation soulève une gamme de considérations éthiques et pourrait représenter une menace pour l'intégrité de l'administration de la justice. Même si la plupart des codes d'éthique juridique envisagent la possibilité que d'anciens juges retournent à la pratique du droit, les règles à ce sujet sont désuètes, sous-analysées et généralement inadéquates. Les auteurs de cet article passent en revue les règles d'éthique canadiennes qui ont spécifiquement trait aux anciens juges et relèvent leurs lacunes. Ce faisant, les auteurs examinent, à des fins de comparaison, les règles d'éthique canadiennes auxquelles sont assujettis les fonctionnaires qui retournent au secteur privé et les règles américaines qui s'appliquent aux anciens juges. Ces règles ont été élaborées dans un contexte différent, mais elles portent sur beaucoup des mêmes enjeux, et elles sont plus exhaustives. À la suite de leur analyse, les auteurs proposent de nouvelles règles pour les juges qui retournent à la pratique du droit. Ces règles ne sont évidemment pas le texte définitif à ce sujet; plutôt, elles sont un point de départ d'une discussion approfondie des questions que soulève la situation. Elles reflètent les points contradictoires sur lesquels les barreaux doivent se pencher à mesure qu'augmente le nombre de juges qui retournent à la pratique du droit.

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Introduction

In the past, retiring judges actually retired. However, it has recently become increasingly common for retired judges to return to the practice of law. To take a prominent example, as of the summer of 2011, of the seven living former Supreme Court of Canada Justices, all are employed and five practice law.¹ This phenomenon is not confined to appellate judges: trial judges are also going back to practice.² Several factors likely contribute to this trend, including increased life expectancy, lucrative employment opportunities, and shifting cultural attitudes about retirement.

The return of former judges to the practice of law raises an array of ethical considerations and potential threats to the integrity of the administration of justice. Although most codes of legal ethics contemplate the possibility of former judges returning to practice, the rules on this particular topic are dated, under-analyzed, and generally inadequate. This article will review the Canadian rules that specifically relate to former judges and identify their inadequacies. In doing so, the article will consider, for comparative purposes, Canadian ethical rules directed at former public officers who return to practice and American rules directed at former judges. These rules have been developed in a different context, but involve many of the same issues and are more comprehensive. Following this analysis, the article proposes a series of new rules for judges who return to practice. They are not intended as the final word on the subject, but rather as starting points for further discussion of the issues involved. They illustrate the competing considerations with which law societies need to grapple as more judges return to practice.

I. Canadian ethical rules and former judges

1. Overview of Canadian ethical rules

Each province has a law society empowered by statute to regulate the conduct of lawyers.³ In addition, the Canadian Bar Association is a national organization that has produced a model code of conduct.⁴ The model code is not binding, but it influences the rules of provincial law societies, and in some cases it has been adopted as the governing code

1. Cristin Schmitz, "Law profs. call for rules to 'guide' ex-judges", *The Lawyers Weekly* (1 April 2011) online: The Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=1382>>.

2. See, e.g., Granger Legal, online: <<http://grangerlegal.ca>> (a law practice operated by a former judge of the Ontario Superior Court of Justice).

3. General references in this article to the provinces of Canada include the territories.

4. The Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa CBA, 2009 [CBA Code].

of conduct.⁵ In addition to a “code” of conduct, many law societies have “rules” governing lawyer conduct.⁶ Both are binding, and the distinction between these two types of documents is not consistent. To the extent that there is a pattern, the “rules” documents tend to be more procedural and administrative while the “code” documents tend to focus specifically on ethical issues.

More recently, the Federation of Law Societies of Canada (FLSC) has created a model code, the aim of which is to eliminate any significant differences between rules of conduct across Canada.⁷ The expectation is that most if not all provinces will adopt the FLSC Code, potentially with some minor variations, in the place of their current rules within the next few years. Manitoba has already adopted a new code virtually indistinguishable from the FLSC Code.⁸ Nova Scotia has adopted a new code of professional conduct, effective from 1 January 2012, that mirrors the FLSC Code.⁹ Alberta has also adopted a new code of conduct modelled on the FLSC Code, effective from 1 November 2011,¹⁰ although the new code modifies the FLSC Code extensively.¹¹

2. *Restrictions on appearances before courts*

Provincial law societies have rules directed at former judges.¹² None of these rules entirely prevents a judge from returning to practice. In nearly every province there is a restriction on the ability of a judge to appear in court as counsel. The exact meaning of “appearance” is not defined in any of the ethical rules. The term obviously includes physical presence as an

5. The law societies of the Northwest Territories, Nunavut, Prince Edward Island and Yukon use a version of the CBA Code.

6. See, e.g., Law Society of Alberta, *Act, Rules, Code & Guidelines*, online: LSA <http://www.lawsociety.ab.ca/lawyer_regulation/act_rules_code.aspx>.

7. Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: Federation of Law Societies of Canada, 2010) [FLSC Code].

8. Law Society of Manitoba, *Code of Professional Conduct* (Winnipeg: LSM, 2010) [Manitoba Code].

9. Nova Scotia Barristers' Society, *Code of Professional Conduct* (2011), online: NSBS <<http://www.nsbs.org>> [Nova Scotia Code].

10. Law Society of Alberta, *Code of Conduct* (2011), online: LSA <<http://www.lawsociety.ab.ca/files/regulations/Code-New.pdf>> [New Alberta Code].

11. Alberta retains most of its current rules but reorganizes them to fit the FLSC Code's numbering scheme. See Law Society of Alberta, *EBulletin* (24 June 2001) online: LSA <<http://www.lawsociety.ab.ca/publications/bulletins.aspx>> (“The code has a new format, but contains familiar content”).

12. The term “retired judge” is sometimes used in rule headings, although the rules themselves are broader in scope. See, e.g., FLSC Code, *supra* note 7 (“A judge who returns to practice after retiring, resigning or being removed from the bench”: R 6.07); Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2010 [LSUC Rules] (“a lawyer ... who has retired, resigned, or been removed from the Bench”: R 6.08(1)(b)).

advocate during the course of a proceeding, but it could be interpreted more broadly.

The restrictions on appearances generally are of two types, within which there are different variations. The first type of restrictions is court-specific: restrictions on appearing in particular courts. The second type of restrictions is situation-specific, applying if the former judge has some type of relationship with the court that would call the propriety of the proceedings into question. Several provinces have restrictions of both types.

As court-specific restrictions, the provinces that use the CBA Code,¹³ or have replicated identical provisions,¹⁴ prohibit a former judge from appearing before a court of equal or inferior jurisdiction to the one to which he or she was previously appointed unless the governing law society gives permission.¹⁵ Although Nunavut uses the CBA Code, a stricter version of the rule appears in the Rules of the Nunavut Law Society, which prevents former judges from appearing before any court without permission.¹⁶ The Rules of the Law Society of Alberta feature the same strict restriction, which is imposed as a condition of reinstatement on former judges.¹⁷ Nova Scotia's Legal Ethics Handbook contains the same restriction as the CBA Code,¹⁸ although in the new Nova Scotia Code the restriction only lasts three years from the date of retirement.¹⁹ The FLSC Code, Manitoba Code, and New Brunswick Code of Professional Conduct feature the same time-

13. Unless otherwise noted, this includes the Northwest Territories, Nunavut, Prince Edward Island, and Yukon. See Law Society of the Northwest Territories, *Policy Directives* (February 2010), online: LSNT <<http://www.lawsociety.nt.ca>> (a Policy Directive establishes the CBA Code as binding); Law Society of Nunavut, *Legal Ethics and Practice Committee*, online: LSN <http://lawsociety.nu.ca/legal_ethics.html> ("Lawyers in Nunavut are obliged to follow the [CBA Code]"); Law Society of Prince Edward Island, *Ethics and Code of Conduct*, online: LSPEI <http://www.lspei.pe.ca/ethics_and_code.php> (the Law Society website links directly to the CBA Code); and Law Society of Yukon, *Rules* (Whitehorse: LSY, 2010), R 221 [Yukon Rules] (Yukon has its own code of conduct, but the Yukon Rules establish that the current CBA Code is also binding).

14. Unless otherwise noted, Saskatchewan and Newfoundland and Labrador. Their codes are largely identical to the CBA Code, although they do not include some of the amendments made in the 2009 revision.

15. CBA Code, *supra* note 4, c XIX, commentary 4; Law Society of Saskatchewan, *Code of Professional Conduct*, Regina: LSS, 1991, c XIX, commentary 4 [Saskatchewan Code]; Law Society of Newfoundland and Labrador, *Code of Professional Conduct*, St John's: LSNL, 1998, c XIX, commentary 4 [Newfoundland Code].

16. Law Society of Nunavut, *Rules of the Law Society of Nunavut* (Iqaluit: LSN, 2009) s 75(2).

17. Law Society of Alberta, *The Rules of the Law Society of Alberta* (Calgary: LSA, 2010) R 117(b) [Alberta Rules].

18. Nova Scotia Barristers' Society, *Legal Ethics Handbook* (Halifax: NSBS, 2011) c 16.11 [Nova Scotia Handbook].

19. Nova Scotia Code, *supra* note 9, R 6.07.

limited restriction.²⁰ In Ontario a former “appellate judge”²¹ is prohibited indefinitely from appearing before any court without the Law Society’s permission.²² The rule emphasizes that permission “may only be granted in exceptional circumstances.”²³ Other former judges²⁴ are immediately able to appear before courts of higher jurisdiction and after two years are able to appear before courts of equal or inferior jurisdiction and tribunals over which they had appellate authority.²⁵ In British Columbia, unless the Law Society grants its permission, former Supreme Court Masters are not able to appear before Masters or Registrars for three years, former Provincial Court judges are not able to appear before Provincial Courts for three years, and former federally appointed judges are not able to appear in any court in British Columbia.²⁶ In Quebec, former judges are prohibited from acting as attorney or counsel in the court of which he or she was a member, or before any member of such court, for one year.²⁷

As situation-specific restrictions, the law societies that use the CBA Code or have replicated identical provisions²⁸ state that a former judge should refrain from appearing before a court of any jurisdiction if “by reason of relationship or past association, the lawyer would appear to be in a preferred position.”²⁹ The FLSC Code and the codes of Alberta, British Columbia, Ontario, Manitoba, New Brunswick, and Nova Scotia each

20. FLSC Code, *supra* note 7, R 6.07; Manitoba Code, *supra* note 8, R 6.07; Law Society of New Brunswick, *Code of Professional Conduct*, Fredericton: LSNB, 2003, c 17, commentary 8 [New Brunswick Code]. See also Law Society of New Brunswick, *General Rules under the Law Society Act, 1996* (Fredericton: LSNB, 1997) R 76 (the rule in the Code is duplicated in the Rules).

21. The rules define “appellate” judges as having sat on the Supreme Court of Canada, the Court of Appeal for Ontario, or the Federal Court of Appeal. See LSUC Rules, *supra* note 12, R 6.08(1)(a).

22. *Ibid.*, R 6.08(3).

23. *Ibid.*

24. A “retired judge” is defined as a judge formerly of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Court of Justice, or the Superior Court of Justice. See LSUC Rules, *supra* note 12, R 6.08(2)(a).

25. *Ibid.*, R 6.08(4).

26. Law Society of British Columbia, *Law Society Rules* (Vancouver: LSBC, 2011) R 2-54 [British Columbia Rules].

27. Code of Ethics of Advocates, RQ c B-1, R 1, s 4.01.02 [Quebec Code].

28. *Supra* notes 13-14.

29. CBA Code, *supra* note 4, c XIX, commentary 5.

have an analogous rule directed at lawyers generally.³⁰ The commentary to the Alberta rule specifically contemplates its application to former judges, and suggests that: (1) there will usually be no apprehension of bias two years after a judge's retirement,³¹ (2) the apprehension of bias can "in some cases" be addressed by the consent of the other parties to a matter,³² and (3) the restriction can sometimes extend to other members of the same law firm if, for instance, the firm only has two partners.³³ This restriction is layered on top of the Alberta Rules restrictions, which already prevent judges from appearing before any court without the permission of the law society.³⁴

The CBA Code's stated rationale for the situation-specific restrictions on appearances is 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 would suffer; if the reverse were true, the client might suffer."³⁵ This rationale is replicated in several provinces,³⁶ and a very similar concern is expressed in the Alberta Code.³⁷ "Fellow judge bias" has also been recognized in the jurisprudence, although only in the different context of current judges appearing before a court.³⁸

The situation-specific restrictions focus on the relationship between the former judge and the judge before whom he or she is appearing. They

30. FLSC Code, *supra* note 7, R 4.01(2)(c) (replicated in Manitoba); Law Society of Alberta, *Code of Professional Conduct*, Calgary: LSA, 2010 [Alberta Code] (a lawyer may not appear if there is a "past or present relationship with the judge [that] would create a reasonable apprehension of bias": c 10, R 9); LSBC, *Professional Conduct Handbook*, Vancouver: LSBC, 2010, c 8.1(c) [British Columbia Handbook]; LSUC Rules, *supra* note 12, R 4.01(2)(c); New Brunswick Code, *supra* note 20, c 8, commentary 10(iii); Nova Scotia Handbook, *supra* note 18, c 14, guiding principle (c). The FLSC Code rule has an exception where "all parties consent and it is in the interests of justice." The New Brunswick Code and Nova Scotia Handbook rules have an exception where the judge consents to the lawyer's appearance.

31. Alberta Code, *supra* note 30, c 10, C.9.2(b).

32. *Ibid*, c 10, C.9.2.

33. *Ibid*, c 10, C.9.1.

34. *Supra* note 17. This restriction could apply after permission is given or as a guide in determining whether to give permission.

35. *Supra* note 4, c XIX, commentary 4.

36. *Supra* notes 13-14; Nova Scotia Handbook, *supra* note 18, commentary 16.11.

37. *Supra* note 30, c 10, C.9.2(b) ("The lawyer's subsequent appearance before the body as counsel may be improper because of actual or perceived collegiality with the current adjudicators, or because of a suspected 'reverse bias' that could operate to the detriment of the lawyer's client"). See now New Alberta Code, *supra* note 10, R 4.01(3).

38. *Occidental Chemical Corp v Sovereign General Insurance Co* (1997), 32 OR (3d) 277 (Gen Div) at 280 (the defendant's status as an Alberta judge was considered relevant in resolving a conflict of jurisdictions between Alberta and Ontario, but not determinative); *R v Perley* (2004), 278 NBR (2d) 170 (Prov Ct) at paras 49-53 (held that reviewing the validity of a search warrant issued by another member of the same court did not create a reasonable apprehension of bias). See generally *R v RDS*, [1997] 3 SCR 484 at 530-31, setting out the test for the disqualification of judges based on the apprehension of bias.

are not based on conflict of interest or confidentiality concerns. Under these restrictions, a former judge might be unable to appear before a close colleague from when he or she was a judge. This could happen if the former judge were scheduled to appear before such a colleague in the court to which he or she was formerly appointed. It could also happen if such a colleague was appointed to an appellate court and then ended up on the panel hearing an appeal handled by the former judge.

In light of the rule's rationale, it makes sense that the term "appearance" should be interpreted broadly. Authoring a *factum*, for instance, is a form of written presence which is at least as capable of biasing the judge as is physical presence. Justice John Laskin of the Court of Appeal for Ontario once commented that "In our court the *factum* is often far more important than the oral argument."³⁹ If the restrictions on appearances did not capture written advocacy, it would be a significant deficiency.

3. *Restrictions on references to prior judicial status*

Each code of conduct has a rule or rules on advertising for legal services. The general rule, present in the CBA Code⁴⁰ and replicated in several jurisdictions,⁴¹ is that "Advertising must not mislead the uninformed or arouse unattainable hopes and expectations." Every other jurisdiction has a similar rule.⁴² This rule requires former judges to exercise caution when advertising their experience, since references to judicial experience could set unrealistic expectations. This possibility is addressed pointedly by some law societies, which expressly prohibit former judges from referring to their prior judicial status when marketing their services.⁴³

One British Columbia rule also prohibits former judges from mentioning their judicial experience when appearing before courts.⁴⁴ The concern is presumably that judicial experience is irrelevant to the issues before the court and could be unduly influential. Other codes of conduct contain more general rules which might have the same effect. Examples

39. John I Laskin, "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive *Factums*", online: Court of Appeal for Ontario <<http://www.ontariocourts.on.ca/coa/en/ps/speeches/forget.htm>>.

40. *Supra* note 4, c XIV, commentary 3.

41. *Supra* note 14; Newfoundland Code, *supra* note 15, c XIV, commentary 3; Saskatchewan Code, *supra* note 15, c XIV, commentary 2; New Brunswick Code, *supra* note 20, c 16, commentary 3.

42. British Columbia Handbook, *supra* note 30, c 14.2; Alberta Code, *supra* note 30, c 5, r 1(b); Manitoba Code, *supra* note 8, R 3.01(2); Nova Scotia Handbook, *supra* note 18, c 20, guiding principles (a)-(b); LSUC Rules, *supra* note 12, R 3.02(2); Quebec Code, *supra* note 27, s 5.01.

43. British Columbia Rules, *supra* note 26, R 2-54(4)-(6); Law Society of Saskatchewan, *Rules of the Law Society of Saskatchewan* (Regina: LSS, 1991), R 1605(1).

44. British Columbia Handbook, *supra* note 30, c 8.22.

include rules against referencing irrelevant facts⁴⁵ or asserting the lawyer's personal views.⁴⁶

4. *Discretionary conditions*

Some law societies have the explicit ability to impose conditions on former judges upon their reinstatement.⁴⁷ Others have the right to impose conditions when giving a former judge permission to appear before a court.⁴⁸ It is not apparent what the nature and scope of these conditions would be or how frequently they are imposed. The conditions of reinstatement contemplated elsewhere in the codes of conduct appear concerned with the familiarity of the lawyer with the law and his or her competency to return to practice.⁴⁹ This might be a concern for judges who seek reinstatement after several years of retirement,⁵⁰ but it sheds no light on the sorts of conditions that might be imposed on an already-reinstated judge seeking approval to appear as counsel.

5. *Rules directed at lawyers who formerly held public office*

Most codes of conduct have a rule directed at lawyers who previously worked in government. The nature of the employment encompassed by these rules is most commonly described as the holding of "public office" and being a "public officer," although there are also several instances in which the term "public employee" is used⁵¹ and some instances in which the phrase "public officer or employee" is used.⁵² The varied terminology could indicate that "public officer" and "public employee" have distinct meanings. However, it is difficult to determine what that distinct meaning might be.⁵³ It is more likely that the terms are synonymous.

45. CBA Code, *supra* note 4, Appendix 47.

46. Alberta Code, *supra* note 30, R 11; Manitoba Code, *supra* note 8, R 4.01(1), commentary.

47. Nova Scotia Barristers' Society, *Regulations made under the Law Society Act* (Halifax: NSBS, 2011), s 5.44 [Nova Scotia Regulations]; British Columbia Rules, *supra* note 26, R 2-54(2).

48. Alberta Rules, *supra* note 17, R 117(b); LSUC Rules, *supra* note 12, R 6.08(3); Yukon Rules, *supra* note 13, s 151.1(4).

49. See Alberta Rules, *supra* note 17, ss 93(6), 118(1)(a); Yukon Rules, *supra* note 13, s 151.1(3); British Columbia Rules, *supra* note 26, R 2-59(2).

50. See Alberta Rules, *supra* note 17, R 117(a) (applications for reinstatement by former judges may only be referred to the Credentials and Education Committee if more than three years has elapsed since retirement).

51. CBA Code, *supra* note 4, c XIX, commentary 3; British Columbia Handbook, *supra* note 30, c 5.9-5.10; New Brunswick Code, *supra* note 20, c 17, commentary 7; Nova Scotia Handbook, *supra* note 18, c 16.10.

52. CBA Code, *supra* note 4, c IV, commentary 14; New Brunswick Code, *supra* note 20, c 5, commentary 12.

53. See for example Nova Scotia Handbook, *supra* note 18, c 16.7-16.10 (immediately after two provisions directed at the "lawyer in public office" there is a provision directed at the lawyer leaving "public employment").

The public officer rules restrict the ability of lawyers to accept new employment related to their previous public employment. The law societies that use the CBA Code or have replicated identical provisions⁵⁴ have three different rules of this nature. Other law societies have adopted these rules selectively.⁵⁵ The first rule prevents a lawyer from acting to the detriment of someone about whom the lawyer acquired confidential information when acting as a public officer.⁵⁶ The second rule prevents a lawyer from acting in the “same or any related matter” that the lawyer was “previously concerned with in an official capacity.”⁵⁷ The third rule prevents a lawyer from accepting employment “in connection with any matter [about which] the lawyer had substantial responsibility or confidential information.”⁵⁸ In Ontario, this rule is narrower: a lawyer cannot act for a client “in connection with any matter for which the lawyer had substantial responsibility” as a public officer.⁵⁹ In Alberta, this rule is broader: a lawyer who held public office may be subject to “special considerations” in ensuring that subsequent representation is free from “compromising influences.”⁶⁰

The law societies that use the CBA Code or have replicated identical provisions⁶¹ also have a rule directed specifically at former public employees who performed an adjudicative function. The rule states that a lawyer “should avoid advising upon a ruling of an official body of which the lawyer either is a member or was a member at the time the ruling was made.”⁶² A variation of this rule has also been adopted in Alberta, New Brunswick, and Nova Scotia.⁶³ There are no rules specifically directed at former public employees in the FLSC Code, Manitoba Code, or Nova Scotia Code.

54. *Supra* notes 13-14.

55. As noted in the footnotes following the discussion of each rule.

56. CBA Code, *supra* note 4, c IV, commentary 14; British Columbia Handbook, *supra* note 30, c 5.10; New Brunswick Code, *supra* note 20, c 5, commentary 12; Nova Scotia Handbook, *supra* note 18, c 5.16.

57. CBA Code, *supra* note 4, c X, commentary 6; New Brunswick Code, *supra* note 20, c 17, commentary 5(a); Nova Scotia Handbook, *supra* note 18, c 16.7; Quebec Code, *supra* note 27, s 3.05.05.

58. CBA Code, *supra* note 4, c XIX, commentary 3; British Columbia Handbook, *supra* note 30, c 5.9; New Brunswick Code, *supra* note 20, c 17, commentary 7; Nova Scotia Handbook, *supra* note 18, c 16.10.

59. LSUC Rules, *supra* note 12, R 6.05(5).

60. Alberta Code, *supra* note 30, c 6, G.2 (examples are provided, but they are not exhaustive). See also New Brunswick Code, *supra* note 20, c 17, commentary 5(a). The New Alberta Code, *supra* note 10, does not contain specific rules relating to former public officers.

61. *Supra* notes 13-14.

62. CBA Code, *supra* note 4, c X, commentary 6.

63. Alberta Code, *supra* note 30, c 6, G.2; New Brunswick Code, *supra* note 20, c 17, commentary 5(b); Nova Scotia Handbook, *supra* note 18, c 16.7.

a. *Rationale for the rules*

According to the Alberta Code, the rationale of the “public office” rules is to address the conflict of interest and confidentiality issues unique to public employment.⁶⁴ The former public employee rules can therefore be seen as paralleling the former client conflict of interest rules. The concern in both cases is the potential for the “appearance of impropriety” if some aspect of prior employment were to give the current client an unfair advantage.⁶⁵ The public officer, like the lawyer, is in a position to obtain confidential information, which could provide such an advantage.⁶⁶ In the other provinces, the stated rationale of the public officer rules is to prevent lawyers in the public eye from bringing the legal profession into disrepute.⁶⁷ However, this rationale cannot fully explain the rules directed at former public employees, which apply even if the lawyer is far removed from the public eye. The Alberta Code’s rationale is more compelling.

b. *Arguments for and against applying these rules to judges*

The term “public office” has been defined fairly consistently outside the codes of conduct. *The Dictionary of Canadian Law* defines “public office” as corresponding to the definition of “public official,” and a “public official” is defined as “a person appointed to an office or employment by or under the Government.”⁶⁸ In *Henly v Mayor and Burgesses of Lyme* a “public officer” was defined as someone “who is appointed to discharge a public duty and receives a compensation.”⁶⁹ The *Interpretation Act* of Alberta defines a “public officer” as including “any person in the public service of the Province (i) who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or (ii) on whom a duty is imposed by or under an enactment.”⁷⁰ The *Interpretation*

64. *Supra* note 30, c 6, G.2.

65. *MacDonald Estate v Martin*, [1990] 3 SCR 1235 at 1260 [*MacDonald Estate*]; CBA Code, *supra* note 4, c X, commentary 3.

66. See Charles W Wolfram, *Modern Legal Ethics* (St Paul, MN: West Publishing, 1986) at 460 (“[access to confidential information] unfairly advantages the lawyer’s private practice and unfairly disadvantages the client’s adversary”).

67. CBA Code, *supra* note 4, c X, commentary 1 (effective in the six jurisdictions using or replicating the CBA Code); FLSC Code, *supra* note 7, R 6.04(1), commentary (replicated in Manitoba); LSUC Rules, *supra* note 12, R 6.05(1), commentary; Nova Scotia Handbook, *supra* note 18, c 16.1; New Brunswick Code, *supra* note 20, c 17, commentary 1.

68. *The Dictionary of Canadian Law*, 3d ed, *sub verbo* “public office”, “public official”.

69. *Henly v Mayor and Burgesses of Lyme* (1828), 130 ER 995 at 1001, cited in *Smith v Christie* (1920), 55 DLR 68 at 74; *McLaughlin v Halifax-Dartmouth Bridge Commission* (1993), 108 DLR (4th) 506 at 513-14 (NSCA).

70. *Interpretation Act*, RSA 2000, c I-8.

Act in several other provinces contains a similar provision, as does the federal *Interpretation Act*.⁷¹

Under any of the above definitions, a judge could be considered a public officer.⁷² There are also several cases in which the court has referred to judges as holding “public office.”⁷³ It may also be significant that both the New Brunswick Code and the Nova Scotia Code discuss former judges in the chapter entitled “Public Office.”⁷⁴

However, even if judges could generally be considered “public officers” or “public employees,” that is probably not the intention of the drafters of the codes of ethics. Several codes describe “public office” as a “legislative or administrative office.”⁷⁵ This refers to only two of the three branches of government: it excludes the judiciary. To consider a comparative source, the American Bar Association *Model Rules of Professional Conduct* contain a rule directed at former “government officers or employees.” The rule is immediately followed by another rule directed at former judges, which is extremely similar.⁷⁶ If judges were government employees, the provision directed at former judges would be redundant. Similarly, one provision of the Newfoundland and Labrador *Interpretation Act* seems to recognize a distinction between “a public officer, a judge or a justice of the peace.”⁷⁷

Although some of the provisions discussed above contemplate lawyers who previously functioned in an “adjudicative capacity” or were “members of a tribunal,”⁷⁸ this does not necessarily include judges.⁷⁹ Most of the public employment rules are directed at lawyers who concurrently hold a position in public office. It follows that the “former public officer” rules are likely directed at former public officers who were concurrently

71. *Interpretation Act*, CCSM, c I80, s 17; RSY 2002, c 125, s 1(1); RSBC 1996, c 238, s 1; RSN 1970, c 182, s 2(1)(a); RSNS 1989, c 235, s 7(1)(w); RSPEI 1988, c I-8, s 1(d); RSNB 1983, c I-13, s 38; RSNWT 1988, c I-8, s 28(1); SS 1995, c I-11.2 s 2; RSC 1985, c I-21, s 2(1).

72. See Beverly G Smith, *Professional Conduct for Lawyers and Judges*, 3d ed (Fredericton: Maritime Law Book, 2007) at 14-2.

73. See, e.g., *R v Ahmad*, [2011] 1 SCR 110 at para 45 (“a trial judge, who is entrusted with the powers and responsibilities of high public office”); *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island* (1994), 120 DLR (4th) 449 at 455 (PEISCAD) (“A general pay reduction for all who hold public office, including judges”).

74. New Brunswick Code, *supra* note 20, c 17, commentary 8; Nova Scotia Handbook, *supra* note 18, c 16.11.

75. CBA Code, *supra* note 4, c 10, commentary 1; LSUC Rules, *supra* note 12, R 6.05(2) commentary; Nova Scotia Handbook, *supra* note 18, c 16, guiding principles.

76. American Bar Association, *Model Rules of Professional Conduct* (Chicago: American Bar Association, 2010), R 1.11-1.12 [ABA-MR].

77. *Interpretation Act*, RSNL 1990, c I-19, s 22(a).

78. See *supra* notes 61-62 and the accompanying text.

79. Nova Scotia Handbook, *supra* note 18, c 16.6 (“a school board or municipal council” are described as examples).

lawyers.⁸⁰ Judges are not concurrently lawyers. Moreover, given that most codes have sections directed specifically at former judges, it seems improbable that none of these sections would make reference to the public officer rules if they were meant to apply. The better view is that the rules directed at former public officers do not apply to judges who return to practice.

6. *Broader ethical rules*

The rules directed at former public officers are based on concerns of confidentiality, conflict of interest, and the integrity of the administration of justice. Without exception, every law society has a general rule directed at each of these concerns. Even if the conduct of former judges is not captured under the public officer rules, it may still be captured in an analogous fashion under the more general rules.

a. *Conflicting professional obligations*

The codes of conduct used by Canadian law societies clearly contemplate the possibility of a conflict of interest in relation to prior employment. This is evidenced by both the former client rules⁸¹ and the former public officer rules.⁸² The conflict of interest in those cases is created by the duty to advance the interests of the current client on one hand and the duty of confidentiality to a former client or public office on the other.⁸³ The difficulty with extending this principle to former judges is that they have no equivalent duty of confidentiality. The conduct of federally appointed judges is guided by the Canadian Judicial Council's *Ethical Principles for Judges*.⁸⁴ The CJC-EP does not suggest the existence of any judicial duty of confidentiality. There must certainly be an expectation of confidentiality in certain circumstances,⁸⁵ but there is no specific ethical duty. It would

80. This is certainly the case for the ABA-MR rule, which has been described by the ABA as a rule applying to "former government lawyers." See Kent D Kauffman, *Legal Ethics* (Clifton Park, NY: Thomson, 2004) at 207.

81. See CBA Code, *supra* note 4, c V, commentary 12 (effective in the jurisdictions that use or replicate the CBA Code); FLSC Code, *supra* note 7, R 2.03(2) (replicated in Manitoba); LSUC Rules, *supra* note 12, R 2.04(5); Alberta Code, *supra* note 30, c 6, R 3(b); British Columbia Handbook, *supra* note 30, c 6, R 7; New Brunswick Code, *supra* note 20, c 6, commentary 4; Nova Scotia Handbook, *supra* note 18, c 6, commentary 8.

82. See *supra* notes 56-63 and accompanying text.

83. Several codes of conduct specifically enforce the confidentiality of information obtained while in public office. See LSUC Rules, *supra* note 12, R 6.05(5), commentary; Nova Scotia Handbook, *supra* note 18, c 16.8; New Brunswick Code, *supra* note 20, c 17, commentary 6; CBA Code, *supra* note 4, c X, commentary 7.

84. Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 2004) [CJC-EP].

85. See for example *R v McClure*, [2001] 1 SCR 445 at 466 (a judge is sometimes able to review privileged solicitor-client information).

therefore be difficult to recognize such a duty after a judge leaves the bench unless one was specifically created by law societies.

b. *Conflicting personal interests*

Even if there is no conflict of professional obligations, there may still be a personal conflict of interest. The law societies that utilize the current CBA Code or have replicated identical provisions⁸⁶ accept that personal interests may have some influence on a lawyer but they preclude interests that “give rise to a substantial risk of [a] material and adverse effect on representation of the client.”⁸⁷ The same standard is also in the FLSC Code and replicated in the Manitoba Code.⁸⁸ In Prince Edward Island, Saskatchewan, Nova Scotia, Ontario, and Yukon the line is drawn at conflicting interests that are “likely to affect adversely the lawyer’s judgement or advice on behalf of, or loyalty to a client or prospective client.”⁸⁹ This standard of “likelihood” as opposed to “substantial risk” is less strict.⁹⁰ The Alberta Code precludes conflicts of interest that impair a lawyer’s objectivity “to the extent that the lawyer would be unable to properly and competently” represent his or her client.⁹¹ The Newfoundland Code and the New Brunswick Code simply prohibit acting for a client if the lawyer has a personal conflict of interest, without any defined threshold risk of influence.⁹² The British Columbia Handbook also has rules for personal conflicts of interest, although they are exclusively focused on conflicts of a business or financial nature.⁹³ The Quebec Code provides that a lawyer is in a conflict of interest when he or she might tend to favour some interests over others or when his or her judgment and loyalty may be unfavourably affected.⁹⁴

A former judge might be faced with a personal conflict of interest if asked to represent a client in a matter requiring one of his or her prior judicial decisions to be addressed. It could sometimes be in the best interests of the client to argue that a previous decision is incorrect. On the

86. The Northwest Territories and Nunavut.

87. *Supra* note 4, c VI, R 1.

88. *Supra* notes 7 and 8, c 2.04(2), commentary.

89. Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 1987, c V, commentary 1 [1987 CBA Code] (binding in PEI); Saskatchewan Code, *supra* note 15, c V, commentary 1; Nova Scotia Handbook, *supra* note 18, c 6, guiding principle 1 and c 7, R (a); LSUC Rules, *supra* note 12, R 2.04(1); Law Society of Yukon, *Yukon Code of Professional Conduct*, Whitehorse: LSY, 1974, part one, R 5 (the Yukon Code supersedes any contradictory provisions in the CBA Code).

90. The use of a stricter standard in the most recent CBA Code was probably influenced by *MacDonald Estate*, *supra* note 65 at 1259, in which the court found that conflict of interest tests based on probability were inadequate.

91. *Supra* note 30, c 6, R 8. See now New Alberta Code, *supra* note 10, R 2.04(10).

92. Newfoundland Code, *supra* note 15, c VI, R (c); New Brunswick Code, *supra* note 20, c 6.

93. *Supra* note 30, c 7.

94. *Supra* note 27, s 3.06.07.

other hand, a former judge has a personal interest, or at least an apparent interest, in defending the correctness of his or her previous decisions, not only as to findings of fact but also as to conclusions of law.⁹⁵ This could well conflict with making submissions in the best interests of the client. This is especially relevant for former appellate judges, who may have participated in landmark decisions. For example, former Chief Justice Dickson famously created the *Oakes* test for analyzing the propriety of *Charter* violations.⁹⁶ It is easy to imagine that, subsequently practising as a lawyer, the former Chief Justice would have been reluctant to argue a quite different approach to the test, even if it was in the best interests of his client to do so.

c. *Administration of justice*

Related to the conflict of interest rule is the duty of a lawyer to protect the public's perception of the administration of justice. Such a duty is asserted in the provincial rules.⁹⁷ In the context of former judges who return to practice, it is possible that the public could lose confidence in the correctness of judicial opinions if even the judges who wrote them seemed to think they were wrong, as might be the case if a former judge were to act as counsel on an appeal of one of his or her decisions. This was the nature of the concern expressed by the court in *Re Solicitors Act and O'Connor*, a case discussed below.⁹⁸ It is also possible that these rules could catch a former judge who, while still a judge, negotiated for employment with one of the parties to a proceeding before him or her or with such a party's lawyer.

7. *Judicial disqualification*

A lawyer could be indirectly prevented from appearing before a judge if the judge were prevented from hearing a case in which the lawyer was counsel.

95. In the context of sitting judges see CJC-EP, *supra* note 84, c 6, commentary E.3. Judicial ethics would prevent a judge from deciding on a related matter, because the earlier decision creates the perception of bias. See also JO Wilson, *A Book for Judges* (Ottawa: Supply and Services, 1980) at 23 (having expressed views on a matter or having a "previous professional connection with the litigation" is "usually" grounds for disqualification); *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 388 ("[judges] would not sit in any case in which they played any part at any stage of the case").

96. *R v Oakes*, [1986] 1 SCR 103.

97. Alberta Code, *supra* note 30, c 1, R 3; British Columbia Handbook, *supra* note 30, c 1, cannons 1-2; LSUC Rules, *supra* note 12, R 4.06(1); Manitoba Code, *supra* note 8, R 4.06(1); New Brunswick Code, *supra* note 20, c 20; Nova Scotia Handbook, *supra* note 18, c 21; Quebec Code, *supra* note 27, s 2.01.01; CBA Code, *supra* note 4, c XIII, (the CBA Code is binding in the Northwest Territories, Nunavut, PEI, and Yukon, and an identical rule is replicated in the Saskatchewan Code and Newfoundland Code). See also FLSC Code, *supra* note 7, R 4.06(1).

98. *Re Solicitors Act and O'Connor*, [1930] IR 623 (HC) [*O'Connor*].

The judiciary shares the same duty as lawyers to uphold the integrity of the administration of justice. The existence of this duty is a central fixture of the CJC-EP, which states that “Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded, and informed person would have a reasoned suspicion of conflict between a judge’s personal interest (or that of a judge’s immediate family or close friends or associates) and a judge’s duty.”⁹⁹ This rule is substantively similar to the situation-specific restrictions of lawyers’ appearances,¹⁰⁰ and would probably be triggered in the same circumstances. The rule would only become significant where a former judge failed to withdraw appropriately.

8. *Common law rules*

In cases such as *MacDonald Estate*, Canadian courts have asserted the jurisdiction necessary to remove counsel from a case in order to ensure the proper administration of justice.¹⁰¹ One case suggests the existence of a limited common law rule that addresses the conflict of interest and confidentiality concerns unique to former judges. In *R v Chandra*, a former judge who had previously issued search warrants against the defendant then went on to work for the defendant’s law firm.¹⁰² The attorney general sought to have the firm removed as counsel. The court dismissed the motion because the former judge was not privy to confidential information and was no longer an active participant in the case. However, the court did appear prepared to disqualify a former judge as counsel if he or she had previously rendered a decision related to the same case.¹⁰³ The basis for the disqualification would have been the conflict of interest rule from *MacDonald Estate*.¹⁰⁴ If, for example, the former judge had been involved in the case as a lawyer, concerns would arise when the defendant’s lawyers sought to challenge the credibility of one of the witnesses whose testimony had been earlier accepted as credible by the former judge when deciding to issue the warrants.

In the old case of *O’Connor*, the Irish High Court suggested that a former judge should not be permitted to challenge his or her own judicial decisions for fear that it would “shake the authority of the judicial limb of government, and mar the prestige and dignity of the courts.”¹⁰⁵ This could provide a basis for disqualifying a former judge as counsel, and it

99. *Supra* note 84, c 6, principle E.2.

100. *Supra* notes 29-30.

101. *Supra* note 65 at 1245.

102. *R v Chandra* (2000), 275 AR 138 (Prov Ct) [*Chandra*].

103. *Ibid* at para 15.

104. *Ibid* at paras 5 and 16.

105. *O’Connor*, *supra* note 98 at 631.

has been cited in two Canadian cases including *Chandra*¹⁰⁶; however, in neither instance was it applied as a rule. The 1987 CBA Code cited this quotation from *O'Connor* as authority for the rule that prevents former judges from appearing before courts of equal or inferior jurisdiction as lawyers.¹⁰⁷ This is, however, peculiar, since this quotation is not rationally connected to that rule.¹⁰⁸ The citation is not part of the current CBA Code, but several provinces that modelled their code on the 1987 CBA Code still have the citation.¹⁰⁹

9. *Concerns about the Canadian rules*

In general, the only Canadian ethical rules dealing specifically with judges returning to practice are the ones that address the ability to appear before various courts. It is important to appreciate the limited scope of these rules. Such rules can be drafted with different parameters, as the various rules across the provinces indicate, but in the end all of them focus on the notion of an appearance in court. They do not catch lawyers working outside the litigation context. Perhaps of greater concern, they do not appear to catch lawyers who assist other lawyers with a court appearance. They appear to leave a former judge free to provide information and advice to another lawyer working on written submissions or preparing to appear in a courtroom. Further, most of these rules do not prevent all future appearances in court, so in a range of cases these rules will not apply and former judges will be able to appear, raising further concerns about the propriety of those appearances.

In principle, there is nothing wrong with the general rules relating to lawyer advertising. However, it might be beneficial to have a more specific rule directed at former judges. In any case, this is a discrete and relatively small issue in the overall context of judges returning to practice.

Most of the other rules discussed above provide little if any meaningful restriction on former judges. It is unlikely that the rules relating to having previously held public office would be applied to former judges. Fitting situations involving judges who are now in practice into the language of the general provisions relating to confidentiality, conflict of interest, and upholding the administration of justice is challenging. There is no clear

106. *Supra* note 102 at para 9. The other is *S-Marque Inc v Homburg Industries Ltd* (1997), 164 NSR (2d) 38 (SC) at para 10.

107. *Supra* note 89, c XIX, note 5.

108. The rule still permits former judges to appear in courts of higher jurisdiction, which is clearly one place they could challenge their prior decisions.

109. The Law Society of Prince Edward Island uses the 1987 CBA Code as its code of conduct. See also Newfoundland Code, *supra* note 15, c XIX, note 5; Saskatchewan Code, *supra* note 15, c XIX, note 5.

indication that either a law society or a court would treat these provisions as catching specific conduct by former judges. The same concern applies to the common law's analysis of conflicts of interest. Furthermore, leaving concerns to be addressed either by novel interpretations of the general ethical rules or the common law is a reactive approach, one that only has meaning after the fact, when the conduct of a former judge is formally scrutinized by the regulator or by the courts. In contrast, clearer and more specific rules relating to former judges would be proactive: they would allow judges who return to practice to understand, in advance, the unique ethical context in which they operate.

II. *American ethical rules and former judges*

1. *Overview of American codes of conduct*

Each of the fifty states and the District of Columbia regulates lawyer conduct independent of other bars. Like the CBA and FLSC, the ABA produces a model code of conduct. The ABA-MR has an extremely high adoption rate,¹¹⁰ although individual states often make selective modifications.¹¹¹ The only state code that does not resemble the ABA-MR is California's,¹¹² although even there amendments are being considered to make the rules align more closely with the ABA-MR.¹¹³ Lawyers appearing in federal courts are generally governed by the rules of the local state.¹¹⁴ The authority to regulate lawyer conduct belongs primarily to the

110. American Bar Association Center for Professional Responsibility, *Model Rules of Professional Conduct Dates of Adoption*, online: American Bar Association <<http://www.americanbar.org>>.

111. A variety of resources highlight state variations from the ABA-MR. See American Bar Association Center for Professional Responsibility, *Charts Comparing Professional Conduct Rules as Adopted by States to ABA Model Rules*, online: ABA <http://www.americanbar.org/groups/professional_responsibility/policy/charts.html>; "State Ethics Rules", *Lawyers' Manual on Professional Conduct: Model Rules and Standards*, online: BNA <[lawyersmanual.bna.com](http://www.lawyersmanual.bna.com)> s 1:11; Steven Gillers, Roy D Simon & Andrew M Periman, *Regulation of Lawyers: Statutes and Standards*, revised ed (New York: Aspen Publishers, 2011).

112. California's regulatory structure is complex and unusual. See Andrew L Kaufman & David B Wilkins, *Problems in Professional Responsibility for a Changing Profession* (Durham, NC: Carolina Academic Press, 2009) at 16: "California retains its unique mixture of judicial and legislative prescriptions."

113. See Joan C Rogers, "California Bar Readies New Rules for Court But Circulates Seven for Additional Scrutiny" (2010) 26 Law Man Prof Conduct 473, online: BNA <<http://www.lawyersmanual.bna.com>>.

114. Kaufman & Wilkins, *supra* note 112 at 15-16.

courts,¹¹⁵ although the legislatures and bar associations also play roles of varying significance.¹¹⁶

In addition to the rules themselves, “advisory opinions” play an important role in regulating lawyer conduct. In nearly every state, there is a bar association or disciplinary board which releases opinions about how the rules of conduct apply in particular circumstances.¹¹⁷ There is also a body of jurisprudence discussing the codes of conduct, developed primarily in the context of motions to disqualify opposing counsel.

2. *ABA-MR Rule 1.12*

Significantly more judges return to practice in the United States than in Canada, largely because many American judges are elected. If they are defeated in an election, they resume their careers as lawyers. Accordingly, more attention has been paid to this issue in the United States than in Canada.

Rule 1.12(a) of the ABA-MR disqualifies a lawyer from representing a client in connection with a matter that the lawyer participated in “personally and substantially” as a judge, arbitrator, mediator, or other third-party neutral unless all parties to the proceeding give informed consent.¹¹⁸ The term “representing” is broad in scope.¹¹⁹ A “matter” means “a discrete and isolatable transaction or set of transactions between identifiable parties.”¹²⁰

115. Kauffman, *supra* note 80 at 3 and 7-9 (“whenever a state legislature passes a law dealing with lawyers...it is likely that the supreme court of that state will strike down the statute as an impermissible intrusion on the supreme court’s business” at 9). See, e.g., *Shaulis v Pennsylvania (State Ethics Commission)*, 833 A (2d) 123 (Pa Sup Ct 2000) at 124 (the Supreme Court struck down legislation that it found governed lawyer conduct in the practice of law).

116. See Fred C Zaharias, “The Myth of Self-Regulation” (2009) 93 Minn L Rev 1147 at 1147-48; Mortimer D Schwartz et al, *Problems in Legal Ethics*, 9th ed (St Paul, MN: Thomson Reuters/West, 2010) at 51 (“some states have special statutes that govern the conduct of lawyers, and most courts have local rules that apply to all lawyers who appear before them”); Margaret Z Johns & Rex R Perschbacher, *The United States Legal System: An Introduction*, 2d ed (Durham, NC: Carolina Academic Press, 2007) at 33-34 (“associations are usually authorized by the state legislature or supreme court to handle bar admissions and discipline...subject to supreme court review”).

117. These can be persuasive, but are rarely binding. See Schwartz et al, *supra* note 116 at 52; Elizabeth J Cohen, “Regulation of Bar: Panel Ponders What Role Ethics Opinions Should Play in Regulation of Lawyer Conduct” (2011) 27 Law Man Prof Conduct 374, online: BNA <<http://www.lawyersmanual.bna.com>>.

118. *Supra* note 76, R 1.12(a).

119. Illinois State Bar Association, Advisory Opinion on Professional Conduct No 94-09, 1994 WL 904192 (it was considered “representation” when a lawyer offered a free consultation for the benefit of another lawyer’s client).

120. ABA Committee on Ethics and Professional Responsibility, Formal Ethics Op No 342 (1975) [ABA-FO 342]; *Committee for Washington’s Riverfront Parks v Thomson*, 451 A (2d) 1177 (DC Ct App 1982). See, e.g., *In re de Brittingham*, 319 SW (3d) 95 (Tex Ct App 2010) at 99 (different appeals arising out of a case considered the same matter); *James v Mississippi Bar*, 962 So (2d) 528 (Miss Sup Ct 2007) at para 25 [*James*] (a divorce proceeding was considered to be connected with a child custody proceeding).

The “personal and substantial” participation threshold is apparently a high one; a comment to the rule clarifies that this does not include “remote or incidental administrative responsibility that did not affect the merits”¹²¹ and an ABA formal opinion states that a lawyer must have become “personally involved to an important, material degree” before being disqualified.¹²² Rule 1.12(c) extends the disqualification under Rule 1.12(a) to other members of the lawyer’s law firm unless there are screening measures in place.

Rule 1.12(b) prohibits a judge, mediator, or arbitrator from negotiating for employment with any of the parties to a proceeding before him or her or with any of the parties’ lawyers. The rule would not prohibit a judge from negotiating for employment after the proceeding is over or after leaving the bench.¹²³ Since the rule is directed at current judges, it can only apply to judges bound by the rules of professional conduct. This would include lawyers who are part-time judges and could include full-time judges, depending on the regulatory framework within a given state.¹²⁴ Also, if a judge returns to practice, the ABA suggests that disciplinary boards have jurisdiction to apply the rules of professional conduct to the lawyer’s conduct while on the bench, even if he or she was not a lawyer at the time.¹²⁵

Rule 1.12 is the only rule explicitly directed at former judges. The rule has its origins in the broader rules relating to conflict of interest,¹²⁶ and falls in sequence after the former client conflict of interest rule and the former government employment rule. Rule 1.12 is comparable to the former client and former public officer rules included in Canadian codes of conduct.

121. ABA-MR, *supra* note 76, R 1.12, comment 1.

122. ABA-FO 342, *supra* note 120.

123. Philadelphia Bar Association Professional Guidance Committee, Ethics Opinion No 2005-4, 2005 WL 5544947.

124. See Oregon State Bar Association Board of Governors, Formal Opinion No 2009-181, 2009 WL 6824531; State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion Number JI-35, 1990 WL 505815 (the opinion reasons that judges must be lawyers, and that the rules therefore apply).

125. American Bar Association, *Model Rules for Lawyer Disciplinary Enforcement* (Chicago: American Bar Association, 2002), R 6.B (former judges are “subject to the jurisdiction of the board not only for conduct as a lawyer but also for misconduct that occurred while the lawyer was a judge and would have been grounds for lawyer discipline”). See also David Cleveland & Jason Masimore, “The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates, and Other Judicial Figures” (2001) 14 *Geo J Legal Ethics* 1037 at 1055.

126. American Bar Association, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005* (Chicago: Center for Professional Responsibility, 2006) at 282 (the rule addresses circumstances previously captured under the “conflict of interest rubric”).

Most states that model their codes after the ABA-MR have adopted Rule 1.12 without any modification.¹²⁷ The modifications made by other states are mostly insignificant, with only a few exceptions. In the District of Columbia, judges have been edited out of the rule entirely¹²⁸; instead, judges are governed by DC-RPC Rule 1.11.¹²⁹ This rule is generally analogous to ABA-MR Rule 1.12, although there is no informed-consent exception in DC-RPC Rule 1.11. Three other states have deliberately eliminated the informed-consent exception from Rule 1.12(a).¹³⁰ In 2005 the District of Columbia Bar proposed amendments which would have put former judges back under Rule 1.12, but the District of Columbia Court of Appeals refused this amendment for unstated reasons.¹³¹ Another noteworthy modification to Rule 1.12 is in New York, where the ABA-MR version of Rule 1.12(a) has also been modified so as not to apply to judges.¹³² Instead, the older version of the rule from the ABA's *Model Code of Professional Responsibility* has been added as a subsection.¹³³ The older rule prohibits a lawyer from "accept[ing] private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity," and does not include an informed-consent exception.¹³⁴

3. ABA-MR advertising/misrepresentation rules

Although not specifically directed at former judges, the ABA-MR has advertising rules that can restrict the ability of former judges to refer to their prior judicial status. Rule 7.1 prohibits a lawyer from making a "false or misleading communication about the lawyer or the lawyer's services." Rule 7.5(a) extends the application of this rule to "firm names

127. See *supra* note 111.

128. The District of Columbia Bar, *District of Columbia Rules of Professional Conduct* (Washington, DC: District of Columbia Bar, 2007), R 1.12 [DC-RPC].

129. *Ibid.*, R 1.11, comment 1.

130. Maine, New Hampshire, and Wisconsin. See Maine Supreme Judicial Court, *Maine Rules of Professional Conduct*, R 1.12(a), online: <<http://www.courts.state.me.us>>; Supreme Court of New Hampshire, *New Hampshire Rules of Professional Conduct*, R 1.12(a), online: <<http://www.courts.state.nh.us>>; Supreme Court of Wisconsin, *Rules of Professional Conduct for Attorneys*, Madison: Legislative Reference Bureau, 2011, SCR 20: 1.12(a).

131. District of Columbia Bar Rules of Professional Conduct Review Committee, *Proposed Amendments to the District of Columbia Rules of Professional Conduct: Final Report and Recommendations* (Washington, DC: District of Columbia Bar, 2005), R 1.11 (proposed changes); Julie Reynolds & Kathryn Alfisi, "Legal Beat", *Washington Lawyer* 21:1 (September 2006), online: <http://www.dcbar.org/for_lawyers/resources/publications>.

132. New York State Unified Court System, *Rules of Professional Conduct*, New York: New York State Unified Court System, 2009, R 1.12(b) [New York Rules].

133. American Bar Association, *Model Code of Professional Responsibility* (Chicago: American Bar Association, 1969), DR 9-101 [ABA-MC]; New York Rules, *supra* note 132, R 1.12(a) (New York's code was based on the ABA-MC until 2009).

134. *Ibid.*

and letterheads.” In casual conversation, former judges are sometimes still referred to as “judge” or “the honourable.” However, if the judge returns to practice, these references would be factually inaccurate and would violate Rules 7.1 or 7.5(a).¹³⁵ Some opinions have also gone a step further and taken the view that a lawyer should not even be referred to as a “retired” or “former” judge in advertisements or on letterhead, because it might imply that the lawyer has special influence which he or she in fact does not.¹³⁶ Some states have made modifications to Rules 7.1 and 7.5, although insofar as they affect former judges the modifications are not especially noteworthy.¹³⁷

4. *ABA-MR conflict of interest rule*

Like the Canadian codes of conduct, the ABA-MR contains a general rule against conflicts of interest in addition to the situation-specific rules. Rule 1.7(a)(2) prohibits representation of a client if “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”¹³⁸ None of the state variations on the rule are particularly noteworthy.¹³⁹ Although the parties to an adjudicated dispute could not be considered “clients,”¹⁴⁰ there is a possibility of a personal conflict of interest if the lawyer is influenced by his or her previously expressed views on a case or a point of law.¹⁴¹

135. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 95-391 (1995); State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion Number RI-327, 2001 WL 1822442; Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Opinion Number 98-17, 1998 WL 260815; Massachusetts Bar Association Ethics Opinion No 78-8; Florida State Bar Association Committee on Professional Ethics, Opinion 87-9, 1987 WL 125124.

136. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 95-391 (1995); The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Opinion 93-8 (1993); Illinois State Bar Association, Advisory Opinion on Professional Conduct No 92-10, 1993 WL 836943; Michigan Bar Association Ethics Opinions RI-105 (1991) and CI-850 (1983). In contrast see State of Washington Ethics Advisory Committee, Judicial Ethics Opinion 02-17, 2002 WL 34668581; Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Opinion Number 99-156, 1999 WL 1458365; Iowa Supreme Court Board of Professional Ethics and Conduct, Opinion No 96-30, 1997; New York State Bar Association, Committee on Professional Ethics, Opinion 637; Texas Committee of Judicial Ethics, Opinion No 128, 1989 WL 1693504; Arizona Ethics Opinion 87-1 (1987).

137. See *supra* note 111 (many states elaborate on the restrictions in greater detail, although the basic substance remains the same).

138. ABA-MR, *supra* note 76, R 1.7(a) (the rule is subject to certain exceptions, although none is particularly relevant to former judges).

139. See *supra* note 111.

140. See, e.g., Oregon State Bar Association Board of Governors, Formal Opinion No 2005-120, revised 2007, 2007 WL 2324945 (“litigants who appeared before [the judge] were not [the judge’s] clients”).

141. See Part I(6)(b) above.

5. *California rules*

The California Rules of Professional Conduct do not currently have a rule specifically directed at former judges.¹⁴² However, a rule modelled after ABA-MR Rule 1.12 has been approved by the California State Bar, and it will take effect on approval from the California Supreme Court.¹⁴³ There are two substantive differences between the proposed rule and the ABA-MR rule. First, the California rule explicitly deems that the acquisition of confidential information creates a “substantial relationship” to a matter.¹⁴⁴ Second, the disqualification of other members of the same firm as the former judge occurs regardless of whether or not there are screening measures in place.¹⁴⁵ Even if the proposed rule is not adopted, the general conflict of interest rule in the California RPC might have a similar effect. Unless the client consents, the rule prohibits a lawyer from representing a client if the lawyer has or had a “legal, business, financial, professional, or personal relationship with a party or witness in the same matter.” Having been a judge in a related matter could be seen as creating a “legal relationship.” Also, the courts appear willing to enforce Rule 1.12 as a matter of common law.¹⁴⁶

California also has rules equivalent to the ABA-MR advertising rules discussed above. Rule 1-400(D) prohibits advertisements which “tend to confuse, deceive, or mislead the public.”¹⁴⁷ This could capture references to judicial experience, depending on the context.¹⁴⁸

6. *Impact of American codes of judicial ethics*

The American judicial ethics codes may be capable of addressing some of the undue influence concerns not captured by the ethical rules for lawyers. Rule 2.4(B) of the ABA's Model Code of Judicial Conduct prohibits judges from permitting “family, social, political, financial, or other interests to

142. The State Bar of California, *California Rules of Professional Conduct*, San Francisco: State Bar of California, 2011, [California RPC].

143. California State Bar Board of Governors, *Proposed Rules of Professional Conduct*, 2010, online: <<http://ethics.calbar.ca.gov/Committees/RulesCommission/ProposedRulesofProfessionalConduct.aspx>>.

144. *Ibid*, R 1.12, comment 1.

145. *Ibid*, R 1.12(d).

146. See *Cho v Superior Court*, 45 Cal Rptr (2d) 863 (Sup Ct 1995) at 866-67 [*Cho*] (the rule was cited repeatedly, even though the California RPC did not contain an analogous rule).

147. California RPC, *supra* note 142, R 1-400(D)(2).

148. California State Bar Standing Committee on Professional Responsibility and Conduct, Ethics Opinion 2004-167, 2004 WL 30709032 (“Even truthful statements about a formerly held office may still be found improper on a case-by-case basis”).

influence the judge's judicial conduct or judgment."¹⁴⁹ The ABA-MCJC has been widely adopted by the states.¹⁵⁰ Applying a variation of the rule present in the US Judges Code,¹⁵¹ the Judicial Conference of the United States advised that federal court judges should recuse themselves from cases in which one of their former colleagues appears as counsel, for at least "one or two years" after the colleague departs the bench.¹⁵² The effect of this rule is similar to the Canadian judicial conduct rule discussed above.¹⁵³ However, in Canada the judicial rule is to some extent pre-empted by an analogous rule directed at lawyers.¹⁵⁴ Since American lawyers are not subject to the same restrictions on appearances, the judicial code plays a more significant role. This is exemplified by *Chisolm v Transouth Financial*, in which ABA-MR did not apply but the US Judges Code did.¹⁵⁵

III. *The rationale for the American rules*

1. *Conflict of interest*

The underlying concern targeted by Rule 1.12(a) cannot be easily identified. Although it is generally considered a "conflict of interest" rule,¹⁵⁶ nowhere does the rule say which interests are in conflict. In the former client context, the duty of confidentiality to a former client conflicts with the duty to advance the interests of the current client. However, Rule 1.12(a) is not triggered by the acquisition of confidential information in the same way as the ABA-MR former client conflict of interest rule,¹⁵⁷ nor does the rule necessarily require a duty to maintain confidentiality. Rather, Rule 1.12(a) looks for "personal and substantial" participation in the matter at

149. American Bar Association, *Model Code of Judicial Conduct*, Chicago: ABA, 2007, R 2.4(B) [ABA-MCJC]. See also American Bar Association, *Model Code of Judicial Conduct*, (Chicago: ABA, 1990) canon 2(B) (the older revision of the rule, which is substantially the same).

150. See Kaufman & Wilkins, *supra* note 112 at 695 (most jurisdictions' rules are still modeled on the older revision of the rule).

151. Judicial Conference of the United States, *Code of Conduct for United States Judges*, Washington, DC: Judicial Conference of the United States, 2009 at canon 2(B) (the *US Judge Code* differs from the ABA-MCJC only in using the term "should" rather than "shall") [US Judges Code].

152. Judicial Conference of the United States, *Published Advisory Opinions* (Washington, DC: Judicial Conference of the United States, 2009), no 70. The opinion permits a longer or shorter duration depending on the circumstances of the relationship with the colleague. The Judicial Council sets guidelines for the conduct of all federal court judges.

153. See *supra* note 99 and the accompanying text.

154. See *supra* note 30 and the accompanying text.

155. *Chisolm v Transouth Financial*, 2000 US Dist LEXIS 8483 (ND Va) at 12-14 [*Chisolm*].

156. See *James*, *supra* note 120 at para 30 ("Rule 1.12, which is designed to preserve the integrity of the legal system from real or potential conflicts of interest"); ABA-MR, *supra* note 76, R 1.11 and R 1.12 (R 1.12 parallels R 1.11, which is titled "special conflicts of interest for former and current government officers and employees"); New York Rules, *supra* note 132, R 1.12 (in the New York Rules, R 1.12 is also titled a "special conflicts" rule).

157. *Supra* note 76, R 1.9(b)(2).

hand. For the most part, the rule has been applied mechanically, although there are some cases and opinions which express views about the rationale behind the rule.

Rule 1.12(a) is probably based on a presumption that third-party decision-makers who are personally and substantially involved in a matter obtain confidential information as a result. In one New Jersey advisory opinion, a former judge was advised not to participate in a matter related to one previously presided over because of the "slightest possibility of having to use information gained in his service as judge."¹⁵⁸ A Philadelphia ethics opinion states that "Rule 1.12 is designed to prevent, among other things, former judges from benefiting a private party with knowledge or information gained while in public office."¹⁵⁹ There are also at least three instances in which a former judge or mediator has been disqualified as counsel, largely because of confidentiality concerns, and Rule 1.12(a) was cited as authority in each.¹⁶⁰ Lastly, and perhaps most convincingly, the disqualification under Rule 1.12(a) extends to other lawyers at the same law firm unless there are screening measures in place,¹⁶¹ and the ABA-MR states that "[t]he purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected."¹⁶²

If indeed Rule 1.12(a) is based on a presumption of having attained confidential information, then the rule seems to be flawed, in that it does not contemplate confidential information acquired through means other than personal and substantial participation in a matter. It is fitting, then, that California's proposed Rule 1.12 closes this loophole. In a draft release of the rule, the California Bar highlighted and explained the differences between its rule and the ABA-MR rule. The confidentiality modification¹⁶³ was described as "clarifying that the rule *also* applies when a lawyer acquired confidential information while working in a court, even if the

158. Opinion 150, Advisory Committee on Professional Ethics, New Jersey, 1969.

159. Philadelphia Bar Association Professional Guidance Committee, Guidance Request No 88-28, 1988 WL 236408.

160. *Cho*, *supra* note 146 at 866-67; *McKenzie Construction v St Croix Storage*, 961 F Supp 857 (D Virgin Islands 1997) at 861; *Poly Software International v Su*, 880 F Supp 1487 (CD Utah 1995) at 1495.

161. ABA-MR, *supra* note 76, R 1.12(c).

162. *Ibid* at R 1.0, commentary 9.

163. See *supra* note 144 and the accompanying text.

lawyer was not directly involved in the matter.”¹⁶⁴ A Michigan advisory opinion seems to interpret Rule 1.12(a) in the same way.¹⁶⁵

If Rule 1.12(a) is based on a presumption of having obtained confidential information, then that presumption is not rebuttable. This is apparent in the plain language of the rule, which does not allow for exceptions, and also in the California Bar’s discussion of the proposed Rule 1.12.¹⁶⁶ A presumption that cannot be rebutted is really a deeming provision, and it makes sense in this context. Even if a former judge declares that he or she did not obtain useful confidential information as a result of his or her judicial involvement in a matter, there would be no way to verify the declaration, and there might still be an appearance of impropriety. This is illustrated by one of the commentaries to the DC-RPC variation of the rule, which states that “absolute disqualification...carries forward a policy of avoiding both actual impropriety and the appearance of impropriety.”¹⁶⁷

Rule 1.12(a) could properly be considered a conflict of interest rule in circumstances where a third-party decision-maker obtains confidential information and feels an obligation to keep the information confidential. If a lawyer had no obligation to keep information confidential, then he or she would have no reason to feel conflicted about using or disclosing the information. One of the comments to the ABA-MR rule notes that third-party decision-makers “typically owe the parties an obligation of confidentiality under law or codes of ethics.”¹⁶⁸ It is interesting, however, that the rule is not conditional on the presence of such a duty. This suggests that the rule is also intended to serve a secondary function, not motivated by conflict of interest concerns. One ABA formal opinion summarized several possibilities when discussing an analogous rule¹⁶⁹ directed at government officers: “the treachery of switching sides; the safeguarding of confidential government information from future use against the government; the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future

164. *Supra* note 143 [emphasis added].

165. State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion Number RI-260, 1996 WL 381523 (a former special master may subsequently represent a client “where the two matters are not the same *and* the special master did not receive any information while acting as the special master that was not generally known or readily available by other means” [emphasis added]).

166. The draft proposal of California’s R 1.12 addressed questions raised during the public comment period. In response to confusion on the topic, the Bar states that the personal and substantial connection threshold can be met even if the lawyer never attains confidential information: *supra* note 143.

167. *Supra* note 128, R 1.11, comment 5.

168. ABA-MR, *supra* note 76, R 1.12, comment 3.

169. ABA-MC, *supra* note 133, DR 9-101(B) (“A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee”).

employment in regard to those particular matters after leaving government service; and the professional benefit derived from avoiding the appearance of evil.”¹⁷⁰ Although the context was different, many of these concerns are also relevant to Rule 1.12(a).

2. *Appearance of impropriety*

Another probable function of ABA-MR Rule 1.12(a) is to avoid the appearance of impropriety in the administration of justice.¹⁷¹ A similar rule in the older ABA-MC appeared under the heading “avoiding even the appearance of impropriety.”¹⁷² A more recent Michigan ethics opinion suggested a link between Rule 1.12 and ABA-MR Rule 8.4(d), which prohibits conduct that is “prejudicial to the administration of justice.”¹⁷³

A conflict of interest is one way to create the appearance of impropriety, but there are other ways. First, it would be unseemly and unfair if a lawyer were able to use confidential information acquired as a judge to the advantage of his or her client, even if that information was not protected by any duty of confidentiality. Second, the public may be uneasy with the idea of a former judge “switching sides” over the course of the same matter. This is not necessarily because it suggests a conflict of interest, but rather because it raises doubts about the former judge’s loyalty to his or her responsibilities: switching sides is seen as “treachery.” The shift in loyalty is most pronounced when a lawyer switches sides,¹⁷⁴ but it is still present when a judge abandons his or her neutral role in favour of a partisan one. A recent North Carolina State Bar Ethics Opinion applied Rule 1.12(a) to prohibit representation by a former mediator, reasoning that doing so “protect[ed] the integrity of the neutral role of mediators.”¹⁷⁵ An older Alabama Judicial Ethics Opinion similarly states that “it is necessary...to erect a barrier between judicial duties and attorney services performed by a former judge so that no question may arise concerning the independence of the judiciary.”¹⁷⁶

Rule 1.12(b) is almost certainly a rule designed to avoid the appearance of impropriety. To adjudicate a matter while simultaneously trying to get

170. ABA-FO 342, *supra* note 120.

171. See New York State Bar Association, Committee on Professional Ethics, Opinion #389 (1975) (“the necessity for the maintenance of public confidence in the integrity of the profession makes it improper”).

172. ABA-MC, *supra* note 133, DR 9-101.

173. State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion Number RJ-235, 1995 WL 503968 (the opinion actually refers to R 8.4(c), which has since been re-ordered).

174. See, e.g., *R v Zwicker* (1995), 169 NBR (2d) 350 (CA).

175. 2010 Formal Ethics Opinion 8.

176. State of Alabama Judicial Inquiry Commission, Judicial Ethics Opinion 87-297, 1987 WL 1425731.

hired by one of the parties to the dispute would make it seem as though any judgment rendered was influenced by the prospect of future employment.¹⁷⁷ There would be no conflict of interest affecting the representation of future clients, but the propriety of the decision made as a judge would be called into question. One Wisconsin State Bar Ethics Opinion suggested that Rule 1.12(a) was based on this same concern. The opinion excerpted a quote from *The Law of Lawyering*, which stated that the purpose of Rule 1.12(a) was to maintain “[p]ublic confidence in the judicial system [which] would be undermined in the absence of Rule 1.12(a), as suspicions would then be raised whether the judge had anticipated the private representation when making the public decision, or whether a private party had in some way improperly influenced the decision.”¹⁷⁸ This view seems to confuse Rule 1.12(a) with Rule 1.12(b). Rule 1.12(a) is ill-suited to perform the function claimed for it; it still permits a former judge to represent one of the parties to a dispute in a different matter, and even permits the former judge to represent one of the parties to a dispute in the same matter if consent is obtained. In either case, the judge would still be receiving money from one of the parties to a previously adjudicated dispute, and there would still be an appearance of impropriety.

3. *Personal conflict of interest*

The “conflict of interest” aspect of Rule 1.12(a) could refer to personal conflicts of interest, although this would not be entirely consistent with the structure of the rule. Personal conflicts of interest can arise in several ways,¹⁷⁹ and Rule 1.12(a) could presume that such conflicts are more likely to arise out of adjudicative involvement.¹⁸⁰ One Wisconsin Ethics Opinion cites the concern that a lawyer might be required to challenge “decisions made by that very lawyer in a prior adjudicative or third-party neutral role.”¹⁸¹ However, if this were the driving motivation behind the rule, former judges could still be permitted to represent clients seeking to

177. ABA-MC, *supra* note 133, EC 9-3 (“to accept employment would give the appearance of impropriety even if none exists”). See, e.g., State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion Number JI-35, 1991 WL 521917.

178. Geoffrey C Hazard Jr & William Hodes, *The Law of Lawyering*, 3d ed (Westbury, NY: Foundation Press, 2003) at para 16.3, as cited in Wisconsin Bar Association Ethics Opinion E-09-04 (2009) [Wis E-09-04].

179. See Kenneth Kipnis, *Legal Ethics* (Englewood Cliffs, NJ: Prentice-Hall, 1986) at 54: “as all of us value things other than money, the possibilities for conflicts of interest are as far ranging as human desire itself.”

180. See Part I(6)(b) above for examples of potential conflicts.

181. Wis E-09-04, *supra* note 178.

uphold a decision made as judge.¹⁸² Also, if the concern was a personal conflict of interest, there would be little reason to impute the conflict to other members of the same law firm and it would be irrational to contain the conflict using screening measures.¹⁸³

4. *Undue influence*

Although concerns of undue influence appear to be the primary motivation behind the Canadian rules directed at former judges,¹⁸⁴ the concern is much less prominent in the American rules of professional conduct. ABA-MR Rule 1.12 does not, on a plain reading and on consideration of the case law, address the issue of undue influence. In *Chisolm*, a former judge who was previously a member of the district court hearing the case was listed among the defendant's counsel.¹⁸⁵ The court seemed to acknowledge that, because of the lawyer's prior association with the court, there might be an appearance of favouritism and undue influence.¹⁸⁶ However, the court did not find any violation of Rule 1.12.¹⁸⁷ The former judge was still removed as counsel, but only as a consequence of the Code of Conduct for United States Judges,¹⁸⁸ not the ABA-MR.

Although the ABA-MR does not directly address the influence associated with being a former judge, the issue has arisen in some advisory opinions. One Alaska Bar Association Ethics Opinion states that being a former judge "has definite status implications in our society."¹⁸⁹ Another ABA Opinion states that a lawyer being referred to as "judge" could convey the impression that the lawyer is in a special position to influence the judge and could "pose a substantial threat to the impartial determination of issues which the jury is intended by our judicial system to make."¹⁹⁰ One New Jersey directive, from the Administrative Office of the Courts, prohibits former judges from appearing in court and from even having

182. R 1.12 does not include any consideration of the goals of the client. See Missouri Bar Association, Informal Advisory Opinion Number 990076 (the lawyer was not permitted to represent a client seeking to uphold a previous decision made as judge).

183. See *supra* note 162 and the accompanying text (screening measures are designed to contain confidential information).

184. *Supra* note 35 and the accompanying text.

185. *Chisolm*, *supra* note 155.

186. *Ibid* at 12-13.

187. *Ibid* at 11.

188. *US Judges Code*, *supra* note 151 at canon 2(B) (the basis for the disqualification is discussed above in Part II(6)).

189. Ethics Opinion No 2006-4, online: [alaskabar.org](http://www.alaskabar.org) <<http://www.alaskabar.org>>.

190. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 95-391 (WL). See also ABA Informal Opinion No 1448 (WL); New Jersey Advisory Committee on Professional Ethics, Opinion 55 (1964).

their names listed on any court documents.¹⁹¹ Although not discussed, the potential for undue influence is probably what motivates the restriction.

IV. *Possible changes to the Canadian rules*

1. *Changing the scope or duration of the restrictions on appearances*

One concern associated with former judges is that their arguments before a court will be more persuasive than they ought to be. Canadian codes of conduct contain two general types of restrictions on appearances,¹⁹² which reflect two reasons why former judges might be more influential: first, because of experience and status, and second, because of a prior relationship with the presiding judge.¹⁹³ The court-specific restrictions appear to target the first source of influence, while the situation-specific restrictions overtly target the second.

The situation-specific restrictions on appearances are straightforward and have obvious merit. Each province has a variation of this type of restriction. In some the restriction is directed specifically at former judges, while in others it is directed at lawyers generally. The general restrictions are substantively similar to the judge-specific rules, although they do not guide the conduct of former judges as clearly. The likelihood of a former judge having a personal relationship with a presiding judge is unusually high, and it is valuable to have a provision that draws particular attention to that possibility.¹⁹⁴

The value of the court-specific restrictions on appearances is less clear. They address a problem which may be more speculative than real. Although every Canadian law society has adopted some type of court-specific restriction,¹⁹⁵ it is significant that none of the American states has a comparable restriction in its rules of professional conduct. The premise of the restriction seems to be that if a former judge were to appear in a lower court, the presiding judge would be so overwhelmed by respect and admiration that he or she could not properly weigh the former judge's arguments on their merits. However, judges spend the better part of their career analyzing and criticizing the decisions of other judges, and it seems unlikely that they would be unable to do the same when a former judge submits arguments in court. Although it is easy to conjure up the

191. Directive #5-08, *Guidelines on the Practice of Law by Retired Judges* (2008), online: <<http://www.judiciary.state.nj.us/directive/personnel.htm>>.

192. See Part I(2) above.

193. The Alberta Code draws a similar distinction between the pre-existing relationship of lawyer "to the judge" and "to the court." See Alberta Code, *supra* note 30, c 10, C.9.2.

194. See Appendix, R 6.07(1)(b).

195. See Part I(2) above.

mental image of a provincial court judge deferentially listening as a former Supreme Court of Canada justice presents his or her arguments, one wonders whether this would actually happen. It is hardly a vote of confidence in our lower court judges to suggest that they would be incapable of handling this situation with objectivity.

However, even if a former judge would not have special influence over a court, the court-specific restrictions on appearances still have value in other ways. First, so long as the public is of the view that judges have special influence, their appearance in court will raise doubts about the propriety of the outcome. While on the bench, judges have elevated authority in the courtroom, and some might expect that they carry that authority with them after leaving the bench. Even if this is incorrect, the appearance of impropriety should still be avoided. Second, the court-specific restrictions on appearances provide a fall-back means for disqualifying lawyers who may have a collegial relationship with the judge. Although the situation-specific rules already require lawyers to disqualify themselves, nobody can be certain whether they actually do so. It is healthy to err on the side of caution and so to not allow former judges to appear in the first place.

If it is accepted that a court-specific restriction accomplishes a valid objective, then it is perplexing that the LSUC Rules, Manitoba Code, New Brunswick Code, FLSC Code, and Nova Scotia Code each limits the duration of the restriction.¹⁹⁶ What changes after two or three years? A lawyer who is a former judge will always be a former judge and the reverence or influence associated with that status is unlikely to diminish with time. The time limit might be some law societies' way of admitting that the court-specific restriction was never necessary in the first place, although this would be an unprincipled compromise. The rules should either make clear that appearances before courts are improper or they should not prohibit them at all. An arbitrary time limit is not compatible with the primary function served by the restriction.

It is true that personal relationships with other judges might reasonably be expected to diminish over time,¹⁹⁷ although the court-specific restrictions would be irrational if this was their primary concern. There would be no reason to conclude that a former judge has a collegial relationship with all judges from courts of inferior jurisdiction. Even if there were, the suspected relationship would logically be reciprocal, which would lead to the conclusion that former judges should also be prohibited from

196. See *supra* notes 19, 20, and 25 and the accompanying text (the restriction is for two years in the LSUC Rules and for three years in each of the other codes).

197. See *supra* note 152 and the accompanying text.

appearing in courts of higher jurisdiction.¹⁹⁸ A time-limited restriction on appearances would make more sense if it was limited to the same court in which the former judge had served.¹⁹⁹ The more comprehensive solution, however, is to maintain the current court-specific restrictions without a time limit.²⁰⁰

The current court-specific restrictions are limited to the jurisdiction in which the judge presided. There is, for example, nothing in the Ontario rules that precludes a former judge of the Alberta Court of Appeal who now practises in Ontario from appearing in the Ontario Superior Court of Justice or the Court of Appeal for Ontario. Does the rationale supporting court-specific restrictions extend to these sort of cross-border situations? Arguably it does not. There is much less reason to think that a former judge from another jurisdiction will have particular influence over judges in a given province. However, further issues are raised by courts with a national jurisdiction. Former judges of the Supreme Court of Canada should be considered to have presided in all provinces. Former judges of the Federal Court should, as far as appearances before that court is concerned, be considered to have presided in all provinces.

2. *Prohibiting references to prior judicial status*

One of the defining features of a judge is authority over the courtroom. When lawyers advertise themselves as “judge” or highlight judicial experience, the public could easily be led to believe that the lawyer has special influence over the courtroom.²⁰¹ A few provinces have rules specifically targeted at this possibility,²⁰² although other provinces, like the American states, rely on the more general rules prohibiting misleading communications.²⁰³ Some American advisory opinions have had no difficulty applying analogous rules to prohibit inappropriate use of judicial honorifics and there is no reason to doubt that Canadian law societies could do the same. In fact, it may actually be preferable to rely on a broad rule that is purposive and flexible. It would be difficult to design a concise rule which permits appropriate references to judicial experience, such as in a short career biography, while at the same time prohibiting inappropriate references, such as pictures of the lawyer wearing his or her judicial robes.

198. Judges are generally permitted to appear before courts of higher jurisdiction. Alberta is a notable exception; the code makes no distinction between levels of court.

199. See Quebec Code, *supra* note 27, s 4.01.02.

200. See Appendix, R 6.07(1)(a).

201. See Joanne Pelton Pitulla, “Trading on Titles” (1995) 6:4 Prof Law 14.

202. See *supra* note 43 and the accompanying text (British Columbia and Saskatchewan).

203. Every province has a general rule. See *supra* notes 40-42 and the accompanying text.

The American advisory opinions illustrate the importance of context.²⁰⁴ In order to avoid a rule that is excessively narrow or excessively broad, the best approach is to create a provision that draws former judges' attention to the advertising rules and provides some examples of particularly inappropriate advertising tactics.²⁰⁵

A reference to judicial experience while in court raises different issues. It is appropriate to distinguish jury trials from non-jury trials.²⁰⁶ In a jury trial, a lawyer who makes references to previous judicial experience could have special influence over the jury. One can imagine a former judge who becomes a prosecutor and over the course of a trial accuses a witness of lying. The jury might find the former judge's accusation more credible because of his or her judicial experience in assessing the credibility of many witnesses. In a non-jury trial, references to judicial experience are less likely to affect the outcome of the case but could still be cause for concern.

Jury trials create an imperative for prohibiting references to judicial experience. There is less imperative for creating a rule against these references in non-jury trials, but certainly no harm is done by such a rule.²⁰⁷ Most provinces do not have rules capable of otherwise capturing this conduct.²⁰⁸ There are two arguments against a targeted prohibition, although neither is compelling. The first is that concerns over courtroom conduct and improper influencing of the jury are properly addressed through the provincial rules of procedure and evidence. However, most codes of conduct contain entire sections directed at courtroom conduct, and it would be hypocritical to suddenly refrain from drafting a rule on this basis. The second argument is that the circumstances of the proposed rule are so rare that the rule is unnecessary. Indeed, only a fraction of judges who retire return to practice, and there are few jury trials. And of those few cases where a former judge does appear in court for a jury trial, it is still improbable that he or she would mention judicial experience. However, this is not an excuse for failing to prohibit improper conduct. It

204. See, e.g., Texas Committee on Judicial Ethics, Opinion No 128, 1989 WL 1693504 (a former district judge described himself as "district judge" on the first line of his letterhead, then began the second line with "formerly").

205. See Appendix, R 6.07(1)(c).

206. See *supra* note 190 and the accompanying text. The ABA formal opinion cited there draws this distinction.

207. See Appendix, R 6.07(1)(d).

208. Only British Columbia currently has such a rule. There are general rules in other provinces, but they are too vague to reliably capture this type of conduct. See *supra* notes 44-46 and the accompanying text.

would be of little consolation to a wrongfully convicted defendant that the circumstances leading to his or her conviction were unusual or infrequent.

3. *Imposing a duty of judicial confidentiality*

Former judges fit awkwardly into the “conflict of interest” framework of Rule 1.12(a). The supposed conflict of interest is between the duty of confidentiality to the parties of a previous dispute and the duty of loyalty to the current client. It is true that judges become privy to information that could be considered confidential.²⁰⁹ The difficulty, however, is that judges are under no explicit duty to maintain those confidences, particularly after leaving the bench. A former judge who is free to use information obtained while on the bench has no reason to feel conflicted.

In order for there to be any real conflict of professional obligations for former Canadian judges, the law societies would need to first create a rule enforcing the confidentiality of judicial office. Such a rule would fit alongside the rules already enforcing the confidentiality of public office. However, such a rule should ideally be paired with a corresponding duty of confidentiality while the judge is on the bench. Otherwise information that was not confidential would suddenly become confidential once the judge was reinstated as a lawyer. For this reason, it would be ideal if the Canadian Judicial Council were to define the boundaries of a judicial duty of confidentiality. This is an area where collaboration across the two regulatory regimes—the one for lawyers and the one for judges—would pay valuable dividends. In the meantime, the best approach is for law societies to limit judges’ opportunities to use confidential information once they return to practice.

4. *Prohibiting participation in the same or related matters presided over as judge*

The Canadian rules do not specifically prohibit participation in the same case as both a judge and a lawyer. So in theory a judge could decide a motion for summary judgment as the motions judge, cease to be a judge, return to practice, and as counsel argue the appeal of the decision in an appellate court. However, the judge who presided over a case should not be able to act in the same case again as a lawyer. Indeed, this is the basic thrust of Rule 1.12(a), which has been adopted in nearly every state.²¹⁰ Even in many Canadian codes, former public officers are subject to a similar

209. E.g., through their participation in pre-trial conferences and exclusion of evidence hearings. See Rules of Civil Procedure, RRO 1990, Reg 194, R 50.09 and R 50.10 (information from the pre-trial conference that is not part of the public record cannot be raised during the trial and the pre-trial conference judge is precluded from being the trial judge).

210. The one state without the rule, California, is in the process of adopting it.

restriction.²¹¹ It simply does not make sense that former judges, whose participation in a matter is at least as visible and intimate as that of public officers, are not subject to any restrictions on subsequent participation. There are at least four reasons for establishing clear restrictions.

The first reason is that there is a high risk of a personal conflict of interest. There are a variety of circumstances under which the parties to a proceeding might want to challenge a decision made by a judge in an earlier proceeding.²¹² This could put the former judge in the dubious position of challenging his or her own decision. The former judge cannot be expected to pursue those arguments with the same zeal as another lawyer. That puts the client at a disadvantage. This could potentially be overcome with the consent of the client, although the same cannot be said of the other issues associated with the former judge's participation.

The second reason for a prohibition is the potential for confidential information to be used against the opposing party. There are occasionally things that a judge learns over the course of a proceeding that are not matters of public record. This information might be useful in an appeal and could also be useful in cases that are different but related. For example, a judge who presides over a pre-trial conference in a negligent manufacturing case could learn incriminating information about the manufacturer that would be useful if someone else were to file a similar claim. Particularly if the case was settled, some of this information would not be a matter of public record. As another example, a former judge could be hired to litigate a civil case related to a criminal matter over which he or she presided.²¹³ In either case, the consent of the client would obviously be easy to obtain, but would not solve the problem. This is probably why the American rules also require the consent of the other parties to the dispute.

A third concern is that perceptions of judicial neutrality will be compromised as a result of the judge's shifting loyalties. For a judge to preside over a case and then represent one of the parties in the same case would be unsettling even if conflicts of interest and confidentiality were not an issue. It is difficult to understand how a person could carry out a neutral role in a dispute with absolute conviction one day and then adopt a zealously partisan role the next. The perception would be that the former judge lacked conviction in at least one of these roles.

211. See *supra* note 57 and the accompanying text. The former public officer rules are broader in scope, as they prohibit participation in both the same and related matters. The appropriate scope of a Canadian rule directed at former judges is discussed further below.

212. The most obvious example is when a decision is appealed.

213. A judge might acquit the defendant and then subsequently act as his or her lawyer in an action for negligent investigation or malicious prosecution.

The fourth concern is the one cited in *O'Connor*, namely that if a former judge were to challenge his or her previous decisions it might “shake the authority of the judicial limb of government.”²¹⁴ This is the same circumstance that raises concerns about a personal conflict of interest, but *O'Connor* suggests that even if there is no conflict, harm could still be done through the weakening of judicial authority. While we have long accepted that judges make mistakes, *O'Connor* indicates that at least the judges themselves should believe they are making the right decision. One can imagine a judge who admits a key piece of evidence in a murder trial and then acts as a lawyer on the subsequent appeal arguing that it was an egregious miscarriage of justice to admit the evidence. It would be disenchanted if, when dealing with such important decisions, the judge could change his or her mind within a relatively short time. This could shake people’s confidence in the justice system.

Accepting that there is a need for restrictions on participation, the next step is to determine what the restrictions should be. The general rules about avoiding personal conflicts of interest and upholding the integrity of the administration of justice have some role to play, but they are too imprecise to provide a useful guide to former judges.²¹⁵ Rule 1.12(a)²¹⁶ and the CBA Code restriction on former public officers²¹⁷ each provide a model for a more precise rule. In designing a rule, the first question is whether former judges should be disqualified from acting in not just the same case, but in related matters as well.²¹⁸ Of the four concerns summarized above, only the confidentiality concern extends to participation in related matters. It therefore makes sense to only preclude former judges from participating in related matters if they possess confidential information. The ABA-MR rule uses the presumption that judges who participate personally and substantially in a matter acquire confidential information.²¹⁹ Applying the same presumption, a former judge who has participated personally and substantially in a case should not be permitted to participate in related

214. *Supra* note 98 at 631.

215. For a discussion of the problem of imprecision see Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation*, 2d ed (Toronto: Emond Montgomery Publications, 2011) at 123-124.

216. See *supra* note 118 and the accompanying text (“a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge... unless all parties to the proceeding give informed consent”).

217. See *supra* note 57 and the accompanying text (“The lawyer should not represent in the same or any related matter any persons or interests that the lawyer has been concerned with in an official capacity”).

218. The term “related matter” is meant to include civil proceedings related to criminal cases and factually-related civil cases involving the same defendant but different plaintiffs.

219. See Part III(1) above.

matters.²²⁰ A former judge who was only briefly involved with a case in an informal or administrative capacity is unlikely to acquire confidential information that would be relevant to a related matter.²²¹ In that case it would be excessively harsh to limit his or her participation in related matters.²²² It is sufficient to prohibit participation in the same case.²²³

A second question is whether it should be possible for the disqualification of former judges to be negated with informed consent, as in the ABA-MR rule. Informed consent would address some of the issues discussed above, but not all of them. The third and fourth concerns each involve harm to public confidence in the administration of justice, and this cannot be addressed by the consent of the parties to a dispute. In order to maintain public confidence in the administration of justice, former judges should not be permitted to act in any of the same cases that they previously participated in as a judge. However, there is no reason to completely prohibit judges from participating in related matters where the threat to public confidence is less pronounced. The primary concern is that the opposing party will be disadvantaged by the former judge's knowledge of confidential information. In that context, the other party should be able to give informed consent to the former judge's participation.²²⁴

A final question is whether to impute the disqualification of a former judge to other members of the same firm, similar to Rule 1.12(c). In the former client context, the Canadian rules impute disqualification aggressively. Similar concerns, including the public perception of the administration of justice, arise in the former judge context. It is difficult to see how precluding only the former judge but not others in the same firm from acting would be sufficient to maintain public confidence. Accordingly, the former judge's disqualification should be imputed to the firm. However, as under Rule 1.12(c), this should be subject to a screening mechanism which, if properly implemented, would isolate the former judge and so allow others in the same firm to act.²²⁵ Under the Canadian ethical rules, proper screening procedures have become an accepted procedure that balances the competing concerns of lawyers, clients, and

220. See Appendix, R 6.07(1)(f). It would be simpler to say that "a former judge cannot participate in related matters if he or she possesses confidential information advantageous to his or her client." However, there is no defined notion of judicial confidentiality and a presumption is easier to enforce.

221. E.g., a former family court judge who approved an uncontested divorce settlement.

222. E.g., a former family court judge who approved an uncontested divorce settlement should not be precluded from later representing one of the divorcees in a custody dispute.

223. See Appendix, R 6.07(1)(e).

224. See Appendix, R 6.07(1)(f). The FLSC Code defines "consent" in the definition section, and in these proposed rules the term is used with that definition in mind.

225. See Appendix, R 6.07(2).

the general public. For example, these procedures are frequently used in cases involving confidential information. The concerns raised by the involvement of former judges in the same or related matters are equally amenable to a screening mechanism. Given this, an absolute rule precluding other members of the former judge's firm from acting goes further than is required to protect clients and satisfy the public interest.

While these rules parallel the rules on former public officers and former clients, one important distinction should be noted. Those other rules tend to divide matters into three categories: the same, related, and new matters. They address new matters because information obtained in a previous matter could be relevant to a new but unrelated matter. They can do so because they focus on the confidentiality of the information and so the conflict of interest that arises in the new matter. As indicated above, such an approach is problematic in the former judge context because of the absence of a clear duty of judicial confidentiality. This makes it very difficult to formulate a broad rule that would address a former judge's ability to act in new matters.

5. *Prohibiting employment by the parties to a previously adjudicated dispute*

Just as Canadian rules have no parallel to Rule 1.12(a), they also lack a parallel to Rule 1.12(b), which would prohibit judges from negotiating employment with parties to a dispute or their lawyers. Although this is already an obvious violation of judicial ethics principles, the problem is that the Canadian Judicial Council may not be in a position to enforce the rule. The best evidence of having negotiated for employment is accepting employment, and by that point the judge is no longer under the Council's jurisdiction. The ABA-MR solves this problem with a rule directed at judges that is enforced retroactively if a judge is reinstated as a lawyer. This approach may not be possible within the jurisdictional constraints of the Canadian law societies. An alternative formulation would be to prohibit lawyers from being employed by an employer if the negotiations for that employment took place while the lawyer was a judge and was involved with a dispute involving the employer, whether as party or as counsel.²²⁶ This is slightly less comprehensive than Rule 1.12(b), since it would not apply if, subsequent to the negotiations, the former judge was not employed by the party or firm, such as in a case where the negotiations ultimately break down.

226. See Appendix, R 6.07(1)(g).

A more comprehensive alternative would be to prohibit accepting employment from one of the parties to any prior dispute. If a former judge cannot accept employment, then he or she has no incentive to negotiate for employment while on the bench. The difficulty with such a rule is its breadth. A broad prohibition on accepting employment from any party to a previously adjudicated dispute would be extremely harsh. A former judge will normally have played a role in thousands of disputes, involving a large number of different parties. Aside from the fact it would be difficult to keep track, never accepting employment from any of these parties would dramatically limit a former judge's options, especially as pertains to law firms.

6. *Other possible rules*

A group of related concerns still needs to be addressed, and for these there is little precedent in the current Canadian or American rules. These concerns relate to former judges acting in new matters that involve, in some way, one of their previous decisions. A former judge who acts in such a matter faces several issues. One is the actual or potential personal conflict of interest, as discussed above, between the client's best interests and loyalty to the decision. A second is the propriety of a former judge alleging that his or her previous decision is wrong, in fact or law. A third is the possibility that the former judge might attempt to clarify or reinterpret his or her previous decision through subsequent further statements.

A rule should be drafted to deal with personal conflicts of interest.²²⁷ Such a rule would protect a client from the conflicting loyalties at issue. Because the core concern in this area is the protection of the client, the conflict should be one the client can waive by consent.

The concern raised in cases like *O'Connor* of a former judge attacking his or her own decisions may be overstated, to the point that no rule is required. Consider first findings of fact. A former judge would only be likely to have any reason for contradicting his or her prior findings of fact in the same or a related matter: in any other matter, the factual findings from the initial matter would not be open for challenge. So the rules precluding a former judge from acting in the same or a related matter already address the central concern as far as findings of fact go. Consider then conclusions of law. It may appear quite disruptive to the administration of justice for a former judge to allege that one of his or her prior decisions is, in law, wrong. However, judges are allowed to change their views of the law while serving as judges. They can, in effect, reverse themselves. If the

227. See Appendix, R 6.07(1)(h).

administration of justice can cope with this, it should equally, and perhaps more easily, be able to cope with a former judge arguing against his or her previous conclusions as to the law.

As noted, a unique concern associated with former judges expressing views of the law is that they might try to reinterpret or expand a previous decision for the benefit of a client. Any time a former judge comments on the intended meaning of a case he or she decided those comments are likely to be influential. If a former judge has been hired to provide a revised interpretation, then that influence would be improper. There is already a Canadian restriction on former public officers which prevents them “advising upon” the rulings of official bodies that they were a member of at the time of the ruling. If an analogous restriction were imposed on former judges, it would eliminate the potential for unduly influential commentary on previous cases. However, care must be taken in drafting any rule on this point. It would be overly broad to preclude a former judge from providing any advice that involved using one of his or her previous decisions. Former judges should be able to rely on, interpret, apply, and even contradict such decisions. But as a lawyer they should not be able to purport to elaborate on or clarify the decisions.²²⁸

7. The alternative: prohibiting judges from returning to practice

The simplest and most reliable solution to the ethical issues raised above is to prohibit judges from returning to practice.²²⁹ Supporters of this approach argue that part of the quid pro quo for a judicial appointment should be that the judge will not practice again. There are a variety of reasons why judges should be willing to accept this restriction. Judges are well-remunerated, both while serving and under their pensions, and so should be willing to accept a restriction on their ability to earn income after leaving office. In addition, having been giving significant status and influence by the state, judges should not expect to profit privately from having held that office. However, prohibition is a radical solution which raises several issues of its own.

Both New Zealand and England have had a ban on former judges returning to practice, and the debate surrounding their bans may be instructive for Canada. The English ban on former judges returning to practice was nearly eliminated, but it was eventually maintained after a

228. See Appendix, R 6.07(1)(i).

229. For a recent argument that certain American judges should not be allowed to return to practice see Mary L. Clark, “Judicial Retirement and Return to Practice” (2011) 60 Cath UL Rev 841. The author concludes (at 904) that “the real and apparent threats to judicial independence, impartiality, and integrity presented by Article III judges returning to practice outweigh concerns for former judges’ access to lucrative law practice opportunities.”

vigorous debate. The only written authority for the ban is a provision in the terms of employment for salaried judges which states that appointment is “made on the understanding that appointees will not return to practice.”²³⁰ A 2004 consultation paper suggested that the restriction narrowed the applicant pool for judges and contributed to the lack of ethnic diversity in the judiciary.²³¹ In 2006, the Lord Chancellor released a second consultation paper announcing his decision to lift the ban and seeking feedback on what sorts of restrictions should be placed on former judges.²³² The Lord Chancellor’s belief was that concerns of undue influence were overstated and could be mitigated with restrictions similar to those now in place in Canada and the United States.²³³ However, the consultation paper was met with opposition from both lawyers and judges, each of whom were deeply concerned about the impact that allowing judges to return to practice would have on public perceptions of the judiciary.²³⁴ The terms and conditions of service were never changed, and judges have continued to express opposition to any amendments.²³⁵

Until recently, it was also a condition of employment for New Zealand High Court judges that they never return to private practice.²³⁶ This restriction was narrower than the one in England, which applies to all salaried judges, and apparently less authoritative; on at least one occasion, a High Court judge ignored the restriction and returned to private practice without consequence.²³⁷ The same judge recently criticized the restriction

230. Judicial Appointments Commission, “High Court Judges: Outline of Terms and Conditions of Service”, online: <<http://jac.judiciary.gov.uk/selection-process/selection-exercises.htm>> (each posted position contains a link to the relevant terms and conditions of service).

231. Department for Constitutional Affairs, “Increasing Diversity in the Judiciary”, CP 25/04 (2004) at 44-45.

232. Department for Constitutional Affairs, “Return to Practice by Former Salaried Judges”, CP 15/06 (2004).

233. *Ibid* at 7-10 (no specific reference was made to the Canadian and American rules, although the possible restrictions suggested were generally very similar).

234. London Solicitors Litigation Association, “LSLA Response to DCA Consultation Paper CP15/06” (7 December 2006): “Many are concerned that while the risk of actual bias or undue influence may be modest, the same cannot be said for the perception experienced...by clients and the lay public”; The Judges’ Council, “Report of the Judges’ Council Working Group on the Consultation Paper CP15/06” (30 November 2006): “it would inevitably diminish the standing of the judiciary and seriously weaken its independence...perception of possible bias will be a constant threat.”

235. Judiciary of England and Wales, “The Report of the Advisory Panel on Judicial Diversity 2010” (March 2010) at 51-52. But see Judiciary of England and Wales, “Judicial Diversity Conference: A Judiciary for the 21st Century” (11 March 2009) at 12 (a publication from the year earlier recommending lifting the ban).

236. David AR Williams, “The Judicial Appointment Process” (2004) NZ Law Review 39 at 79 (the “undertaking not to resume practice” is set out by the author, who was a High Court judge).

237. *Ibid* at 83: the author reports that his return to the bar after sitting on the high court “did not cause any trouble, sensitivity, or difficulty to myself, the legal profession, the public, or the judiciary before whom I appeared.”

and identified several reasons why it was problematic. Among the most persuasive was the argument that it was an unjustifiable restraint of trade that “would not be legally permissible in any other sphere.”²³⁸ In 2005, shortly after the article was published, New Zealand lifted the restriction because it was “considered to be unenforceable and inappropriate.”²³⁹

When examined, the practice in England and New Zealand does not offer a compelling reason to adopt an outright ban on judges returning to practice in Canada. The English opposition to lifting the ban, which is well documented, is based on fears that the judiciary will be corrupted or lose public confidence. These concerns are legitimate, but the outright ban is an imprecise solution.

Many of the arguments in favour of a prohibition apply equally to lawyers who hold a variety of public offices, in particular to those who serve on important tribunals or hold leading positions in the government. These people also are well-remunerated and they also get significant status and influence from these positions. There is no suggestion that these people should be prohibited from returning to practice. It is hard to see why judges should not have the same option. Furthermore, some lawyers accept a significant reduction in remuneration to become judges, and they may consider the ability to return to practice as essential to that economic bargain. Those countries that prohibit judges from returning to practice do so largely for historical reasons. Given our opposite history, any argument for prohibition would need to be highly compelling to trigger a switch in approach. Overall, a more measured approach is the more appropriate solution.

Conclusion

There is a clear imperative for ethical rules directed at former judges. A review of Canadian and American ethical rules and case law reveals no fewer than seven unique concerns associated with former judges returning to practice: undue influence over judges as the result of personal relationships, undue influence over judges and juries as the result of judicial reverence, conflicts of professional obligations, conflicts of personal interests, harm to the integrity of the administration of justice, the potential deception of the public regarding a lawyer’s qualifications, and the potential for the appearance of impropriety. Even though some of these concerns are sometimes overstated, most of them are a legitimate

238. *Ibid* at 82.

239. Letter to Will Bortolin from Kieron McCarron, Judicial Administrator to the Chief Justice, Chief Justice of New Zealand (13 July 2011) (the letter notes that it is still a convention that former judges do not return to the practice of law).

threat to the proper administration of justice. In many respects, the current Canadian ethical rules are an inadequate response to these concerns. Admittedly there are different ways that the conduct of former judges could be addressed: there are general rules meant to protect the integrity of the administration of justice that can be invoked, opposing counsel can bring a motion for the disqualification of a former judge, and the presiding judge can always disqualify himself or herself. However, these avenues are not sufficiently specific to address the complex issues raised by judges returning to practice. Specific rules, clearly addressing the most problematic conduct, would provide more meaningful guidance for the conduct of judges returning to practice and would help to minimize the instances of impropriety.

The ethical rules in this area have not been subjected to much analysis, largely because until recently few Canadian judges returned to practice. With more former judges returning to practice, the time has come to address the inadequacies. The Canadian public officer rules and American former judge rules provide a foundation for designing amendments. In the Appendix, the conclusions from the foregoing analysis have been used to draft a proposed rule about former judges returning to practice. Adopting such a rule would be an important step forward in the modernization and ongoing development of Canadian ethical rules for lawyers.

Appendix

The proposed rule is formatted and numbered to match the FLSC Code.

6.07 FORMER JUDGES RETURNING TO PRACTICE

6.07(1) A lawyer who returns to practice after retiring, resigning or being removed as a judge must not:

(a) appear as a lawyer in any province in which the lawyer previously exercised a judicial function before:

- (i) the court of which the lawyer was a member; or
- (ii) any courts of inferior jurisdiction to the court of which the lawyer was a member or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction

unless the governing body so approves on the basis of exceptional circumstances;

(b) appear before a judicial officer if by reason of relationship or past association the lawyer would appear to be in a preferred position, unless all parties consent;

(c) advertise prior judicial experience so as to suggest that the lawyer has special influence beyond that of other lawyers, including:

- (i) using a judicial title or honorific, whether or not qualified by language indicating that the lawyer no longer holds judicial office; or
- (ii) using a picture of the lawyer wearing judicial robes;

(d) refer to the lawyer's prior judicial experience while appearing before a court;

(e) act in any matter in which the lawyer participated as a judge;

(f) unless all parties consent, act in any matter related to a matter in which the lawyer substantially participated as a judge;

- (g) be employed by any party or any party's lawyer from any matter in which the lawyer substantially participated as a judge if negotiations for that employment occurred during the participation in that matter;
- (h) unless the client consents, act where there is an actual or potential personal conflict of interest between the interests of a client and the lawyer's loyalty to one of the lawyer's previous judicial decisions; or
- (i) provide advice about the interpretation of one of the lawyer's previous judicial decisions that is intended to elaborate on or clarify the decision.

6.07(2) Where a lawyer is disqualified from acting under sub-rules 6.07(1)(e) or (f), a partner or associate of the lawyer may act in the matter only if:

- (a) all parties consent to the lawyer's partner or associate acting; or
- (b) the lawyer's partner or associate establishes that it is in the interests of justice to act in the matter, having regard to all relevant circumstances, including:
 - (i) the adequacy of assurances that no disclosure of information about the matter to the partner or associate has occurred;
 - (ii) the adequacy and timing of the measures taken to ensure that no disclosure of information to the partner or associate will occur;
 - (iii) the extent of prejudice to any party;
 - (iv) the good faith of the parties;
 - (v) the availability of suitable alternative counsel; and
 - (vi) issues affecting the public interest.

