

May 29, 2017

VIA E-MAIL: consultations@flsc.ca

Me Maurice Piette
President
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Dear Me Piette:

**RE: Proposed Changes to Model Code of Professional Conduct
Consultation Report, January 31, 2017**

The Advocates' Society is a not-for-profit association of over 5,500 lawyers across Canada. The mandate of The Advocates' Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, The Advocates' Society's members have a keen interest in the effective judicial resolution of legal disputes.

The Advocates' Society has reviewed the proposed amendments to the Model Code of Professional Conduct, with the rationale for these amendments, as articulated in the Consultation Report dated January 31, 2017. The Advocates' Society makes the following submissions for the Federation's consideration.

1. *Technological Competence*

The Advocates' Society agrees that competency requires that lawyers understand the legal and ethical implications of technological tools used as part of their practice, including issues related to privacy and security. As such, The Advocates' Society sees it as reasonable for the Model Code to specifically address technology within the commentary about competence and to include the proposed second sentence under paragraph 5A: "A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3."

The Advocates' Society, however, has concerns about the ambiguity around the proposed addition in paragraph 5A to the commentary that, "[A] lawyer should develop and maintain a facility with technology relevant to the nature and area of the lawyer's practice and responsibilities". To "develop and maintain a facility with technology" is too vague a standard. Moreover, competence in technology will, for some litigators, be delegated to other lawyers within a firm or special service providers.

The goals sought to be advanced by the proposed amendment can be achieved by means other than each individual lawyer developing and maintaining a facility with technology. Specifically, a lawyer lacking individual facility with technology can associate with another lawyer who is delegated the responsibility for technological competence or can retain the services of technology consultants. Acknowledging that technological competence can be achieved through association or delegation also recognizes that technology evolves rapidly and maintaining technological competence may involve a material commitment of time. Hence, competence may be ultimately best achieved by an individual lawyer acknowledging his or her own limitations and taking the requisite steps to associate with or retain persons with the requisite knowledge and expertise.

2. Return to Practice of Former Judges

The Advocates' Society supports the proposed amendment in Rule 5.6-4 surrounding the recruitment of judges. The Advocates' Society suggests deleting the last portion of the last sentence in paragraph 1 of the commentary, to leave the following: "Even the suggestion of lawyers or law firms being able to discuss post-judicial business affairs with a judge puts the appearance of judicial independence into question and could create judicial conflicts of interest detrimental to the expeditious administration of justice ~~if these discussions turn sour~~". The Advocates' Society notes that the appearance of a conflict of interest may ensue if recruitment discussions with a judge do not reach a satisfactory conclusion, but may also ensue if these discussions result in a judge accepting an opportunity to work with a particular firm.

The Advocates' Society agrees with the proposed amendment in Rule 7.7-2, and its associated commentary, expressly imposing a duty of confidence of confidential judicial information, discussions, or deliberations. Such a duty would assist in alleviating the perception that former judges providing counsel to lawyers or litigants are imparting confidential judicial information to select litigants.

The Advocates' Society is also in general agreement with the proposed amendment in Rule 7.7-1. Other than in exceptional circumstances, the public might perceive that a former judge appearing as a lawyer before a court or tribunal results in an unfair advantage. This perception may easily extend beyond any temporal period. For example, the perceived moral suasion of a former Justice of the Supreme Court of Canada or Justice of a provincial appellate court may extend well beyond the three-year time period currently set out in the Model Code.

The Advocates' Society also accepts that an absolute prohibition on a former judge appearing before courts or tribunals will be too severe in certain circumstances, for example where a judge's tenure on the bench is very short and of limited range. As such, the Advocates' Society agrees that a former judge might appear before a court or tribunal in exceptional circumstances as contemplated in proposed Rule 7.7-3 and its associated commentary. With regard to the terms "range or jurisdiction of the former judge's judicial activity" in paragraph 1c) of the commentary, The Advocates' Society would support an express reference to clarify that "range or jurisdiction" may refer to both the location of the former judge and area or areas of law of the disputes which the former judge adjudicated, as applicable.

3. Related Amendment to the Rule on Encouraging Respect for the Administration of Justice

The Advocates' Society views this proposed amendment as non-contentious.

Thank you for providing The Advocates' Society with the opportunity to make submissions in response to the Consultation Report. I would be pleased to discuss this letter with you further.

Yours very truly,



Bradley E. Berg
President

Task Force Members:

Steve Tenai, Chair, *Norton Rose Fulbright Canada LLP*, Toronto

Rosemary Fisher, *SimpsonWigle LAW LLP*, Burlington

Chloe Snider, *Dentons Canada LLP*, Toronto

Anne Turley, *Department of Justice*, Ottawa

Marie-Andrée Vermette, *WeirFoulds LLP*, Toronto