



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

April 11, 2019

Via email: norman.sabourin@cjc-ccm.ca

Norman Sabourin
Executive Director and Senior General Counsel
Canadian Judicial Council
Ottawa, ON K1A 0W8

Dear Mr. Sabourin:

Re: Ethical Principles for Judges

The Canadian Bar Association Judicial Issues Committee (CBA Committee) thanks the Hon. Martel Popescul and the Hon. Deborah Smith, co-chairs of the Canadian Judicial Council's Judicial Independence Committee, for the invitation to comment on proposed changes to the Canadian Judicial Council's *Ethical Principles for Judges* (EPJ).

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Committee addresses policy issues relating to judicial appointments, compensation, discipline and independence. On the issue of post-judicial practice of law, the CBA Committee's comments were developed in consultation with the CBA Ethics and Professional Responsibility Committee, whose mandate includes fostering ethical and professional conduct and standards in the legal profession.

The CJC's January 2019 Background Paper to guide stakeholder feedback on the current approach comments on distinctions between the English and French versions of the EPJ and introduces six themes for consideration: social media; self-represented litigants; case management, settlement conference, and judicial mediation; public engagement; professional development; and post-retirement. The CBA Committee comments on each topic in turn.

Harmonization of English and French Language Versions: Aspirational or Directive

The Background Paper states that the language in the English version is aspirational, while the French version is more directive. The Background Paper notes that the CJC will revise the two versions to "provide further clarity on the generally aspirational nature of ethical guidance for judges." We understand that the CJC plans to revise the French version to be less directive and more aspirational.

The EPJ states:

The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with the difficult ethical and professional issues which confront them and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct. (p. 3)

The CBA Committee believes that modern guidance on judicial ethics requires more than aspirational guidelines.

One argument advanced in support of aspirational guidelines is that they inspire individuals to a higher standard of behaviour by articulating general principles and underlying goals, while a code of conduct creates a minimum standard to which individuals will be held accountable through rules.¹ In other words, a code of conduct sets an ethical ceiling, while aspirational guidelines set a floor. A code of ethics with specific rules of conduct, it is argued, precludes moral development.²

The CBA Committee would take a different view of the purpose of codes of conduct and their intended effects. We agree with then Professor Alice Woolley that, for lawyers, a code of conduct ought to give meaningful guidance on the things lawyers are actually required to do, by articulating specific and general duties.³ Codes of conduct should provide guidance on important issues of practice, avoid moral ambiguity and, perhaps most importantly, articulate for the benefit of the broader public interest the standards by which the profession holds itself to account.

The CBA Committee believes the same holds true for the judiciary. The CBA's 1993 report, *Touchstones for Change: Equality, Diversity and Accountability*, identified the need for mechanisms addressing judicial conduct to maintain public confidence in the justice system.⁴ CBA policy supports a model Code of Conduct for the judiciary developed by the Canadian Judicial Council and its provincial and territorial counterparts and which articulates clear and specific guidance. At minimum, the CBA Committee encourages the CJC to consider more consistent and directive language for the EPJ, to be both meaningful for judicial practice and an aid to public understanding of the standards by which the judiciary holds itself to account.

Social Media

The CBA Committee believes that the extent to which courts engage with social media should be left to court administration. However, the CBA Committee recommends that the CJC offer guidance on the use of social media by individual judges.

The Canadian Centre for Court Technology's May 2015 discussion paper, *The Use of Social Media by Canadian Judicial Officers*,⁵ gives empirical insight and proposed guidance on this issue. The National Center for State Courts Center for Judicial Ethics has also gathered and analyzed advisory opinions and discipline decisions on social media and judicial ethics.⁶ These are rich resources for understanding the range of ethical issues which judges confront when engaging with social media.

¹ M.A. Wilkinson, Crista Walker & Peter Mercer, "Do Codes of Ethics Actually Shape Legal Practice?" (2000) 45 McGill LJ. 645 at 651 [online](#).

² Note 1, at 653.

³ Alice Woolley, "What Should a Code of Conduct Do (Or Not Do)?" *Slaw* (25 February 2016), [online](#).

⁴ CBA, *Touchstones for Change: Equality, Diversity and Accountability* (1993), [online](#).

⁵ "The Use of Social Media by Canadian Judicial Officers" (May 2015).

⁶ See, e.g.: Social Media and Judicial Ethics Update February 2019, [online](#).

The CBA Committee recommends that the EPJ clarify the duty of individual judges on use of social media in personal and professional contexts. The CBA Committee agrees with then Dean Lorne Sossin that judges must understand that their social media activity “will be measured against the standard of public confidence in the justice system.”⁷ We support the recommendation in the CCCT discussion paper that judicial institutions develop complementary education programs and ensure that human and technological resources are in place to support judges in understanding the implications and accountabilities arising from their use of social media.

Self-Represented Litigants

The CBA Committee appreciates that this issue challenges our entire legal system, not only the judiciary. The CBA has generally approached this issue as one of access to justice and is one of many justice organizations to make tools available to the public to assist with defining legal problems, identifying resources and, if needed, guidance on self-representation.⁸

We are advised that National Judicial Institute resources give detailed guidance for judges on a range of issues related to appearances by self-represented litigants. Guidance in the EPJ on the boundaries between assisting and advocating for a self-represented litigant should be helpful for judges and assist the public in understanding the challenges.

Case Management, Settlement Conferences and Judicial Mediation

In general, judges involved in settlement conferences and mediation should not preside over any trial of the issues. In some jurisdictions, parties may agree to a judicial dispute resolution that permits judges involved in pre-trial settlement to make final orders.

Public Engagement

The EPJ identifies several limitations related to public engagement by judges. Judges should not:

- be involved with an organization if there is a prospect that it will be involved in litigation before the judge or will regularly be engaged in proceedings in any court
- solicit funds or membership
- provide investment advice.

There is significant risk of perceived conflict when judges participate in the activities of, or sit on the boards of, civic and charitable organizations. The CBA Committee believes they should do so only with the approval of their Chief Justice.

Professional Development

The CBA Committee believes that judges have a duty to engage in continuing education, particularly about the social context in which judicial decision-making takes place.

This duty is recognized in EPJ Rule 4 (Diligence), Commentary 5 and the CJC’s *Judicial Education Guidelines for Canadian Superior Courts*.⁹

⁷ Lorne Sossin & Meredith Bacal, “Judicial Ethics in a Digital Age” (2013) 46.3 UBC L Rev 629-664, [online](#).

⁸ See, e.g. Legal Health Checks, [online](#).

⁹ *Judicial Education Guidelines for Canadian Superior Courts*, (2008 as am. 2009) [online](#).

Post-Retirement

The CBA Committee encourages the inclusion of post-retirement issues in a revised EPJ.

An important issue is the return to practice of former judges. Generally, this is a matter for law societies, and is, by all accounts, under discussion by the Federation of Law Societies of Canada and its member law societies across Canada. In a 2016 submission to the Federation of Law Societies, the CBA Ethics Committee suggested that the principal issue is not whether former judges should be allowed to return to practice, but rather what aspects of post-judicial practice should be regulated and how.¹⁰

The CBA Committee believes some aspects of legal practice should be permitted by former judges, as they would be beneficial to the public. The most contentious issue is appearances in the court of a former judge. The primary concern, from our perspective, is the perception of bias favouring the former judge. The concern extends beyond individual cases to public perception of the integrity of the legal system.

We encourage the CJC to consider whether a post-judicial code of conduct, separate from the EPJ, might be a better mechanism for managing the expectations and accountabilities of former judges, whether they return to the practice of law or not.

Additional Issues

Several commentators have encouraged the CJC to consider elaborating on a duty of confidentiality for judges.¹¹ The CBA Committee supports including in the EPJ (and a post-judicial code of conduct) guidance demarcating a judicial duty of confidentiality, particularly for matters that are not part of the public record.

The CBA Committee thanks the CJC for the opportunity to comment on these important issues. We would welcome further discussion as the consultation progresses.

Sincerely,

(original letter signed by Tina Head for John D. Stefaniuk)

John D. Stefaniuk
Chair, CBA Judicial Issues Committee

¹⁰ CBA Ethics Committee, [Submission](#) to the Federation of Law Societies (2016).

¹¹ Stephn Pitel & Will Bortolin, "Revising Canada's Ethical Rules for Judges Returning to Practice" (Fall 2011) 34:2 Dalhousie LJ 483-527, [online](#). Adam Dodek, "Judicial Confidentiality" *Slaw* (13 June 2016), [online](#).