

THE BENCH TO THE BAR:

What Can/Should Judges
do After Demitting Office?

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INTRODUCTION

1. In 1990, the Jamaican Parliament enacted the Judiciary (Constitutional Amendment) Act (Act 15 of 1990). The Act amended Sections 100 and 106 of the Constitution to increase the mandatory age of retirement of Supreme Court judges and judges of the Court of Appeal respectively from 65 (with a possible extension to 67) to 70.
2. The Bill was introduced by Hon. Carl Rattray, the then Minister of Justice. In the memorandum of objects and reasons, the Hon. Minister said that the upward revision in the age was desirable given (among other reasons) the capacity of judges of 70 years and over to satisfactorily discharge judicial functions.
3. More than 2 decades has passed since those amendments were made and another observation could be made today with equal force. Increasingly, judges are retiring in good mental and physical health. Many are active for more than a decade after retiring.
4. That post retirement activity takes different forms. Some are non controversial. Those include:
 - (a) Sitting on the bench in other jurisdictions;
 - (b) Chairing or being members of commissions of enquiry or statutory bodies; and

- (c) Lecturing, writing or involvement in voluntary organizations.
5. Some lawyers, members of the public (and I am reliably informed) some judges have questioned the appropriateness of other post retirement activities. These include:
- (a) Preparing and issuing legal opinions, at the request of lawyers or lay clients;
 - (b) Being consultants to law firms; and
 - (c) Being consultants to or members of the boards of directors of commercial corporations.
6. This presentation will consider two separate questions: what are retired judges of the Supreme Court and Court of Appeal now allowed to do and what should they be allowed to do?

WHAT CAN JUDGES DO AFTER LEAVING OFFICE?

7. Unfortunately, the answer to this question cannot be found in any of the obvious places. Neither the Constitution nor (as far as the writer is aware) any statute speaks to it. There is no judicial code of ethics which prescribes this as there is in other jurisdictions. Subject to the letter referred to below, there is no contract of employment that addresses this.
8. While most people seem to agree that retired judges are subject to some restriction, the extent of the restriction is in doubt. Some are of the view that retired judges are not allowed to carry on a legal practice at all. Others think that they are only prohibited from appearing in court.

9. The memorandum of objects and reasons of the Judiciary (Constitutional Amendment) Act gave another justification for the increase in the retirement age: **“the restrictions from private legal practice to which judges are subject after retirement”**. That language appears to support the former view, but there is no indication as to the basis for the assertion.

10. On the other hand, Canon V (g) of the Legal Profession (Canons of Professional Ethics) Rules provides:

“An attorney who previously held a substantive appointment as a judge of the Supreme Court or the Court of Appeal shall not appear as an attorney in any of the Courts of the island, after demitting such office.”

11. By limiting the restriction to court appearance, the Canon arguably envisages that retired judges can practise law otherwise.

12. Upon appointment to the Supreme Court or the Court of Appeal, judges are invited to sign a letter that contains an undertaking relating to post retirement activities. The writer understands that there may have been different versions of the letter. In some, the undertaking is to not return to private practice, and in others the undertaking is to not appear as an advocate. The writer also understands that many judges have never signed such a letter.

13. As indicated below, there is a convention in England that judges will not return to any form of private legal practice after leaving office. There was presumably a similar convention in Jamaica at one time, but neither the regulations nor recent practice suggest that it is still in place.

14. Finally, a question has been raised as to whether any such restriction is constitutional. As indicated below, a retired Trinidadian judge filed a

challenge on that ground. It does not appear however, that the courts were required to determine the issue.

15. It is submitted that the better view is that after leaving office, a judge of the Jamaican Supreme Court or the Court of Appeal can return to the private practice of law, but not as an advocate in the courts.

THE POSITION IN OTHER JURISDICTIONS

16. The position in other jurisdictions varies. I will discuss the position in England, Canada, Trinidad and Tobago, the Bahamas and the Caribbean Court of Justice.

England

17. Judges in England are not expressly prohibited from returning to practice after they demit office, but there is a well established convention that they will not do so. As a very recent article in the Law Society Gazette¹ pointed out, judges' terms of service state that:

“The lord chancellor also regards a judgeship as a lifetime appointment. Any offer of appointment is therefore made on the understanding that appointees will not return to practice.”

18. It seems that this convention or “understanding” may be under threat. The same article quotes the chief justice as saying that **“judges are now prepared to defy this ‘understanding’ if their pensions are reduced”**. This is a reaction to indications that the government is considering changing the judicial pension scheme.

¹ <http://www.lawgazette.co.uk/opinion/joshua-rozenberg/judges-threats-over-pensions-cuts>, June 17, 2013

Ontario, Canada

19. In Ontario a judge can return to practice after he demits office subject to certain limitations. In that province the Law Society is the regulatory body authorized to issue licences to persons who have been approved to practice law as a barrister or solicitor. The Law Society is governed by the **Law Society Act**. Section 31(1) of that Act provides that a judge's licence is held in abeyance while he holds office either as a:

“(a) full-time judge of a any federal, provincial or territorial court, as a full-time master of the Superior Court of Justice, as a full-time case management master, or as a full-time prothonotary of the Federal Court of Canada; or

(b) full-time member of the Ontario Municipal Board or as a full-time member of a tribunal that has a judicial or quasi-judicial function and that is named in the regulations for the purposes of this section.”

20. Section 31(2) further provides that:

“Upon ceasing to hold an office described in subsection (1), a person whose licence is in abeyance may apply to the Society to have the licence restored and, subject to subsection (3), the Society shall restore it.”

21. Subsection (3) provides that the Hearing Panel may refuse to restore the judge's licence if it finds that he was removed or resigned from office because of:

(a) conduct that was incompatible with the due execution of the office;

(b) failure to perform the duties of the office; or

(c) **conduct that, if done by a licensee, would be professional misconduct or conduct unbecoming a licensee.”**

22. **The Rules of Professional Conduct** contain further restrictions on what a retired judge can do when he returns to practice. It makes a distinction between retired appellate judges and other retired judges.

23. Rule 6.08 (3) states that a retired appellate judge cannot **“appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a committee of Convocation appointed for the purpose. This approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.”**

24. In relation to other retired judges, Rule 6.08 (4) states that one cannot **“appear as counsel or advocate:**

(a) before the court on which he served or any lower court; and

(b) before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction

for a period of two years from the date of his or her retirement, resignation, or removal, without the express approval of a committee of Convocation, appointed for the purpose, which approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.”

25. It appears that retired judges in Ontario can practice law outside of the courts. However, the legislators obviously had concerns with a retired judge appearing as counsel before a court on which he served or a lower court. They addressed those concerns by effectively prohibiting retired appellate judges permanently, and other retired judges for two years,

from appearing as counsel or advocate. A retired judge can only avoid these prohibitions with the committee's approval, which will only be granted in "exceptional circumstances".

Trinidad and Tobago

26. In Trinidad and Tobago, the Third Schedule, Part A, Rule 54(1) of the **Legal Profession Act** states that:

"A person who previously held a substantive appointment as a Judge of the Supreme Court shall not appear as an Attorney-at-law in any of the Courts of Trinidad & Tobago for a period of ten years commencing on the date of his retirement, resignation or other termination of such appointment."

27. Rule 54(2) goes on to state that **"this rule shall not apply to a person who is appointed as a Judge in a temporary capacity."**
28. The writer understands that prior to the enactment of this provision the position in that jurisdiction was the same as it is in Jamaica, with no express statutory or other prohibition. A retired Trinidadian judge instituted proceedings questioning the constitutionality of any such restriction, but it seems the matter was never determined by the courts.
29. Instead, the provision quoted above was enacted, perhaps as a compromise position.
30. Trinidad treats with the problem of retired judges appearing as counsel in court by imposing a longer time ban than obtains in Ontario. As is the case in Ontario, the wording of Rule 54(1) suggests that retired judges can engage in other legal activities, before the expiration of the ten year restriction.

31. Like their English counterparts, it appears that the judges in the twin island republic are not happy with the present position because of the state of their pensions. According to an article in The Trinidad Guardian Newspaper that was published on January 15, 2012², a proposal was sent to Cabinet to reduce the ten year ban on retired judges returning to practice in the courts. The proposal was made in response to concerns by judges that their pension package was not enough to meet their expenses after retirement.
32. The article quoted retired Appeal Court Justice Zainool Hosein who returned to practice after serving the ten year ban as saying:
- “It’s no good tying people up and saying you can’t practice for ten years and leave their pension at a static level. It soon becomes eroded by not only inflation, but medical care.”**
33. However, the proposal was withdrawn as it was felt that the Law Association³ and not Cabinet should handle this initiative.
34. The Trinidadian Cabinet recently approved legislation to increase the pensions of former Chief Justices and retired judges⁴, but the concerns are plainly not resolved. At a press conference on June 27, 2013, the attorney general indicated that judges are threatening to resign because of concerns in relation to pensions, remuneration and other issues. He said that the Government is moving to amend legislation to allow for an increase in pension payments to retired judges, and that he has asked

² <http://www.guardian.co.tt/news/sunday-january-15-2012/bitter-pill-retired-judges>

³ The Law Association is a regulatory body

⁴ <http://www.newsday.co.tt/news/0.179821.html>

the Law Association to look at the issue of the ten year ban as “**the time has come to review that measure**”⁵.

Bahamas

35. The Commonwealth of the Bahamas does not place any restrictions on a retired judge returning to practice, whether in the courts or otherwise, and many retired judges have done so. In fact, the first Bahamian Chief Justice Sir Leonard Knowles returned to private practice as an advocate after he retired (before the mandatory retirement age). His letterhead read “*Sir Leonard J Knowles, Former Chief Justice of the Commonwealth of The Bahamas*”. More than one retired judge is presently in private practice in that jurisdiction.

Caribbean Court of Justice

36. Clause 1.18 of the **Code of Judicial Conduct** for judges of the CCJ states that “**a judge shall not practice law whilst the holder of judicial office.**” It does not however speak to whether a judge can practice law after he demits office. There is therefore no express provision prohibiting a retired judge of the CCJ from practicing law in a jurisdiction that allows him to practice law.

WHAT SHOULD JUDGES BE ABLE TO DO AFTER LEAVING OFFICE?

37. Unlike other public servants, some retired judges in Jamaica receive a pension equivalent to 100% of their final salary⁶. However, pensions are

⁵ <http://www.newsday.co.tt/news/0,179821.html>

⁶ Judges who go directly to the bench from the private sector may receive a reduced pension depending on the length of their service.

not indexed to inflation or present salaries, and in real terms their value may diminish significantly. Retired judges may therefore reasonably wish to return to private practice to obtain an additional source of income in order to meet their increasing living and medical expenses.

38. It is submitted that the present state of uncertainty is undesirable, and that judges, lawyers, and the public generally should be clear as to the extent of any restrictions. The more important question may therefore be what the restriction should be.
39. In the writer's view, retired judges should not be prevented from practising law other than as advocates. However, valid concerns have been expressed about judges returning to practice in the courts over which they presided and before the judges with whom they sat. The writer does not share the concern that retired judges will necessarily have any advantage over other counsel.
40. They may have developed close personal and professional relationships with their former colleagues, but in our small society that is also true of many other circumstances. They may have a good idea as to the predilections and views of their former colleagues, but to some extent, many senior counsel may also share that advantage.
41. The more valid concern is that many lawyers and litigants will fear that a retired judge will have an unfair advantage, even if only as a result of an unconscious bias. In the writer's view, that may be a sufficient reason to maintain at least a temporary restriction on retired judges appearing as advocates.

CONSEQUENTIAL ISSUES

42. Regardless of how this issue is resolved, it is submitted that judges who return to private practice whether in the courts or otherwise, will be subject to the same requirements that apply to other private practitioners. They should therefore (inter alia):

- (a) Hold current practising certificates;
- (b) Comply with the continuing legal professional development regulations;
- (c) Comply with the regulations relating to clients' accounts and accounting reports; and
- (d) Be subject to the jurisdiction of the Disciplinary Committee of the General Legal Council.

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