The Australasian Institute of
Judicial Administration Incorporated

GUIDE TO JUDICIAL CONDUCT

(Third Edition)

Published for
The Council of Chief Justices of Australia and New Zealand
by The Australasian Institute of Judicial Administration Incorporated

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The Australasian Institute of Judicial Administration Incorporated ("AIJA") is an incorporated association affiliated with Monash University. Its main functions are the conduct of professional skills courses and seminars for judicial officers and others involved in the administration of the justice system, research into various aspects of judicial administration and the collection and dissemination of information on judicial administration. Its members include judges, magistrates, legal practitioners, court administrators, academic lawyers and other individuals and organisations interested in improving the operation of the justice system.

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REVISION RECORD

By resolution of the Council of Chief Justices of Australia and New Zealand a paragraph has been added in section 2.3 before the final paragraph on page 9. (November 2020).

ACKNOWLEDGMENTS

This is the Third edition of the ‘Guide to Judicial Conduct’.

In 1996, Professor Wood of the Faculty of Law in the University of Melbourne was invited by the Council of Chief Justices to prepare a paper which was subsequently published by the AIJA under the title *Judicial Ethics – A Discussion Paper*. In the paper, Professor Wood acknowledged that its purpose was "to raise issues for discussion, not to attempt to settle them".

Subsequently, the Council of Chief Justices asked two retired Supreme Court judges to undertake a limited survey of judicial attitudes to issues of judicial conduct, and then to prepare a succinct draft statement of principles affecting the conduct of members of the judiciary, and their relevance to specific issues, for the guidance of members of the judiciary. They generously agreed to do so.

The Council selected the Hon Sam Jacobs AO QC, a former judge of the Supreme Court of South Australia, and the Hon John Clarke QC, formerly a judge of the Court of Appeal of the Supreme Court of New South Wales. In the later stages the Hon John Clarke QC was replaced by the Hon Brian Cohen QC, also a former judge of the Supreme Court of New South Wales. All gave their services in an honorary capacity. Administrative assistance to the authors has been provided by the AIJA which also appointed an Advisory Committee to assist them. The advice of that committee is gratefully acknowledged.

The Second edition of the Guide incorporated additional material and changes which reflected comments made upon the Guide and developments in the law. That edition of the Guide was overseen by the Hon John Doyle AC, then Chief Justice of South Australia and the Hon Michael Black AC, then Chief Justice of the Federal Court of Australia.

The second edition was published in March 2007.

At a meeting of the Council of Chief Justices in October 2016 it was resolved that the Guide be revised to take account particularly of developments in the area of social media as it affects judicial officers. The Hon John Doyle AC agreed to oversee the revision of the Guide with the assistance of the Australasian Institute of Judicial Administration (AIJA) and a small Consultative Committee. The Committee consisted of the Hon Justice Murray Aldridge, Family Court of Australia, the Hon Justice Malcolm Blue, Supreme Court of South Australia, Chief Magistrate Steven Heath, Western Australia, the Hon Justice Susan Kenny, Federal Court of Australia, the Hon Justice Helen Winkelmann, Court of Appeal, New Zealand and her Honour Judge Dina Yehia, District Court of New South Wales.

A literature search was commissioned from Dr Marilyn Bromberg, Senior Lecturer, The University of Western Australia Law School, in relation to social media as it impacts upon judicial officers.

All heads of jurisdiction were invited to suggest any changes which they thought might be made to the third edition of the Guide including any new matters which might be included in the revised text.

Thanks are due to Mr Doyle and to the members of the Consultative Committee who have considered a number of drafts leading up to the third edition of the Guide. The work involved has been significant. Thanks are also due to Emily Hanckel-Spice, associate to Justice Susan Kenny, who was involved in the editing of the third edition and to Professor Greg Reinhardt, Executive Director of the AIJA and his personal assistant, Ms Delwyn Gillan, for their coordination of the preparation of the third edition of the Guide.

PREFACE

This is the Third Edition of the Guide to Judicial Conduct.

It has been acknowledged in previous editions that the Guide was first published as a result of a decision by the Council of Chief Justices of Australia to state principles relating to judicial conduct for the guidance of members of the judiciary. The initial work was undertaken by the Hon S J Jacobs AO QC, the Hon M J R Clark QC and the Hon B J Cohen QC.

The Guide provides principled and practical guidance to judges as to what may be an appropriate course of conduct, or matters to be considered in determining a course of conduct, in a range of circumstances. It is by maintaining the high standards of conduct to which the Guide aspires that the reputation of the Australian judiciary is secured and public confidence in it maintained.

The circumstances requiring guidance can change over time. Accordingly it has been necessary to revise the Guide. The assistance of the Hon John Doyle AC, the Australasian Institute of Judicial Administration, and the consultative committee in that process is acknowledged.

The Council of Chief Justices of Australia and New Zealand has approved the publication of the Third Edition of the Guide by the AIJA, on their behalf.

The Hon Justice Susan Kiefel AC
Chief Justice of Australia

CHAPTER ONE

1 INTRODUCTION

1.1 Purpose of this publication

The purpose of this publication is to give *practical guidance* to members of the Australian judiciary at all levels. The words "judge" and "judiciary" when used include all judges and magistrates.

Importantly, this publication seeks to be positive and constructive, and to indicate how particular situations might best be handled.

There is a range of reasonably held opinions on some aspects of the restraints that come with the acceptance of judicial office and allowance has been made for that in the Guide.

The conduct of judges is always under scrutiny today, with particular interest in standards of judicial conduct. Sometimes public comment on judicial conduct has been influenced by false notions of judicial accountability which fail to recognise that *a judge is primarily accountable to the law, which he or she must administer, in accordance with the terms of the judicial oath, "without fear or favour, affection or ill-will"*.

Some judges respond to the pressures of greater public scrutiny by adopting what has been described as a "monastic" lifestyle, believing that the less judges are involved in non-judicial activities, and the more they limit their social contacts, the less likely they are to put at risk public respect for the judiciary. While that view is understandable, it may well create as many problems as it solves, and not only by limiting the attractiveness of judicial office. Judges "increasingly have to deal with broad issues of social values and human rights, and to decide controversial moral issues that legislators cannot resolve" (Wood, *Judicial Ethics – A Discussion Paper*, AIJA (1996) at 1). A public perception of judges as remote from the community they serve has the potential to put at serious risk the public confidence in the judiciary that is a cornerstone of our democratic society.

The preferred position, which is supported by a clear majority of judges who responded to the survey undertaken for the purpose of the second edition of the Guide, is that judges – subject always to the priority to be given to judicial duties and other necessary restraints – should be, and be seen to be, involved in the community in which they live, and should enjoy the fundamental freedoms of other citizens. In the words of an American commentator (McKay "The Judiciary and Non-Judicial Activities" (1970) 35 *Contemporary Legal Problems* at 9, 12, cited by Wood at 3-4) it is appropriate that judicial officers "live, breathe, think and partake of opinions" in the real world and "continue to draw knowledge and to gain insights from extrajudicial activities that would enhance their capacity to perform the judicial function".

Once again, however, it is important to emphasise that what follows is not intended to be prescriptive, unless it is so stated. This publication recognises that in cases of

difficulty or uncertainty, the primary responsibility of deciding whether or not a particular activity or course of conduct is or is not appropriate rests with the individual judge, but it strongly recommends consultation with colleagues in such cases and preferably with the head of the jurisdiction.

1.2 Scope of this publication

This publication does not purport to be a code in any sense of that word, or to lay down rules. It purposely avoids using the expression "judicial ethics" or describing conduct as "unethical". A brief explanation of the reasons is necessary.

There can be little disagreement with the following statement of Thomas *(Judicial Ethics in Australia*, 3rd ed (2009) at 8-9):

> No one doubts that judges are expected to behave according to certain standards both in and out of court. Are these mere expectations of voluntary decency to be exercised on a personal level, or is there a general expectation that a certain standard of conduct needs to be observed by this particular professional group in the interests of itself and the community?
>
> As this is a fundamental question, it is necessary to make some elementary observations. We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. The liberty and fortune of any citizen may some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations. …
>
> If these standards are not effectively maintained, public confidence in the independence and trustworthiness of judges will erode and the administration of justice will be undermined.

It is possible to identify principles or standards of conduct appropriate to the judicial office, but their application to particular issues may, sometimes, reasonably give rise to different answers by different judges. The answer may vary according to the jurisdiction of the court or the place in which the court sits. To give to such standards of conduct the status of rules is to invest them with a prescriptive role which may well be inappropriate.

This publication does not refer to relevant academic literature or the voluminous case law, particularly on the topic of bias, actual or apprehended. It is directed to the Australian judiciary who will find in the work of Justice Thomas and Professor Wood a much fuller discussion, with copious references to source material in academic journals and decided cases.

Finally, this publication does not pretend to be exhaustive, but topics it fails to address may well be discussed in the two principal sources already referred to.

1.3 A judge's family

The acceptance of judicial office has implications for the family of a judge. The constraints that a judge accepts upon appointment are not directly applicable to family members. But the conduct of family members may, for example, give rise to an apprehension of bias on the part of the judge, or suggest that the judge has made inappropriate disclosures or statements.

The widespread use of social media including by members of judges' families increases the risk of the conduct of a family member giving rise to issues to which the Guide has application. Also, members of the judge's family may be judged or treated as if they were subject to restraints not applicable to others. See further at Chapter 8.

Accordingly, the Guide provides some guidance to judges in relation to conduct by family members that might raise issues for the judge under the Guide. It is the responsibility of a judge to bring such matters to the attention of family members.

CHAPTER TWO

2 GUIDING PRINCIPLES

The principles applicable to judicial conduct have three main objectives:

- To uphold public confidence in the administration of justice;
- To enhance public respect for the institution of the judiciary; and
- To protect the reputation of individual judicial officers and of the judiciary.

Any course of conduct that has the potential to put these objectives at risk must therefore be very carefully considered and, as far as possible, avoided.

There are three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives. These are:

- Impartiality;
- Judicial independence; and
- Integrity and personal behaviour.

These objectives and principles provide a guide to conduct by a judge in private life and in the discharge of the judge's functions. If conduct by a judge is likely to affect adversely the ability of a judge to comply with these principles, that conduct is likely to be inappropriate.

This chapter will deal briefly with some aspects of each of these principles, to be followed in later chapters by their application to a selected range of topics or situations. It will become apparent that these basic principles are not in watertight compartments, and may often overlap.

2.1 Impartiality

The large volume of case law involving challenges to judicial impartiality testifies to its importance and sensitivity. There is probably no judicial attribute on which the community puts more weight than impartiality. It is the central theme of the judicial oath of office, although the same words of that oath also embrace the concepts of independence and integrity, and indeed, in many cases, those concepts are involved in acting impartially.

The application of the requirement of impartiality is always subject to considerations of necessity. This may mean that in a small court, or in a court that sits in an isolated location, or in a court such as the High Court where members have a constitutional responsibility to sit, the significance of the matters identified later will differ.

It is easy enough to state the broad indicia of impartiality in court – to be fair and even-handed, to be patient and attentive, and to avoid stepping into the arena or appearing to take sides. None of this, however, debars the judge from asking questions of witnesses or counsel which might even appear to be "loaded" in order to gain a better understanding and eventual evaluation of the facts, or submissions on fact or law.

The more difficult and often controversial area concerns the judge's extra-judicial activities, which may give rise to a challenge to impartiality by reason of apprehended:

- Bias;
- Conflict of interest; or
- Prejudgment of an issue.

These matters are dealt with in Chapter 3.

2.2 Judicial independence

Much has been written about judicial independence both in its institutional and individual aspects. Judicial independence is sometimes mistakenly perceived as a privilege enjoyed by judges, whereas it is in fact a cornerstone of our system of government in a democratic society and a safeguard of the freedom and rights of the citizen under the rule of law. There are two aspects of this concept that are important for present purposes: Constitutional independence and independence in discharge of judicial duties.

2.2.1 Constitutional independence

(a) The principle

The principle of the separation of powers requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and be seen to be, independent of the legislative and executive branches of government.

The relationship between the judiciary and the other branches should be one of mutual respect, each recognising the proper role of the others (see para 5.6). An appropriate distance should be maintained between the Judiciary and the Executive, bearing in mind the frequency with which the Executive is a litigant before the courts.

Communication with the other branches of government on behalf of the judiciary is the responsibility of the head of the jurisdiction or of the Chief Justice.

It is not uncommon for the executive government, or even Parliament itself, in matters affecting the administration of justice generally, to want to use the expertise of judges other than in the exercise of their judicial duties. The fact that the High Court has held the conferral of certain non-judicial functions on judges to be invalid (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* [1996] HCA 18; 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* [1996] HCA 24; 189 CLR 51) does not necessarily mean that any such request for extra-judicial advice or service must be refused, but acceptance requires very careful consideration and appropriate safeguards so that the institutional integrity of the court is preserved *(South Australia v Totani* [2010] HCA 39; 242 CLR 1; *Fardon v Attorney-General (Qld)* [2004] HCA 46; 223 CLR 575) (see Chapter 3).

(b) Attacks upon constitutional independence

Two important attributes of constitutional independence, namely security of tenure and financial security, are sometimes misunderstood, criticised, threatened, or even ignored. When these are the subject of debate, any response on behalf of the judiciary should come from the head of the jurisdiction or from the Chief Justice. This does not preclude appropriate intervention by individual judges, but it is preferable that they should consult the head of the jurisdiction.

2.2.2 Independence in discharge of judicial duties

(a) The principle

Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence.

Judges should bear in mind that the principle of judicial independence extends well beyond the traditional separation of powers and requires that a judge be, and be seen to be, independent of all sources of power or influence in society, including the media and commercial interests.

The terms of the judicial oath by which all judges should be guided in the discharge of their duties have already been referred to in para 1.1, but judges should at all times be alert to, and wary of, subtle and sometimes not so subtle attempts to influence them or to curry favour.

It is likely that at some time in a judicial career, a case to be decided (or similar cases) will have been the subject of discussions in the media, sometimes calculated to arouse and even to inflame public opinion. On occasions a judge may be subjected to personal and hostile criticism by the press, by politicians, in social media, in print and electronic media. Sometimes the criticism will reveal that the critic does not understand the relevant principles or law, or that the critic is ill-informed and unfair.

Public scrutiny, fair or unfair, informed or not, goes with the exercise of the judicial office.

It is easy enough to assert that a judge is, and must be, immune to the effects of publicity, whether favourable or unfavourable, and fearless, but it is less easy to deny the insidious pressure of such publicity. Ordinarily, the independence of the judiciary and of the individual judge will best be served by reliance on personal integrity and the dictates of conscience. But sometimes a public response will seem to be called for.

Before responding the judge should consult with the head of jurisdiction. If the court has a media officer, that person can provide valuable advice and guidance, subject to the views of the head of jurisdiction. Sometimes a representative of the legal profession will provide an adequate response.

In rare cases a public response will be called for. Ordinarily that response should come from the head of jurisdiction or the Chief Justice.

Comment or criticism which threatens to interfere with the administration of justice, and so raises the issue of contempt, raises legal and other issues not dealt with here.

(b) Threats to independence in discharge of judicial duties

Occasionally judges receive letters or other communications containing threats to the safety or welfare of themselves or members of their family, in an effort by or on behalf of disgruntled parties, or special interest groups, to influence a judicial decision.

Conduct of this nature will not, of course, have any effect, but this does not mean that it should be ignored. It is prudent to report any such threat to the administrative or judicial head of the jurisdiction and, if appropriate, to a senior police officer.

Judges should also be alert to observe other conduct which may not be a direct attempt to influence the judge, but may nevertheless be aimed at obstructing the course of justice. A typical example is the intimidation of a witness by the presence in court of persons hostile to that witness, particularly in criminal cases. Appropriate steps to protect such a witness are not inconsistent with judicial impartiality.

A judge who becomes aware of unlawful or improper conduct in connection with the discharge of the judge's judicial duties will have to consider whether that conduct should be reported to the police or to some other appropriate person and whether it should be disclosed publicly by making a statement in open court or in some other way. The timing of any such action by a judge can be particularly delicate. This is a matter on which discussion with the head of the jurisdiction or with an experienced colleague is desirable.

2.3 Conduct generally and integrity

Judges are entitled to exercise the rights and freedoms available to all citizens. It is in the public interest that judges participate in the life and affairs of the community, so that they remain in touch with the community.

On the other hand, appointment to judicial office brings with it some limitations on private and public conduct. By accepting an appointment, a judge agrees to accept those limitations.

These two general considerations have to be borne in mind in considering the duty of a judge to uphold the status and reputation of the judiciary, and to avoid conduct that diminishes public confidence in, and respect for, the judicial office.

In this area, "there can be few absolutes since the effect of conduct on the perception of the community depends on community standards that may vary according to place or time". (Canadian Judicial Council, *Ethical Principles for Judges* (1998) at 14). Judges should be experienced in assessing the perception of reasonable fair-

minded and informed members of the community in deciding whether conduct is or is not likely to diminish respect in the minds of such persons. Within that framework, however, there are some precepts which, as a guide to judicial behaviour, are not controversial:

- Intellectual honesty;
- Respect for the law and observance of the law (although a judge like any other citizen, through ignorance or error, may well commit a breach of a statutory regulation which will not necessarily reflect adversely on judicial integrity or competence);
- Prudent management of financial affairs;
- Diligence and care in the discharge of judicial duties; and
- Discretion in personal relationships, social contacts and activities.

It is the last of these precepts that is likely to cause the most difficulty in practice. As a general rule, it permits a judge to discharge family responsibilities, to maintain friendships and to engage in social activities. But it requires a judge to strike a balance between the requirements of judicial office and the legitimate demands of the judge's personal life, development and family. Judges have to accept that the nature of their office exposes them to considerable scrutiny and to constraints on their behaviour that other people may not experience. Judges should avoid situations that might reasonably lower respect for their judicial office or might cast doubt upon their impartiality as judges. They must also avoid situations that might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour that might be regarded as merely "unfortunate" if engaged in by someone who is not a judge might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.

Some specific situations are addressed in Chapters 4, 5 and 6.

Judges should remember that many members of the public regard judges as a privileged group because of their remuneration and entitlements, and because of the nature of the judicial office. They are likely to expect that a judge will be especially vigilant in observing appropriate standards of conduct, both publicly and privately.

Judges must conform to the standard of conduct required by law and expected by the community. They must treat others with civility and respect in their public life, social life and working relationships. It goes without saying that Judges must not engage in discrimination or harassment (including sexual harassment) or bullying. In relation to these matters, Judges must be particularly conscious of the effect of the imbalance of power as between themselves and others, especially their Chambers staff, Court staff and junior lawyers.[1]

It is not necessary for present purposes to address the power of parliaments to remove a judge for serious misconduct. It is sufficient to note that there is

[1] Paragraph added to the third edition by resolution of the Council of Chief Justices of Australia and New Zealand, November 2020.

persuasive authority for the view that it is not necessary to prove an offence in order to invoke the power.

CHAPTER THREE

3 IMPARTIALITY

A judge should try to ensure that his or her conduct, in and out of court, in public and in private, maintains and enhances public confidence in the judge's impartiality and in that of the judiciary.

This chapter deals with aspects of a judge's private life that can raise matters that have the capacity to affect adversely the public perception of a judge's impartiality. Chapter 4, which deals with conduct in court, also raises some matters relevant to impartiality.

For present purposes it is not necessary to do more than identify some broad areas of sensitivity in no particular order of importance. The list is not exhaustive, but may help to keep judges alert to any risk of a challenge to their impartiality. They are in the nature of warning signs, and the direction in which they point in some common factual situations will be examined more closely in Chapter 4.

3.1 Associations and matters requiring consideration

Professional or business associations requiring consideration include those, past and current, involving directly or indirectly:

- Litigants;
- Legal advisers of litigants; and
- Witnesses.

Other matters requiring consideration are:

- Close relationship to persons in the previous categories;
- Social contact with parties or witnesses; and
- Public statements or expressions of opinion on controversial social issues, or matters in issue in litigation made before or after appointment.

3.2 Activities requiring consideration

- Current commercial or business activities – likely in any event to be limited in scope;
- Personal or family financial activities, including shareholding in public or private companies or other investments; and
- Membership of or involvement with educational, charitable or other community organisations if they become parties to litigation.

Judges should bear in mind that the management by others of a share portfolio or other investments will not necessarily avoid the need to consider questions of apprehended bias or interest. Judges therefore need to take reasonable steps to be aware of the nature of all investments in which they have an interest

The fundamental principle is that a judge should not engage in an activity that raises a real risk that the judge will be disqualified from performing judicial duties because

of a disqualifying factor, nor engage in an activity that would compromise the objectives or infringe the principles identified in Chapter 2.

There are some well established principles:

- Although active participation in or membership of a political party before appointment would not of itself justify an allegation of judicial bias or an appearance of bias, it is expected that, on appointment, a judge will sever all ties with political parties. An appearance of continuing ties, such as might occur by attendance at political gatherings, political fund raising events or through contributions to a political party, should be avoided.
- A judge should be cautious about associations of a business or of a social kind, and with organisations or persons who might be or become a litigant or a witness in the judge's court.

Judges should be aware that the majority of complaints to the Judicial Commission of New South Wales involve allegations of bias against a party, or failure to give a fair hearing. For the most part such complaints have not been sustained, but they indicate the need for care to avoid them.

The guiding principles are:

- Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judge from hearing a case is to be judged by the perception of a reasonable well-informed observer. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers;
- The parties should always be informed by the judge of facts which might reasonably give rise to a perception of bias or conflict of interest but the judge must himself or herself make the decision whether it is appropriate to sit.

Judges should be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately, such as in an attempt to influence the composition of the bench or to cause delay. (The observations of members of the High Court in *Ebner* [2000] HCA 63; 205 CLR 337, set out at the end of para 3.3.1 are relevant here.)

3.3 Conflict of interest

Some common situations are mentioned in this chapter, but whether or not such situations disclose a relevant conflict of interest is often debatable.

3.3.1 Shareholding in litigant companies, or companies associated with litigants

Relevant questions for the judge to consider are:

(a) Is the shareholding sufficiently large to enable the judicial or related shareholder to influence the decisions of the company?

(b) Is the value of the judicial or related shareholding likely to be affected by the outcome of the litigation?

But the ultimate issue is whether a fair-minded lay-observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case.

If the answer to either question is in the affirmative, it is clearly a case for self-disqualification, but if the answer to both questions is negative, the basis for disqualification is much less obvious. Nevertheless, it is important to make full disclosure to the parties before making a decision, although a failure to do so in some circumstances may not be critical.

The judge should disclose the fact of the shareholding in open court thereby giving the parties an opportunity to make any submissions with respect to disqualification or otherwise.

It may be wise, but not obligatory, to limit the range of investment in public companies, to minimise the need for frequent disclosure. Shareholding in a public investment company or in managed funds may be a sensible alternative. The acquisition of shares in an incorporated legal practice, not publicly listed, is likely to give rise to significant problems, and is not acceptable. The acquisition of shares in a publicly listed incorporated legal practice is better avoided, because of the risk of conflict issues arising.

For a more comprehensive examination of the relevant principles with respect to judicial shareholding in litigant public companies as a sufficient reason for disqualification see *Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v ANZ Banking Group* [2000] HCA 63; 205 CLR 337.

The application of these principles, and the making of a decision whenever issues of possible bias are raised, call for a good deal of care and common sense. It is useful to bear in mind the remarks of Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner* [2000] HCA 63; 205 CLR 337 at [20]:

> This is not to say that it is improper for a judge to decline to sit unless the judge has affirmatively concluded that he or she is disqualified. In a case of real doubt, it will often be prudent for a judge to decide not to sit in order to avoid the inconvenience that could result if an appellate court were to take a different view on the matter of disqualification. However, if the mere making of an insubstantial objection were sufficient to lead a judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the

composition of the bench. That would be intolerable.

3.3.2 Business, professional and other commercial relationships

Business, professional and other commercial relationships have the capacity to cause a judge to have a potential interest in the outcome of litigation, and so to raise the question of possible disqualification. If such a relationship means that a judge has a "not insubstantial, direct, pecuniary or proprietary interest in the outcome of litigation" (*Ebner* [2000] HCA 63; 205 CLR 337 at [58]), disqualification will ordinarily be necessary.

The circumstances requiring consideration are varied. A judge should consider any current commercial or business activities, although it is likely that they will be limited. A judge should also consider any such activities undertaken by close relatives. Although these are properly to be considered under the heading "Personal relationships" (below), a financial interest of a close relative might be regarded by an observer as equivalent to a financial interest on the part of the judge.

The relationships or associations that require consideration under this head include relationships such as insurer and insured, banker and customer, local government body and ratepayer, school and parent of child attending school. In some circumstances such a relationship could give rise to a disqualifying interest in the outcome of litigation. The judge should consider any such relationship that arises on the facts.

The judge should also consider whether any such relationship might give rise to a conflict of interest because of an appearance of predisposition in favour of or against the other party to the relationship. There is, for example, an obvious difference between the situation of the judge who is negotiating, say, the terms under which a bank will extend a significant overdraft, and that of a judge whose relations with a bank do not involve the bank doing anything more than honouring its obligations as a banker. Similarly, a judge who is a ratepayer and is also an objector to a rate assessment or an objector to a planning application, will be in a different situation to a judge who is merely a ratepayer. A judge whose claim under an insurance policy is questioned by the insurer is in a different situation to a judge who is merely a policy holder or whose claim under the policy is quite uncontentious.

3.3.3 Judicial involvement with litigant community organisations

Questions similar to those posed with respect to judicial shareholdings and commercial relationships may again be relevant, ie is the judge able to influence decisions of the organisation; is the litigation likely to have an effect on the organisation that is involved? But even if a negative answer is given to those questions, disqualification may be the most prudent course to adopt where a relationship exists. There may be no significant conflict of interest, but a real risk of the appearance of bias by reason of the judge's empathy with the organisation.

3.3.4 Personal relationships

There are many personal relationships to be considered. The most important relationships may be categorised for present purposes as:

First degree – parent, child, sibling, spouse or domestic partner;

Second degree – grandparent, grandchild, "in-laws" of the first degree, aunts, uncles, nephews, nieces;

Third degree – cousins and beyond;

And such relevant relationships may exist with:

(i) Parties;

(ii) Legal advisers or representatives of parties;

(iii) Witnesses.

In addition to such relationships, friendship or past professional or other association with such persons needs to be considered in some situations. There are no hard and fast rules, but the following guidance is offered.

(a) A judge should not sit on a case in which the judge is in a relationship of the first, second or third degree to a party or the spouse or domestic partner of a party.

(b) Where the judge is in a relationship of the first or second degree to counsel or the solicitor having the actual conduct of the case, or the spouse or domestic partner of such counsel or solicitor, most judges would and should disqualify themselves. Ordinarily there is no need to do so if the matter is uncontested or is a relatively minor or procedural matter. Nor is there a need to do so merely because the person in question is a partner in, or employee of, a firm of solicitors or public authority acting for a party. In such cases, it is a matter of considering all the circumstances, including the nature and extent of the involvement in the matter of the person in question. Some judges may be aware of cases involving such a relationship when the judge has sat without objection, but current community expectations make such conduct undesirable.

In most of these situations, Bar Rules in each jurisdiction require a barrister to return a brief to appear in a contested hearing, so the occasion for a judge to disqualify himself or herself should arise infrequently.

There may be a justifiable exception:

- By reference to the principle of necessity (see para 2.1);
- Where the solicitor-relative is a partner or employee of the solicitor on the record, but has not been involved in the preparation or presentation of the case;
- Where, notwithstanding the relationship, the parties to the case consent to the judge sitting but that may depend upon the nature of the relationship, which should be disclosed to the parties before the judge decides whether to sit or not to sit.

(c) Personal friendship with a party is a compelling reason for disqualification, but friendships should be distinguished from acquaintanceship which may or may not be a sufficient reason for self-disqualification, depending upon the nature and extent of such acquaintanceship. The judge should consider

whether to inform the parties of an acquaintanceship before the hearing begins.

(d) A current or recent business association with a party will usually mean that a judge should not sit on a case. For this purpose a business association usually does not include associations such as insurer and insured, banker and customer, rate payer and local government body, but might do so, depending on the circumstances.

(e) Past professional association with a party as a client is not of itself a reason for disqualification unless the judge has been involved in the subject matter of the litigation prior to appointment or unless the past association gives rise to some other good reason for disqualification.

If the judge has been involved in the subject matter of litigation, the judge should not sit, but otherwise the decision to sit or not to sit may depend upon the extent of previous representation and when it occurred. It may be desirable to disclose the circumstances of such representation to the parties before deciding what to do. The nature and content of anything learned, or any views formed, bearing upon the credibility of the party may need to be considered.

(f) Friendship or past professional association with counsel or a solicitor is not generally to be regarded as a sufficient reason for disqualification. An existing commercial or business relationship between the judge and counsel or a solicitor in a matter to be heard by the judge will require very careful consideration, as will the question of the extent and detail of the disclosure required by the judge in the circumstances.

(g) Where a person who is in a first degree relationship to the judge is known to be a witness, the judge generally should decline to take the case, unless the witness is to give only undisputed narrative testimony. In such a case, and if no objection is taken by the parties, the judge may decide to sit, but may well choose not to do so.

(h) Where the relationship of a witness to the judge is of the second or remoter degree, disqualification by the judge is less compelling, but again the decision to sit or not to sit may depend upon the nature of the testimony and the issue, if any, of credibility.

(i) The mere fact that a witness is personally well known to the judge, may not of itself be a sufficient reason for disqualification of the judge. If however the credibility of the witness, as distinct from opinion, is known or likely to be in dispute, the judge should not sit.

(j) A recent business association between a judge and a witness will not necessarily be a basis for disqualification of the judge, particularly if the association involved only an isolated transaction, but all of the circumstances should be carefully considered.

In the latter two cases, the fact of the relationship or friendship, and ordinarily its nature, should be disclosed to the parties.

3.4 Other grounds for possible disqualification

If a judge is known to hold strong views on topics that are relevant to issues in the case by reason of public statements or other expression of opinion on such topics, possible disqualification of the judge may have to be addressed, whether or not the matter is raised by the parties. In such a case, the judge will have to assess, and respond to, the risk of an appearance of bias. The risk is especially significant when a judge has taken part publicly in a controversial or political discussion. (Discussions of that nature concerning the administration of justice are dealt with as a separate matter in para 5.6.)

What a judge may have said in other cases by way of expression of legal opinion whether as *obiter dicta* or in dissent can seldom, if ever, be a ground for disqualification.

When a close member of a judge's family is engaged in politics, the judge needs to bear in mind the possibility that, in some proceedings, that political activity might raise concerns about the judge's own impartiality and detachment from the political process.

3.5 Disqualification procedure

(a) If a judge considers that disqualification is required, the judge should so decide. Prior consultation with judicial colleagues is permissible and may be helpful in reaching such a decision. The decision should be made at the earliest opportunity to minimise costs or delay attributable to disqualification, should that occur.

(b) In cases of uncertainty where the judge is aware of circumstances that may warrant disqualification, the judge should raise the matter at the earliest opportunity with:

(i) The head of the jurisdiction;

(ii) The person in charge of listing;

(iii) The parties or their legal advisers;

not necessarily personally, but using the court's usual methods of communication.

(c) Disqualification is for the judge to decide in the light of any objection, but trivial objections are to be discouraged.

(d) It may be appropriate for the judge to be informed by correspondence, or for the judge to inform the parties by correspondence, that a question of disqualification has arisen or may arise. Subject to that, the matter should be dealt with in open court.

A transcript of what is said in court should be taken. It will generally be appropriate for the judge to hear submissions from the parties.

(e) The judge should be mindful of circumstances that might not be known to the parties but might require the judge not to sit, and of the possibility of the

parties raising relevant matters of which the judge may not be aware. It is not appropriate for a judge to be questioned by parties or their advisers.

(f) If the judge decides to sit, the reasons for that decision should be recorded in open court. So should the disclosure of all relevant circumstances.

(g) Consent of the parties is relevant but not decisive in reaching a decision to sit. The judge should avoid putting the parties in a situation in which it might appear that their consent is sought to cure a ground of disqualification. Even where the parties would consent to the judge sitting, if the judge, on balance, considers that disqualification is the proper course, the judge should so act.

(h) Even if the judge considers no reasonable ground of disqualification exists, it is prudent to disclose any matter that might possibly be the subject of complaint, not to obtain consent to the judge sitting, but to ascertain whether, contrary to the judge's own view, there is any objection.

(i) The judge has a duty to try cases in the judge's list, and should recognise that disqualification places a burden on the judge's colleagues or may occasion delay to the parties if another judge is not available.

There may be cases in which other judges are also disqualified or are not available, and necessity may tilt the balance in favour of sitting even though there may be arguable grounds in favour of disqualification.

3.6 Summary

If these guidelines do not lead the judge to a conclusion, there is a large volume of case law and academic writing that may assist the judge, but in the end the decision to sit or not to sit must rest comfortably with the judicial conscience.

CHAPTER FOUR

4 CONDUCT IN COURT

4.1 Conduct of hearings

It is important for judges to maintain a standard of behaviour in court that is consistent with the status of judicial office and does not diminish the confidence of litigants in particular, and the public in general, in the ability, the integrity, the impartiality and the independence of the judge. It is therefore desirable to display such personal attributes as punctuality, courtesy, patience, tolerance and good humour. The trial of an action, whether civil or criminal, is a serious matter but that does not mean that occasional humour is out of place in a courtroom, provided that it does not embarrass a party or witness. Indeed it sometimes relieves tension and thereby assists the trial process.

Nevertheless, the entitlement of everyone who comes to court – counsel, litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind. Bullying by the judge is unacceptable. It is worth remembering that many complaints to the Judicial Commission of New South Wales by litigants and their lawyers have had as their foundation remarks made by judicial officers in the course of proceedings. The absence of any intention to offend a witness or a litigant does not lessen the impact.

A judge must be firm but fair in the maintenance of decorum, and above all even-handed in the conduct of the trial. This involves not only observance of the principles of natural justice, but the need to protect a party or witness from any display of racial, sexual or religious bias or prejudice. Judges should inform themselves on these matters so that they do not inadvertently give offence.

A judge should remember that informal exchanges between the judge and counsel may convey an impression that the judge and counsel are treating the proceedings as if they were an activity of an exclusive group. This is a matter to be borne in mind particularly in a case in which there is an unrepresented litigant, but the caution extends to all cases.

4.2 Participation in the trial

It is common and often necessary for a judge to question a witness or engage in debate with counsel, but the key to the proper level of such intervention is moderation. A judge must be careful not to descend into the arena and thereby appear to be taking sides or to have reached a premature conclusion.

4.3 Private communications

The principle that, save in the most exceptional circumstances, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of a party) otherwise than in the presence of, or with the previous knowledge and consent of, the other party (or parties) once a case is under way is, of course, very well known. The principle is referred to by McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* [1973] VR 122 (at 127) in a

statement approved in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 by Gibbs CJ (at 346) and Mason J (at 350-351). An approach to a judge in chambers by the lawyers for one party should not be made without the presence, or the knowledge and consent of, the lawyers for the other party. It is important to bear in mind that breaches of the principle can occur through oversight, sometimes when attempts are made to adopt what may seem to be practical, convenient, or time-saving measures. Care should be taken, for example, on country circuits if suggestions are made about shared travel that seem sensible at the time, but may in fact involve a breach of the principle.

The frequent use of emails for communication between judges' chambers and lawyers or litigants, usually about listing arrangements, sitting times and other routine matters, means that often a lawyer or litigant will have an email address for the judge's staff and chambers.

The use of this form of communication should not be allowed to obscure the principle just stated. Judges should ensure that their staff understand what is and is not permitted. Neither lawyers nor litigants should be permitted to seek guidance from the judge on practical or procedural points that arise, other than by joint approach or with the consent of the other parties. Nor should lawyers or litigants be permitted to advance arguments by email.

Prudence will sometimes dictate that dealings with a litigant in person should be conducted by a registry officer, not by a judge's staff.

4.4 Criminal trials before a jury

It is of particular importance in a jury trial that the nature or extent of judicial intervention in the course of evidence or argument does not convey to the jury a judicial view of guilt or innocence.

4.5 Revision of oral judgments

A judge may not alter the substance of reasons for decision given orally. That is the basic principle. Subject to that, a judge may revise the oral reasons for judgment where, because of a slip, the reasons as expressed do not reflect what the judge meant to say, or where there is some infelicity of expression. Errors of grammar or syntax may be corrected. References to cases may be added, as may be citations for cases referred to in the transcript.

4.6 Summing up to a jury

The transcript of a summing up to a jury is, like the transcript of evidence, intended to be a true record of what was said in court.

Apart from errors of spelling or punctuation which may alter the meaning if uncorrected, there should be no change to the transcript of a summing up unless it does not correctly record what the judge actually said. Where time and opportunity permit, it is desirable for a judge to prepare written notes of the intended charge to the jury, particularly with respect to directions on the law, which may help to validate any proposed change to the transcript of the summing up. If the transcript is

corrected, and a fresh transcript of the summing up incorporating the corrections is to be prepared, the original transcript should be retained on the court file.

4.7 Reserved judgment

A judge should aim to prepare and deliver a reserved judgment as soon as possible, but it sometimes happens that circumstances lead to an unacceptable accumulation of reserved judgments. In that event, a judge should speak to the head of the jurisdiction about the situation before the delay has become a problem.

A judge should be mindful of the adverse impact on litigants of delay in delivering judgment, and of the erosion of public confidence in the administration of justice that delay can cause. Unacceptable delay may lead to complaints. A judge who is beginning to accumulate reserved judgments should approach the head of jurisdiction to discuss the problem and to raise the possibility of assistance for the judge in question. The matter should not be left until the number of judgments involved and the delay involved have become a significant concern.

A judge who has difficulty with judgment writing should not hesitate to ask the head of jurisdiction to enrol the judge in one of the numerous judgment writing courses that are available.

A head of jurisdiction or division should consider remedial action that may assist a judge who is accumulating reserved judgments.

4.8 Critical comments

Particular care should be taken to avoid causing unnecessary hurt in the exercise of the judicial function. This includes taking care about comments made in court (see 4.1 above) and observations made in reasons for judgment or in remarks on sentence. The legitimate privacy interests of those involved in litigation and of third parties should also be borne in mind. As Gleeson CJ put it in his monograph 'Aspects of Judicial Performance' published in The Role of the Judge, Education Monograph 3, Judicial Commission of New South Wales (2004) at 5:

> 'The absolute privilege which attaches to fair reports of court proceedings should lead judges to be conscious of the harm that may be done, unfairly, to third parties by an incautious manner of expressing reasons for judgment. It is not only fairness to the parties that should be operating as part of a judge's concern. Non-parties can often be seriously damaged by a judge's manner of expressing reasons for judgment. Sometimes this may be the result of mere thoughtlessness. A judge should never cause unnecessary hurt.'

And see the monograph generally, especially at 4 and 5.

Judicial officers exercising an appellate or review jurisdiction should approach the exercise of that function with similar considerations in mind. It is one thing to correct error but quite another to criticize unnecessarily or thoughtlessly the primary judicial officer or tribunal.

4.9 The judge as a mediator

Some judges consider that the role of a mediator is so different from that of a judge that it is undesirable for a serving judge to act as a mediator. The difference lies in the interaction of a mediator with counsel and parties, often in private – ie in the absence of opposing counsel or parties, which is seen to be incompatible with the way in which judicial duties should be performed, with the risk that public confidence in the judiciary may thereby be impaired.

In some courts precedent or established practice are contrary to a serving judge acting as mediator. Views as to the permissibility of a judge of a federal court, subject to Chapter III of the Constitution, acting as a mediator, are divided. It should also be acknowledged that mediation can take differing forms.

In some courts, the Rules of Court with respect to mediation specifically recognise the appointment of a serving judge as a mediator.

The success of judicial mediation in those jurisdictions may justify the practice. The statutory obligation of confidentiality binding upon a mediator, and the withdrawal of the judge from the trial or an appeal, if the mediation fails, should enable a qualified judge to act as a mediator without detriment to public expectations of the judiciary.

CHAPTER FIVE

5 ACTIVITIES OUTSIDE THE COURTROOM

This chapter deals with specific examples of conduct or activities in which a judge might engage but, as indicated in Chapter 1, it does not seek to be prescriptive. Opinions about such activities may vary but the cardinal test for each judge in considering what to do is conformity with the objectives and principles dealt with in Chapter 2

Principle and protocol require that if the executive government is seeking the services of a judge for a non-judicial appointment, the first approach should be to the head of the jurisdiction, seeking the approval of that person for the appointment of a judge from that jurisdiction, and approval to approach the judge in question. The head of the jurisdiction will consider the propriety of the judge accepting the appointment, with particular reference to the maintenance of the independence of the judiciary and to the needs of the court. The head of the jurisdiction will consult with other members of the jurisdiction as may seem appropriate. If there is no objection in principle, the head of the jurisdiction will consider whether the judge can be made available, and whether the first approach to the judge in question should be from the head of the jurisdiction or from a representative of the executive.

A judge who is approached directly by or on behalf of a member of the executive government should, without delay, raise the matter with the head of the jurisdiction and should inform the person making the approach that the judge will do so.

It is inappropriate, subject to legislative provision, for a serving judge to accept payment other than reimbursement of expenses or an equivalent allowance, in connection with a non-judicial appointment.

5.1 Membership of a government advisory body or committee

There is no simple answer to the question whether a judge should serve on a statutory or government body or committee.

It is generally not inappropriate for a judge to be a member of a committee dealing with matters having a direct relationship with judicial office such as court structures, law reform (but as to this, see below) or other legal issues, and there may be other cases in which it would be desirable in the public interest to have the benefit of a judge's expertise and experience on a government committee or advisory body. Much will depend upon the role and terms of reference of the committee or advisory body. But in weighing the options, a judge should remember that membership of a permanent body might involve advising on controversial issues, which may be inconsistent with the perceived impartiality and political neutrality of a judge.

5.2 Submissions or evidence to a Parliamentary inquiry relating to the law or the legal system

It is appropriate for a judge to make a submission or give evidence at such an inquiry if care is taken to avoid confrontation or the discussion of matters of a political rather than a legal nature, but prior consultation with the head of the jurisdiction is desirable. Again, the expertise or experience of a judge can be of great assistance in the examination of issues relating to legal or procedural matters. As long as discretion is exercised, this should not detract from the independence of the judiciary from the legislative and executive branches of government.

5.3 A judge as a law reform commissioner

Judges have been appointed as part-time commissioners at both state and federal level on many occasions, although in some States it is thought that judges should not accept such an appointment. As long as time spent in the work of the commission does not interfere with judicial duties, and if the approval of the head of the jurisdiction has been given, there need not be any conflict between the role of the commissioner and judge.

As in situations dealt with already, the experience of a judge can be valuable in considering the need for reform in a particular area of the law, and in looking at the effect in practice of proposed changes. This need not be in conflict with a judge's judicial duties or detract from judicial independence.

5.4 Membership of a non-judicial tribunal

The head of the jurisdiction should be consulted about the proposed appointment. If the appointment is made by a Minister or a government officer, the protocol outlined at the beginning of this chapter should be observed.

There are a number of tribunals in respect of which there is statutory authority for judicial membership, but in some other cases – particularly if decisions of the tribunal are likely to be controversial as in the case of some sporting disciplinary tribunals – the judge should weigh the risks of involvement and adverse publicity before accepting appointment. In the case of private or sporting tribunals, the judge should consider whether any apparent conferring of judicial authority on the tribunal is appropriate.

5.5 Membership of a parole board

In some States it has been common practice for serving and retired judges to be members of parole boards on which their judicial experience is undoubtedly valuable. A judge should consider the risk of problems, such as criticism of parole decisions reflecting adversely on the judge as a member of the judge's court, or the potential for the board appearing to be part of the executive branch of the government. This is a matter that should be considered in consultation with the head of jurisdiction.

5.6 Membership of the Armed Forces

A number of judges continue to serve in the Armed Forces after appointment as a judge, in a legal capacity. There is no objection of principle to this. Such service is contemplated by the *Defence Force Discipline Act*. Nevertheless, a judge's primary responsibility is the administration of justice in the court to which the judge is appointed. Service in the Armed Forces should not involve commitments that detract from that. Continued service in the Armed Forces after appointment should be undertaken only after consultation with the head of jurisdiction.

5.7 Public comment by judges

5.7.1 Participation in public debate

Many aspects of the administration of justice and of the functioning of the judiciary are the subject of public consideration and debate in the media, at public meetings and at meetings of a wide range of interest groups.

Appropriate judicial contribution to this consideration and debate is desirable. It may contribute to the public's understanding of the administration of justice and to public confidence in the judiciary. At the least, it may help to dispose of misunderstandings, and to correct false impressions.

Considerable care should be exercised to avoid using the authority and status of the judicial office for purposes for which they were not conferred. Points to bear in mind when considering whether it is appropriate to contribute to public debate on any matter include the following:

- A judge must avoid involvement in political controversy, unless the controversy itself directly affects the operation of the courts, the independence of the judiciary or aspects of the administration of justice;
- The place at which, or the occasion on which, a judge speaks may cause the public to associate the judge with a particular organisation, group or cause;
- There is a risk that the judge may express views, or be led in the course of discussion to express views, that will give rise to issues of bias or prejudgment in cases that later come before the judge even in areas apparently unconnected with the original debate. A distinction might be drawn between opinions and comments on matters of law or legal principle, and the expression of opinions or attitudes about issues or persons or causes that might come before the judge;
- Expressions of views on private occasions must also be considered carefully as they may lead to the perception of bias;
- Other judges may hold conflicting views, and may wish to respond accordingly, possibly giving rise to a public conflict between judges which may bring the judiciary into disrepute or could diminish the authority of a court;
- A judge, subject to the restraints that come with judicial office, has the same rights as other citizens to participate in public debate;

- A judge who joins in community debate cannot expect the respect that the judge would receive in court, and cannot expect to join and to leave the debate on the judge's terms.

If the matter is one that calls for a response on behalf of the judiciary of the Commonwealth, State, Territory or court collectively, that should come from the relevant Chief Justice or head of the jurisdiction, or with that person's approval. Subject to that, and bearing in mind the points made above, care is called for before contributing to community debate using the judicial title, or when it will be known that the contribution is from a judge.

5.7.2 Public debate about judicial decisions

It is well established that a judge does not comment publicly once reasons for judgment have been published, even to clarify ambiguity.

On occasions decisions of a court may attract unfair, inaccurate or ill-informed comment. Many judges consider that, according to the circumstances, the court should respond to unjust criticism or inaccurate statements, particularly when they might unfairly reflect upon the competence, integrity or independence of the judiciary. Any such response should be dealt with by the Chief Justice or other head of the jurisdiction.

5.7.3 Judges explaining the legal system

Judges are often asked to speak to community groups and organisations. As long as the object is to improve community understanding of the administration of justice, such opportunities are to be welcomed. Of course, the precautions identified in para 5.7.1 and para 5.7.2 should be noted.

An invitation to participate in a radio "talk back" program or to appear on television, should be discussed with the head of jurisdiction before any decision is made. "Talk back" radio and television require particular care. A court media officer should ensure that the "host" understands and will observe the limits on judicial participation, and should be involved in the making of necessary arrangements.

5.8 Writing for newspapers or periodicals; appearing on television or radio

There is no objection to judges writing for legal publications and identifying themselves by their title.

There is no objection to articles in newspapers or non-legal periodicals and contributions to other media intended to inform the public about the law and about the administration of justice generally. Before agreeing to write such an article, the judge should consult with the head of the jurisdiction.

Occasionally a judge may be invited to contribute to public discussion on matters of general public interest. Such contribution might be written, by radio or by television. There is no objection in principle to this, but the precautions identified in para 5.7 should be considered. Contribution by radio or by television requires particular care.

If the subject matter might be controversial the head of jurisdiction should be consulted. The judge should consider the risk of the judge's opinion being associated by others with the judge's office or court. Even when acting in a private capacity on a non-legal matter a judge should take care about becoming embroiled in a public controversy.

5.9 Legal teaching

It is common for judges to lecture at law schools after they are appointed and to take part in Bar and Law Society professional development programs, whether for remuneration or not. As long as this does not interfere with judicial duties, there is an advantage in having a judge give lectures to students. On matters on which there may be differences of views, discretion will have to be exercised – particularly when the lecturer may later have to decide the question as a judge.

5.10 Books – prefaces and book launches

Legal textbooks frequently have prefaces or reviews written by judges and such an activity is unlikely to be open to any reasonable objection.

In writing a preface for, or agreeing to launch, a non-legal book, some care and discretion is called for. Both the subject matter of the work, and the relationship of the judge to the author, need to be weighed, in order to avoid any perception that the judge may be promoting a particular cause or taking a political stance, or that the author's reason for seeking to involve the judge might be more mercenary than personal.

It goes without saying that a judge should be mindful of the possible significance of commenting on a book, and the possible association of the judge with the author's opinion on matters of law that might come before the judge.

Short laudatory "quotes" or comments on a dust jacket or soft cover have a distinctly commercial aspect, and should be avoided.

5.11 Writing legal books

Judges also write and contribute to legal books. This is not controversial and it is not wrong for a judge to receive payment for writing of this nature. As a practical matter these payments are unlikely to be large. The writing of a book should not, of course, interfere with the performance of a judge's judicial duties.

5.12 Taking part in conferences

Judges may, and frequently do, deliver papers without a fee at legal conferences, organised by not for profit organisations.

Participation in, or the giving of papers, without a fee at non-legal conferences, organised by not for profit organisations, is not objectionable. It is advisable to avoid speaking or writing on controversial or politically sensitive topics. A judge who is asked to speak at a non-legal conference should make sure that there is no

risk of the judge appearing to be associated with the organisers or others who share the platform with the judge, if such association is likely to be controversial.

It may be inappropriate for a judge to give a paper at a conference organised by commercial organisations, as opposed to a not for profit organisation.

5.13 Professional Development

Judicial officers will be better able to maintain the high standards expected of them if they are provided with good quality professional development programs. These will help them maintain and improve their skills, respond to changes in society, maintain their health, and retain their enthusiasm for the administration of justice.

Judges should be provided with, and should take part in, appropriate programs of professional development, such as those provided by the National Judicial College of Australia, the Judicial Commission of New South Wales and the Judicial College of Victoria. Programs and conferences that involve judges from other courts and places, and which provide an opportunity for the wider discussion of common issues, may be particularly valuable.

Whilst judges have an individual responsibility to pursue opportunities for professional development, they are entitled to expect that their court will support them by providing reasonable time out of court and appropriate funding.

5.14 Welfare of fellow judicial officers

A court is a collegial institution. Members of a court can be expected to care about the welfare of their colleagues, particularly if a colleague's health or wellbeing might affect the discharge of his or her duties.

The issue here is one of appropriate care and concern, not of legal responsibility. It will usually be appropriate to inform the head of jurisdiction if there is cause for concern about the welfare of a colleague. There may be situations in which, before doing so or as well as doing so, it will be appropriate to offer assistance to the colleague in question.

A judge should treat judicial colleagues with courtesy and consideration.

5.15 Personal welfare

A judge whose ability to discharge judicial duties is adversely affected by the judge's health or welfare should, of course, raise the matter with the head of jurisdiction.

5.16 Court staff

A judge should treat all court staff courteously and considerately. A judge should be mindful that court staff may feel unable to differ from the judge. In dealing with senior court staff an individual judge should respect their responsibility for the efficient administration of the court and the proper use of court resources.

CHAPTER SIX

6 NON-JUDICIAL ACTIVITIES AND CONDUCT

This chapter poses, in no particular order of importance, a number of specific questions that a judge may have to answer, always within the framework of the guiding principles discussed in Chapter 2. It also considers the cessation of other roles upon appointment.

6.1 Cessation of other roles upon appointment

Care needs to be taken to relinquish inconsistent offices and work upon appointment. In some jurisdictions the appointment takes effect immediately and is publicly announced at the same time. In such instances, even if some time may elapse before actually commencing judicial duty, the appointee, now a judicial officer, obviously cannot continue to act as counsel in any matter.

When an appointment is made but is to take effect from a later date questions sometimes arise about the desirability of the appointee appearing as counsel after the announcement of the appointment, but before it takes effect. It is generally accepted that, during this period, an appointee should not appear as counsel in the court to which he or she has been appointed or in a lower court or tribunal in the same hierarchy. Apart from any other objection, appearance as counsel might give rise to a perception that unfair or improper advantage is being taken of the standing of the judicial office that the appointee is about to hold.

Appearances in a higher court or in a court or tribunal in another hierarchy may not give rise to the same undesirable perceptions but many would still see this as best avoided. There can however be no hard and fast rule and there may be instances – such as when a client would be seriously prejudiced if the brief were returned – when the better course may be to retain the brief. The circumstances can vary greatly and it would always be prudent for the appointee first to consult with the judicial head of the court or another senior colleague. Some of the issues are discussed in *Expectation Pty Ltd v PRD Realty Pty Ltd & Anor* (No 2) [2006] FCA 392; 151 FCR 160.

6.2 Commercial activities

The permissible scope of involvement in commercial enterprise concurrently with judicial office is limited by a number of factors:

- Judicial office is a full-time occupation and the timely discharge of judicial duties must take priority over any non-judicial activity;
- The benefits of office, including pensions (where applicable) or superannuation, should give a comfortable level of financial security for life to obviate the need to augment earnings by activities that might generate a conflict of interest or otherwise pose a potential threat to public confidence;
- Directorships of public companies should be resigned on appointment and not thereafter accepted while in judicial office.

It is not possible to be definitive about the commercial activities that are appropriate and inappropriate. The judge should consider how the judge's involvement

(whatever it is) might reflect on the judicial office. Any activity that will, or might, involve the judge in unlawful activity, obviously should be avoided. A commercial activity that might give rise to public controversy seems undesirable. The issue is one on which consultation with colleagues may be helpful.

Some activities may be seen as inappropriate for a judge, simply because of the nature of the activity. Difficult assessments may have to be made. Attitudes can change over time. A judge who lives or works in a small community may face difficulties that do not arise because of the "practical invisibility" that a larger community may confer on a judge residing or working in it.

A judge should not engage in any financial or business dealing that might reasonably be perceived to exploit the judge's judicial position, or that will involve the judge in frequent transactions or business relationships with persons likely to come before the judge in court.

The judge should be scrupulous to avoid any use of court resources or facilities in connection with commercial activity by the judge.

Some small-scale non-judicial activities that might be perceived as commercial are quite common and not objectionable, particularly if they are primarily recreational. Examples (and there are many others) are:

- Hobby farms and other agricultural enterprises;
- Larger managed enterprises that do not require "hands on" responsibility;
- Directorship of small family companies.

6.3 Judges as executors or trustees

The management of deceased estates for close family members, whether as executor or trustee, is unobjectionable, and may be acceptable even for other relatives or friends if the administration is not complex, time consuming or contentious.

The risks associated with the office of trustee, even of a family trust, should not be overlooked. Beneficiaries are not always happy with management or discretionary decisions taken by a trustee, and a judge would be wise to weigh such factors before accepting the office.

6.4 Acceptance of gifts

It is necessary to draw a distinction between accepting gifts in a personal capacity unrelated to judicial office, eg from family or close friends, and gifts which in some way relate, or might appear to relate, to judicial office. It is only in the latter category that acceptance of gifts or other benefits needs careful consideration.

Some such gifts are unobjectionable, for example a small gift such as a bottle of wine or a book by way of thanks for making a speech or otherwise participating in a public or private function.

Some benefits which may well be legitimate marketing or promotional activities may nevertheless cause difficulties. Refusal of such a benefit may seem churlish or

even offensive if it imputes or implies improper motives, but the short answer is that there is no good reason why judges should receive free benefits that others have to pay for. On the other side of the same coin, it is axiomatic that judges must not exploit the status and prestige of judicial office to solicit or obtain personal favours or benefits.

Judges should be wary about acceptance of any gift or benefit or hospitality that might be interpreted by others as an attempt to woo judicial goodwill or favours. Gifts or other benefits from practising members of the legal profession may fall into that category.

6.5 Engagement in public and community organisations

Prior to their appointment, many judges have been actively engaged in community organisations, particularly but not exclusively educational, charitable and religious organisations. Such engagement as a judge is to be encouraged and carries a broad based public benefit, provided it does not compromise judicial independence or put at risk the status or integrity of judicial office. It is the proviso that helps to define the limits, namely:

- Such activities should not be too numerous or time consuming;
- The judicial role should not involve active business management;
- The extent to which the organisation is subject to government control or intervention must be weighed.

The governing bodies of universities, public or large private hospital boards or other public institutions invite special attention. Although the management and funding structures of such organisations are complex, and are often the subject of public debate and political controversy, many judges, present and past, hold or have held high office in such organisations without embarrassment by regulating the nature or extent of personal involvement in contentious situations.

The following matters may warrant consideration when considering a proposed appointment:

- The risk of the organisation becoming involved in disputes, particularly disputes with a political aspect, with the Executive Government.
- The risk of the organisation failing to comply with legislation binding it.
- The risk of the organisation getting into financial difficulty.

The role of many such public institutions is, moreover, changing. They are often encouraged to be more entrepreneurial. Commercial activities and industrial issues or disputes are likely to appear on their agendas. The more that the business of their governing bodies comes to resemble that of the board of directors of a public company, the less appropriate judicial participation may be. There is, however, no embargo on such an activity. It is for the individual judge to weigh the "pros and cons" by reference to the suggested guidelines.

Experience demonstrates that, for various reasons, the management of bodies and institutions that deal with children or other vulnerable members of society can give rise to difficult and controversial issues relating to the responsibility of the relevant board or council if something goes wrong. A judge should give careful consideration

to the issue of risk and risk management before accepting a board or council appointment of this type.

Any conflict of interest in a litigious situation must of course be declared.

6.6 Public fund raising

Organisations of the kind referred to in the preceding paragraphs are often engaged in public fund raising.

A judge should avoid any involvement in fundraising such as might create a perception that use is being made, or advantage taken, of the judicial office. A judge should be especially careful to avoid creating such a perception in the minds of actual or potential litigants or witnesses before the judge's court.

Publication of the name of a judge as a subscriber is not itself objectionable, but many judges may prefer anonymity. It is a matter of personal taste.

6.7 Character and other references

The Judicial Commission of New South Wales (the members of which include the heads of the five courts in that State) in 2000 expressed a view that judicial officers should not give character evidence or issue written testimonials directed to the same issue. This is subject to two exceptions:

- When it would be unjust or unfair to deprive the beneficiary of special knowledge possessed by the judge; and
- When a member of the judge's staff is given a reference relating to employment.

The second of these exceptions does not deal with character evidence.

In other States a less strict view may be held. There are different opinions, but they appear to justify the following summary:

(a) There is no objection in principle to a judge giving a reference as to character or professional competence of persons who are well known to the judge, and preferably favourably known – a wise person takes care in choosing referees. But a judge should consider the potential embarrassment if the subject of the reference proves to be unsatisfactory. The judge should also be mindful of the risk of the reference being used in a manner not foreseen by the judge. It is permissible to use a judicial letterhead for a reference as to legal professional competence of a former member of the judge's staff, but in other cases it is more appropriate to use a private letterhead.

(b) Whether a judge should give character evidence in court or otherwise is a vexed question that can be resolved only by the individual judge in the context of a particular case. The issues to be weighed include:

- It may seem unfair to deprive the person concerned of the benefit of such evidence if no other person is in a position to give the relevant evidence.

- If the person concerned has generally been of good repute, there are probably others who can so testify.
- Such evidence from a judge may well put pressure on the trial judge or magistrate or may be seen as doing so.
- The outcome, whether favourable or unfavourable to the person charged, may well become the subject of ill-informed publicity, referable to the judge's involvement.

It would be wise to consult the head of the jurisdiction if asked to give such evidence.

6.8 Use of the judicial title

Although there should be no need for a judge to conceal the fact that he or she is a judge, care should be taken not to create an impression that a judge's name, title or status is being used to suggest in some way that preferential treatment might be desired or that the status of the office is being used to seek some advantage, whether for the judge or for someone else.

6.9 Use of judicial letterhead

Judges should avoid the use of a judicial letterhead in correspondence unrelated to their official duties in circumstances where the use of the letterhead might be taken to suggest a request for, or expectation of, some form of preferential treatment. To take a very obvious example, if a judge were to write a letter complaining to a service company about a defective repair job, it would be wrong to use a judicial letterhead. Similarly, if a judge had a disputed claim on an insurance policy, it would be unwise to use a judicial letterhead even though it may very well be a fact that the insurance company knows that the insured is a judge. It is, however, customary and proper for a judicial letterhead to be used for some private purposes connected with a judge's office, such as writing or responding to notes sent on the occasion of a friend's appointment or retirement from the bench.

A judge should be mindful that email correspondence might identify the writer as a judge, and in that way is equivalent to using the judicial letterhead.

6.10 Protection of personal interests

Judges should be circumspect about becoming involved in personal litigation, even if the litigation is in another court. Good sense must prevail and although this does not mean that a judge should abandon the legitimate pursuit or defence of private interests, their protection needs to be conducted with great caution to avoid creating any impression that the judge is taking improper advantage of his or her position. The judge should consider also the possibility of an adverse finding, and the impact of that if it occurs.

6.11 Social and recreational activities

There is such a wide range of social and recreational activities in which a judge may wish to engage that it is not possible to do more than suggest some guidelines.

Judges should themselves assess whether the community may regard a judge's participation in certain activities as inappropriate. In cases of doubt, it is better to err on the side of caution, and judges generally will be anxious and careful to guard their own reputation. A brief reference, far from exhaustive, to some "grey" areas may help judges to make their own decision with respect to those and other activities.

6.11.1 Social contact with the profession

There is a long-standing tradition of association between bench and bar, both in bar common rooms and on more formal occasions such as bar dinners or sporting activities. Many judges attend Law Society functions by invitation. The only caveat to maintaining a level of social friendliness of this nature, one dictated by common sense, is to avoid direct association with members of the profession who are engaged in current or pending cases before the judge. A similar test should be applied in cases of private entertainment. It is undesirable for a judge to approach a party enquiring whether that party has any objection to private entertainment of the judge by another party. This is likely to be seen as putting the party of whom the request is made in the awkward position of being expected to agree that there is no objection.

Circuit courts, however, may pose some difficulties. It is common for members of the legal profession in country areas to entertain the judge, either in a group or in private homes. The judge in accepting or offering hospitality must be and be seen to be even-handed towards legal practitioners engaged in the current sittings. The judge should not be regularly entertained by or retain too close a relationship with a practitioner who regularly has litigation before the court.

Similarly, in country sittings involving criminal cases, care must be taken not to accept assistance outside the court from police who might be appearing in cases in the sittings. Some judges consider that they should not rely on the police to supply transport to and from the courthouse in order that it might not be thought that the judge is siding with those regarded as representing the prosecution.

Socialising and friendships in a small community can create particular problems for judges who reside there. It is important to avoid being seen as favouring individuals or organisations that are likely to appear before the judge.

6.11.2 Membership of clubs

A judge cannot be a member of a club or society that engages in unlawful or invidious discrimination. The principle is easily stated, but not easy to apply.

Societies and clubs that permit only male or female members have a long history. Some such clubs have arisen in response to the exclusion of females from membership of certain clubs.

Many judges consider that it is invidious to be a member of a club that will not accept as a member a judicial colleague of the opposite gender. A number of courts and judges will not hold functions at such clubs. In making a decision about

membership a judge should be mindful of the message that sends to judicial colleagues and to the public.

6.11.3 Visits to bars and clubs; gambling

This is also a matter for the individual judge. A judge should give thought to the perceptions that might arise from, for example, the reputation of the place visited, to the persons likely to be present, and any possible appearance that the premises are conducted otherwise than in accordance with law.

6.11.4 Sporting and other club committees

There is in general no objection to a judge serving on such committees so long as they do not make unreasonable demands on a judge's time. Some judges consider that a judge should not sit on a committee exercising disciplinary powers.

CHAPTER SEVEN

7 POST-JUDICIAL ACTIVITIES

The purpose of this chapter is not to dictate to retired judges, but to give guidance to serving judges who are contemplating or planning for their retirement.

7.1 Professional and commercial activities

There are many judges, particularly those who have remained in office to the age of statutory retirement, who choose to undertake only non remunerative activities in retirement. They thereby avoid the sometimes difficult and controversial decisions that have to be taken by those who seek a more active and remunerative role.

The receipt of a judicial pension, for the most part publicly funded, is not in itself a bar to post judicial remunerative activities. Most judges on appointment make a substantial financial sacrifice in terms of earning capacity. Nor does it seem necessary, in the discussion that follows, to draw any distinction *in principle* in respect of:

- Those who have reached the statutory age of retirement;
- Those who, after quite lengthy judicial service, have chosen to retire early for reasons other than ill-health;
- Those relative few who have found themselves ill-suited to the judicial role and have resigned after a short term in office.

But in some jurisdictions legislation limits the remunerative activities in which a recipient of a judicial pension may engage.

If there is one guiding principle, a former judge should be satisfied that any proposed professional or commercial activity is not likely to bring the judicial office into disrepute, or put at risk the public expectation of judicial independence, integrity and impartiality.

7.2 Professional legal activities

7.2.1 Practice at the bar and appearance before a court

This is a "grey area" in which it is not possible to formulate Australia-wide guidelines. A judge contemplating retirement should consult the Australian Bar Association, and the local Bar Association or Law Society for relevant rulings. All however proscribe appearance as counsel in a court of which the judge was formerly a member, for various periods ranging from two to five years. As well, a former judge should not appear as counsel in a case in which a decision by the former judge will be cited as authority.

The question of principle is whether the appearance of the former judge before a court, in which the judge sat or in respect of which appeals lie to the court of which the judge was a member, might, because of the relationship, appear to be inconsistent with the impartial administration of justice. The issue goes to the integrity of the judicial process.

7.2.2 Practice as a solicitor

Active association with a firm of solicitors, whether as a partner, consultant, or in some other capacity, is permissible, but preferably not sooner than a year or so after retirement. Care should be taken to ensure that the firm does not take active steps to promote itself by overt reference to the judge's former judicial status.

7.2.3 Alternative dispute resolution – mediation and arbitration

It has become quite common for judges who have retired, whether early or at full retirement age, to be appointed or to offer their services as mediators or arbitrators. Although some judges do not approve of such activities, they are not at present subject to any legal or professional restraint.

7.2.4 Appointment as an acting or auxiliary judge

Many States make provision for a retired judge to return to the court, for temporary or intermittent periods, as an acting judge.

A retired judge who sits from time to time as an acting or auxiliary judge should consider carefully the appropriateness of other activities that the retired judge might be undertaking. The exercise of the judicial office on a part-time basis may require the observance of, or at least consideration of, some of the restrictions identified in this publication. Particular care should be exercised in relation to activities undertaken concurrently with part-time judicial work.

7.3 Commercial activities

It is permissible to engage in commercial activities. However, a retired judge should consider whether his or her activities might harm the standing of the judiciary, because of a continuing association in the public mind with that institution.

7.4 Political activity

The restraints that prevent a serving judge from having any involvement in politics cease to apply on retirement but, as with commercial activity, the retired judge should consider whether the particular activity undertaken might reflect adversely on the judiciary, because the public might continue to associate the retired judge with that institution.

7.5 Participation in public debate

A retired judge has the same freedom as an ordinary citizen to engage in public debate, and in many cases is well qualified to do so, particularly in matters touching the administration of justice generally. A retired judge should, however, consider whether a contribution to public debate is appropriately identified as coming from a retired judge.

7.6 Community and social activities

A retired judge has the freedom of any citizen to engage in chosen recreational and other community and social activities untroubled by the risks of a conflict of interest

or perception of bias which have to be weighed by a serving judge, as earlier discussed.

Even in retirement, however, a former judge may still be regarded by the general public as a representative of the judiciary, and any activity that might tarnish the reputation of the judiciary should be avoided.

CHAPTER EIGHT

8 FAMILY AND RELATIVES

As has been stated (see para 1.3), the principles identified in the Guide are the basis for, and a guide to resolution of, issues involving the family and relatives of a judge, being issues that arise under the Guide.

Issues involving a judge's relatives, especially close relatives, can give rise to particularly difficult questions. A judge must accept the restraints that flow from the principles identified in the Guide. The relatives of a judge need not. They are entitled to pursue their own careers and businesses, and to lead their own lives. There are likely to be situations in which the activities or careers of relatives attract consideration of the principles identified in the Guide, because the situation presents an issue under the Guide which the judge must address. So, the fact that a family member is a judge, subject to certain restraints, can cause difficulty from time to time.

If a judge's spouse is involved in a business, or is employed in a commercial activity, can the judge participate in, and support the judge's spouse in, social and other like functions that the spouse will attend, linked to the spouse's employment? Are there events or activities involving the judge's spouse that the judge should decline to attend? Can a judge be involved in events, such as fundraising events at the judge's children's school? Can a judge discuss the details of judicial work, and frustrations that the judge might feel, with the judge's spouse or immediate family, as a judge might with a trusted colleague? If a judge's spouse or child is a politician, can the judge help out in any way with political activities? If a family member conducts a shop, can the judge help in the shop on a weekend? What should a judge do if the judge's child is attending a party at which the judge suspects that alcohol will be provided to teenagers? Examples of these "family issues" can be multiplied.

The response by a judge to such matters will depend on the particular circumstances. Matters affecting a spouse's or partner's career or appointment will, for example, call for consideration of public attitudes or perceptions, the kind of activity the partner engages in, the other persons present or participating. Matters involving children are likely to turn on the age of the children, their ability to observe confidentiality, and whether they still reside with the judge. These are examples only.

In the end, each situation must be resolved by the judge applying the principles identified in the Guide. A central issue will always be whether and how the situation might reflect adversely on the judge or the judiciary or might diminish public confidence in them. But, just as a judge should not retreat from society, nor should a judge retreat from normal family life. On occasions, the principles in the Guide will prevent a judge from engaging in some aspects of family life. But the principles operate on the basis that, as far as practicable, a judge can engage in normal family life.

There is another aspect to this. Rightly or wrongly, fairly or unfairly, some people will expect a higher standard of conduct from members of a judge's family, simply because they are related to a judge. They may treat poor conduct by a family member as reflecting adversely on the judge, even though the judge may have had no ability to prevent what occurred. Some will treat things said by family members as reflecting the judge's opinion, or as reflecting things the judge may have said within the family circle.

In situations like this the judge's conduct is not in issue. The difficulty, if there is one, arises from the fact that members of a judge's family may be treated or assessed differently from the manner in which other members of the community are assessed or treated.

On appointment a judge might find it helpful to explain to family members how and why the judge is now subject to a number of restraints that might affect the judge's participation in family life. Likewise, when an issue arises that has, or is likely to have, an impact on family life. A judge might also explain that sometimes people will judge members of the judge's family more critically because they are a member of a judge's family, just as they will assess the conduct of a judge, even in a family setting.

On appointment a judge should consider whether it is desirable for family members to take particular security measures (such as when answering the telephone or opening the front door). The need for such measures will depend on the nature of the jurisdiction exercised by the judge's court.

CHAPTER NINE

9 SOCIAL MEDIA

New technologies have transformed the manner in which users interact with each other and in particular give, receive, exchange and display information about themselves and others. These technologies are used widely, including by judges, their families and the courts in which judges work. "Social media" is a term commonly used to refer collectively to technologies that facilitate social interaction. Each of them differs. A helpful summary can be found in "Challenges of Social Media for Courts & Tribunals, Issues Paper for a Symposium", Dr Marilyn Bromberg-Krawitz (May 2016) published by the Australasian Institute of Judicial Administration Incorporated and the Judicial Conference of Australia. Dr Bromberg-Krawitz states (at 2-3):

> '"[S]ocial media" encompasses social interaction via technological means. These technological means allow users to interact with vast amounts of information in unprecedented ways, and allows for personalization as a result of the ability to control the flow of information.' Examples of popular social media include: Facebook, Twitter, YouTube, Instagram, LinkedIn and blogs. A person can use social media to share information, including comments, photographs and videos easily and it is normally free to do so. A person merely needs internet access on a computer or a digital media device to use social media. A large number of people can see what a social media user shares, and the information shared 'may remain on the internet in perpetuity'. A social media user can also add comments, photographs, etc. to an existing social media post. Social media users can modify the privacy settings that apply to their social media to control who can see their social media accounts and posts. Social media has some similarities with the average website, but an important difference is that social media permit the public to post information immediately, and the average website generally does not.
>
> (Footnotes omitted)

There is no reason in principle to deny judges the use of social media. But a judge should be aware of the risks that go with the use of social media, and should act with care in light of these risks. As the Guide makes clear, at all times a judge is governed by the principles of, and must act in a manner that promotes public confidence in, judicial impartiality, independence and integrity: see Chapter 2.

A judge should be mindful of the risk that the judge's use of social media might reveal material that emanates from the judge or that has been seen or received by the judge and compromises or appears to compromise the objectives identified above or the standing and integrity of the judge.

Accordingly, bearing in mind the content of the Guide, a judge should consider the content of any interaction using social media, the possible dissemination of the content without the knowledge of the judge, and the possible disclosure of the judge's connection with the material. Various aspects of social media should be considered. The only safe course is to assume that material which the judge creates

or receives, or with which the judge comes in contact, may become public without the judge knowing, and contrary to the judge's wishes. The fact that a judge has accessed material can become public, even though the judge accessed the material anonymously. Material may be disseminated widely, and again without the judge's knowledge. The material can be disseminated in seconds. Once disseminated, it may prove impossible to remove the material from the sites to which it has been disseminated.

A judge must also be mindful of the persons with whom the judge has a connection through the use of social media. An established connection between the judge and an individual, or between the judge and a lawyer, might be problematic if the person or lawyer comes before the judge. It may be difficult for a judge to keep track of all of the persons with whom the judge has had contact or connection using electronic media, but the record of that contact will always exist. To an outsider, the contact may seem significant, even though the judge has no memory of it.

A judge should do all that is practical in the circumstances to take care who sees what the judge disseminates. A judge should be mindful that one cannot rely completely on privacy settings because these may change. A judge should use the highest privacy setting available. But the operation of such settings may be affected by the controller or manager of the media used, and the judge may be unaware that in this way the privacy setting has been effectively altered. The use of a privacy setting does not prevent others from sharing material posted by a judge, and so does not prevent dissemination by and to others. A judge might create a social media page that does not contain the judge's name or photograph. Despite such an attempt at anonymity the public might learn that the judge is the author of the page.

The scope and effect of privacy settings is a complex matter. A judge contemplating opening a social media account should first obtain competent advice about this.

It goes without saying that a judge should give careful consideration to the content of material disseminated through social media. The considerations here are much the same as apply to any communication by a judge. There are a variety of ways in which the content of a communication might appear to compromise the judge's impartiality, independence or integrity. A judge cannot be certain how far, or to whom, the content created by the judge may go. The "practical permanence" of material disseminated through social media means that casual remarks or embarrassing comments are at risk of exposure long after they have been forgotten by the judge. Comments by a judge relating to litigation or litigants before the judge, or to lawyers before the judge, should be avoided. Generally, a judge should not use social media to disseminate material that would embarrass the judge if it became public.

Family members of a judge and court staff should be alerted to the circumstance that their discussion of, or comment about, cases coming before the judge requires consideration. A judge might be quite unaware of a family member's use of social media. But members of the public may assume that material emanating from a member of a judge's family or from court staff is attributable to the judge, or reflects the judge's views. Like a judge, members of the judge's family should be alert to the possibility of a connection through social media with someone involved in a case

before the judge. If this arises, the family member should inform the judge, so that the judge can consider whether any action needs to be taken, and if so, what action is appropriate.

The use of social media by a judge is governed by the principles on which the Guide is based. But a judge needs to be aware of the practical operation of social media, and aware of the situations in which and the manner in which features of social media may create risks that the judge needs to consider. A judge should also consider the security risk that might arise out of the disclosure of information through social media.

These days, judges and their families need to be aware of the possibility in any situation of the presence of a camera and of its use to take pictures of and record sound at public or private functions and events.