

GUIDELINES FOR JUDICIAL CONDUCT

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A. PREFACE/PURPOSE

[1] This publication is intended to provide practical guidance to members of the judiciary in New Zealand. The general principles it identifies underpin the legitimacy of judicial function which is essential to any society organised by law. As such, the general principles can readily be accepted as standards all judges in accepting appointment agree to live by and the public of New Zealand is entitled to expect in judicial conduct.

[2] The application of the principles in practice to circumstances as they arise every day is not always as clear cut as agreement on the general principles might suggest. The application of a principle may be novel or may be affected by changing community values. In some cases, whether the principle is engaged at all in the particular circumstances may be a matter of reasonable differences of view. In other cases there may be reasonable differences of opinion as to whether particular conduct by a judge affects the judicial function or whether it is private.

[3] For these reasons, the guidance provided in these statements and comments is not intended to be a code of conduct. It does not identify judicial misconduct. It is advice. The advice is designed to assist judges to make their own choices informed by a checklist of general principle and illustrations drawn from experience.

[4] There is a further reason why a statement such as this should be seen as advisory only. A judge can be removed from office for gross misconduct by Parliament (in the case of judges of the High Court or Court of Appeal) or the responsible Minister (in the case of other judicial officers). These guidelines are not, however, principally concerned with the sort of misconduct which would justify removal from office. They are concerned with the promotion of higher standards of conduct. No system of discipline to impose and support a code of conduct for judicial officers exists in New Zealand or comparable jurisdictions for good reason. It would undermine the fundamental principle of judicial independence. The independence of the judiciary is essential to the balances in our constitutional arrangements. It is not a protection for judges. It is a protection for the people of New Zealand. It is secure only if each judge is free to decide cases impartially according to law, without external pressure and without fear of the consequences. A system of discipline according to a code of conduct, whether imposed by executive government or judicial self-regulation, is inconsistent with judicial independence.

[5] Independence is not licence. It is responsibility. And the New Zealand judges have indicated that they would be assisted by advisory guidelines in discharging that responsibility. This publication responds to that need.

[6] It is hoped too that the publication may illustrate the difficult choices thrown up for individual judges from time to time. In the end, the legitimacy of judicial function and the independence of the judiciary depend upon public confidence. Stripping away the mystique attached to what judges do and making explicit the processes by which ethical dilemmas are confronted respects the community's vital interest in judicial standards and their maintenance.

[7] Advice such as is provided here can never hope to be definitive. It must evolve to meet the changing expectations the community reasonably has of its judiciary. So the standards discussed are in part tentative and subject to reconsideration.

B. IMPARTIALITY

[8] Impartiality is the essential quality required of the judge. That is made explicit by the judicial oath which requires judges to act "without fear or favour, affection or ill-will". Even the constitutional requirement of judicial independence is essentially a means to the end of impartiality.

[9] Impartiality must exist both as a matter of fact and as a matter of reasonable appearance. Reasonable appearance of partiality can be impossible to dispel, leaving a sense of injustice which is deeply destructive of confidence in judicial decisions.

[10] The appearance of impartiality is measured by the standard of a reasonable, fair-minded, and informed person.

[11] The appearance that a judge is not impartial can be given by apparent conflict of interest, by judicial behaviour on the bench, and by associations and activities off the bench. Whether such appearance could reasonably be given is often extremely difficult to judge in advance or at the time. A Judge will need to be careful about expressions of views which might give the appearance of bias particularly in relation to differences arising from culture, race, religious belief or gender.

[12] From time to time Judges will err in concluding that no reasonable apprehension of partiality or bias could be taken from the circumstances. A conclusion that there was a reasonable apprehension of bias by an appellate or reviewing court does not of itself entail criticism of the judge's conduct or ethics. That is not however a distinction always appreciated by lay litigants. Some particular vigilance on the part of the Judge is warranted by the sensitivity of the issue and its capacity to erode confidence in the judiciary.

[13] Judges should always disqualify themselves in any case where they have doubts as to their ability to be impartial.

[14] Judges should always disqualify themselves in any case where they consider that a reasonable, fair-minded and informed person would consider they might not be impartial.

[15] The requirement of impartiality does not mean that judges cannot have sympathies or opinions about matters of public interest. But they must recognise and suppress their own views in doing right according to law with an open mind in the particular case.

[16] Conduct which is commonly cited as giving rise to a reasonable apprehension of bias is discussed further under the headings: Discharge of Judicial Function, Conflict of Interest, Extra-judicial activities.

C. INDEPENDENCE

[17] The independence of the judiciary from the legislative and executive arms of government is fundamental to the constitutional balance under the Constitution Act 1986 and to the principle of legality which underlies it and the rights and freedoms recognised by the New Zealand Bill of Rights Act 1990.

[18] It is secured by ancient guarantees of security of tenure and salary, now to be found in ss23 and 24 of the Constitution Act 1986 and by constitutional conventions which prevent the executive directing the judiciary or criticising judges. Parliament directs the judiciary only by legislation.

[19] The independence of the judiciary imposes reciprocal obligations upon the judges to respect the proper role of Parliament and the executive. Judges cannot avoid entering upon politically contentious matters if properly brought before them in legal proceedings (although comments should be measured). But extra-judicial statements upon politically contentious matters are not appropriate if the Judge's involvement could reasonably undermine confidence in his or her impartiality on a matter that could come before the court, if it might unnecessarily expose the judge (and the judiciary) to political attack, or if the status of judicial office is used.

[20] Where matters affecting the judiciary (such as questions about judicial salaries or terms) are the subject of public comment or debate, response on behalf of the judiciary should come from the Chief Justice or the head of jurisdiction affected. Individual comments by judges on

such topics may not be inappropriate, but it is advisable to consult the Chief Justice or head of jurisdiction in advance.

[21] Judges are independent in the performance of judicial function not only from the other branches of government, but from each other. Judicial decision-making is the responsibility of the individual judge, even in a collegiate appellate court. The Chief Justice or Head of Jurisdiction has no authority over the discharge of judicial function by other judges.

[22] Judges must protect independence by rejecting any attempts to influence them except by public advocacy in the courtroom.

(1) *Communication with Executive or Parliament on Behalf of the Judiciary*

[23] Communication with the Executive on behalf of the judiciary is usually the responsibility of the Chief Justice or (if only one jurisdiction is affected) the head of jurisdiction. Such communication should be open and formal.

[24] Communication with political parties, Members of Parliament or any appearance of political lobbying (such as through signing petitions) is inappropriate.

(2) *Membership of political organisations*

[25] Membership in or association with political organisations is inconsistent with judicial independence.

(3) *Voting*

[26] In the past, Judges have taken the view that they should abstain from voting in general elections. The more general view, however, is that judges should not feel precluded from exercising the general privileges of citizenship.

(4) *Service on government committees and inquiries*

[27] Judges are sometimes asked to serve as commissioners in public inquiries or in Ministerial or departmental working parties or committees. Invitation to accept non-judicial functions should always be carefully considered for compatibility with judicial function. The judge approached should consult the head of jurisdiction and the Chief Justice before accepting. Relevant considerations will be the impact upon judicial strength during the time of the secondment and any implications for judicial independence.

[28] Judges should not agree to serve on government advisory bodies or committees without the approval of the Head of Jurisdiction. The correct protocol is for the Executive to first approach the Head of Jurisdiction to ascertain whether a member of the Bench can be released for such service. If a direct approach is made to the Judge, he or she should bring the matter to the attention of the Head of Jurisdiction. Factors which will influence the appropriateness of acceding to the request are the maintenance of the independence of the judiciary and workload considerations. Whether service on advisory bodies or committees to Executive government is appropriate depends upon the role of the body and whether judicial membership in it might be perceived to be inconsistent with impartiality and the political neutrality of Judges.

(5) *Submissions or evidence to Parliamentary Select Committees*

[29] It is not inappropriate for a Judge to make a submission or give evidence before a Parliamentary Select Committee on a matter affecting the legal system. It is important to avoid entering upon matters of a political nature and to bear in mind the need to maintain judicial independence from the Legislative and Executive branches of government. It is important for the Head of Jurisdiction to be consulted before embarking upon a submission.

(6) *Participation in public debate*

[30] If a matter of public controversy calls for a response from the judiciary or a particular court, it should come from the Chief Justice or Head of Jurisdiction or with his or her approval. In other cases it may be beneficial to public debate for Judges to provide information relating to the administration of justice and the functions of the judiciary. Such participation is desirable but requires care. In particular a Judge must avoid political controversy unless the controversy is about judicial function. It is important to avoid using judicial office to promote personal views and to avoid the appearance of capture by particular organisations or causes. It is important to avoid expressing opinions on matters which may arise in litigation and which may lead to concern about the impartiality of the Judge.

(7) *Comments on judicial decisions*

[31] Judgments must stand without further clarification or explanation. Where a decision is subject to inaccurate comment, any appropriate response should be from the Chief Justice or Head of Jurisdiction. Generally the most effective response is to get the full text of the judgment into the public arena promptly.

D. EXTRA JUDICIAL ACTIVITIES

[32] The days are past when appointment to the judiciary compelled social and civic isolation. Effective judges are not isolated from the communities they serve. Communities are not well served by judges whose personal development is arrested by judicial appointment. Judges are also entitled to private and civic lives which are not stunted or disadvantaged by office.

[33] On the other hand, a judge's conduct, both in and out of court, inevitably attracts closer public scrutiny than that of other members of the community. And the standing of the judiciary is adversely affected by conduct which, in someone else, would not excite serious criticism. Judges therefore have to accept some restrictions on conduct and activities as a consequence of appointment. Where the balance should be struck is a matter of reasonable difference of opinion.

(1) *Membership of discriminatory organisations*

[34] In some areas, shifts in public attitudes and values may have removed some dangers and imposed others. It is not so long ago, for example, that divorce was an impediment to judicial appointment while membership by Judges of organisations which discriminated on the grounds of gender or race was not uncommon. Attitudes on these subjects have changed. A Judge should not be a member of any social organisation which discriminates on the basis of race, sex, religion or national origin.

(2) *Alcohol, breaches of law, lack of integrity or propriety in private dealings*

[35] Judges who deal with the effects of alcohol abuse may well be seen as compromised if themselves abusers of alcohol. And breaches of law, at least beyond the trivial or technical, are incompatible with the judicial obligation to uphold law. Lack of integrity or propriety in private dealings and financial affairs, such as would expose the judge to the censure of reasonable, fair-minded, and informed persons, may also be viewed as incompatible with judicial office. Personal and social relationships, if abusive, exploitative or with people who do not observe the law may raise questions about fitness. Matters such as these reflect upon the judge's ability or fitness to discharge the trust of judicial office.

(3) *Rights of property and civil rights*

[36] On the other hand, Judges should not be denied the right to act in protection of rights of property and other personal interests. Nor should they lightly be denied the freedoms of association and expression secured for all citizens.

(4) Service on charitable or community organisations

[37] Extra-judicial responsibilities and interests should not be such as to interfere with the discharge of judicial duties. Judging is onerous work. The Judge's primary responsibility is to fulfil the judicial duties. Any outside activities should not be of a scale which might distract from the Judge's principal responsibilities.

[38] Appointees to judicial office have often been engaged in service through charitable or civic organisations before appointment. It is not always necessary for the Judge to withdraw from such service. Many Judges have served on the boards or as trustees or officers of educational, religious, or charitable organisations. But some caution is required. It is important that the activities of the organisation should not reflect adversely upon the Judge's impartiality or standing or the discharge of the Judge's judicial duties. Involvement in an organisation is not appropriate where

- (a) it is likely to be regularly involved in contested proceedings before the courts;
- (b) its finances are unsound;
- (c) the standing of judicial office could be used to solicit funds;
- (d) the objectives of the organisation include law reform or political change.

[39] It is not appropriate for judges to provide legal or investment advice to charitable organisations. A Judge who is a member of a decision-making body of such organisation may however participate in its decisions including those about investments or legal rights and obligations.

[40] Where a Judge serves on the Board of an organisation which has commercial activities or raises funds from the public, the Judge should not permit his or her name or title to appear on documents associated with an appeal for funds.

[41] A Judge should not personally solicit funds or lend his or her name to fund-raising activities.

[42] It is not appropriate for a Judge to serve or be a member of an organisation conducted for the economic advantage of its members.

(5) Management of own investments

[43] Judges are not precluded from managing their own investments and those of their immediate families or family trusts provided they do not distract from judicial duties. Some caution is necessary if the investments are substantial or of a nature which is likely to give rise to controversy. In such cases it may be preferable for the Judge to be removed from direct management.

(6) Legal advice and representation

[44] Judges should not give legal advice except without compensation for close family members. A Judge is not precluded from acting for himself or herself in legal matters but must not, in so acting, abuse the standing of judicial office to advance the interests of the Judge or the Judge's family. The Judge cannot act as advocate or negotiator for a family member in a legal matter.

[45] A Judge should not accept free legal advice or representation. All professional services from lawyers should be paid for at the lawyer's usual charge-out rate.

(7) Acceptance of gifts and expenses

[46] Acceptance of small gifts for participating in a public or private function is not objectionable. Some care is necessary in accepting payment of expenses.

[47] There is generally no objection to Judges receiving travel and accommodation in return for providing papers at conferences or similar occasions. If the host organisation is a university or a legal organisation there will generally be no problem. If however the organisation is a private one associated with a particular cause or which is a potential litigant before the courts or if the arrangements are unusually lavish, consultation with the Chief Justice or Head of Jurisdiction before accepting is advisable.

[48] Caution is necessary in respect of any significant benefit. There are two risks:

- (i) any suggestion of exploitation of the standing of judicial office to obtain benefit;
- (ii) anything which might be interpreted as an attempt to influence the Judge in performance of judicial work.

(8) Social contact with members of the legal profession

[49] Social contact between members of the bench and bar is a long-standing tradition. Care should be taken to avoid direct social contact with practitioners who are engaged in current cases before the Judge.

(9) *Disciplinary committees*

[50] A Judge should not be a member of the committee of an extra-judicial body which exercises disciplinary powers.

(10) *Other social contacts*

[51] Judges should always be careful about being present in circumstances where gathering or premises may not be conducted in accordance with law or where they may risk associating with people who are involved in criminal activities.

(11) *Use of Judicial Office*

[52] A Judge must not use judicial office for personal advantage or for the benefit of the Judge's family or friends.

(12) *Use of judicial stationery in private business dealings*

[53] In personal business dealings the Judge should not use judicial stationery and must be careful to avoid the appearance of using the standing of judicial office for advantage.

(13) *Letters of recommendation*

[54] Judges should be cautious about providing references or letters of recommendation. There is no objection to letters of recommendation arising out of the personal knowledge of the Judge, but caution is necessary in the use of judicial letterheads. Generally speaking, judicial stationery should be used for recommendations only where the personal knowledge of the person recommended is acquired in the course of judicial work. That is the case, for example, with recommendations for scholarships or employment for former clerks.

(14) *Evidence in Court*

[55] A Judge should not give character evidence in court proceedings as a volunteer. While a Judge may give evidence when summonsed by a party, care needs to be taken not to invoke the standing of judicial office.

(15) Character Evidence

[56] Character evidence may be given where it would be unfair to deprive the person known by the Judge of special knowledge possessed only by the Judge. In such cases it is preferable for the Judge concerned to consult the Head of Jurisdiction if asked to give such evidence.

(16) Writing and media comment

[57] Articles or interviews which inform the public about the administration of justice generally are not objectionable and indeed may well be beneficial in raising public understanding about judicial function. They carry risks however if the Judge expresses views which may be taken to pre-determine issues which may arise for judicial determination or which cross into areas of political controversy. Publication in legal journals is not objectionable but requires care to avoid expressing firm views on matters which may come before the court for determination.

[58] Participation in radio or television programmes should generally be discussed with the Head of Jurisdiction before an invitation is accepted.

(17) Acceptance of fees, royalties and expenses for papers and publications

[59] The delivery of papers on legal subjects at legal conferences is an obligation which goes with judicial office. Acceptance of a fee for such participation is not appropriate.

[60] There is no objection to a Judge receiving royalties or payment for publication of texts or other substantial work. Care should be taken however to ensure that such writing does not intrude upon judicial responsibilities and time. Again, a Judge should be careful in any such publication to avoid the appearance of pre-determining matters which may come before the court in actual controversy.

E. DISCHARGE OF JUDICIAL DUTIES

(1) Behaviour in Court

[61] Judges must determine cases before them according to law without being deflected from that obligation by desire for popularity or fear of criticism.

[62] The Judge must hear a case in accordance with the principles of natural justice and on the evidence in the case. Communication between the Judge and one party, except in proceedings properly heard *ex parte*, is not permissible.

[63] Judges must conduct themselves with courtesy to all and must require similar courtesy of those appearing in court. Judges should be alert to protect parties or witnesses from discourtesy or displays of prejudice based on racial, sexual, religious or other impermissible grounds. Punctuality, patience and tolerance are qualities the Judge should always apply.

[64] A Judge must be firm to maintain proper conduct during a hearing. Intervention is appropriate but should be moderate. It is important a Judge does not appear from interventions to have reached a conclusion prematurely or, in the case of criminal trials before a jury, to have reached a view of guilt or innocence.

(2) Diligence in Discharge of Official Functions

[65] Judges must diligently and faithfully discharge their judicial functions. The obligation covers not only intellectual honesty in judging and prompt disposal of work, but willingness to undertake a fair share of the work of the court.

(3) Correction of Oral Judgments

[66] A Judge should not alter the substance of reasons for decisions given orally. The correction of slips or poor expression including citations omitted at the time of delivery of oral judgments is acceptable.

(4) Correction of Transcript of summing-up

[67] The transcript of a summing-up to a jury should not be altered unless it does not correctly record what the Judge actually said.

(5) *Reserved judgments*

[68] A Judge should deliver reserved judgments within a reasonable time. If other work commitments prevent a Judge from completing a reserved judgment, it is the responsibility of the Judge to raise the matter with the scheduling Judge or the Head of Jurisdiction so that opportunity for completion of the judgment can be provided.

(6) *Communication with Appellate court*

[69] A Judge should not communicate privately with an appellate court where appeal is taken from the Judge's determination.

F. DISQUALIFICATION OF JUDGES

(1) *Conflict of interest generally*

[70] Judges must disqualify themselves wherever they have personal knowledge of disputed facts in the proceedings or wherever they have a personal view concerning a party or witness of disputed fact in the litigation.

[71] The question of disqualification is for the Judge. The Judge will sometimes be mindful of the burden passed on other Judges if disqualification is resorted to without need. But greater burdens are imposed if an appellate court eventually takes the view that disqualification was appropriate. It is sensible for the Judge to decline to sit in cases of doubt.

[72] Conflict of interest arises in a number of different situations. The Judge must be alert to any appearance of bias arising out of connections with litigants, witnesses or their legal advisors. 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.

(2) *Conflict of interest arising out of legal practice*

[73] Judges should disqualify themselves if they served as a legal advisors in respect of the controversy in issue when in practice or if their firm was concerned with the matter while the Judge was in practice.

(3) Close relationships

[74] Judges should disqualify themselves if in a close relationship to litigants, legal advisors or witnesses in the case. It is impossible to be categorical about the relationships which may give rise to concerns about impartiality. Clearly close blood relationships or domestic relationships are disqualifying.

(4) Disqualification where opinions expressed inconsistent with impartiality

[75] A Judge should consider disqualifying himself or herself if the case concerns a matter upon which the Judge has made public statements of firm opinion after appointment.

(5) Disqualification where economic interest

[76] The Judge should disqualify himself or herself if he or she directly or indirectly or a close relative or member of the Judge's household has an economic interest in the outcome of the proceedings. Such conflicts may arise out of current commercial or business activities, financial investments (including shareholding in public or private companies) or membership or involvement with educational, charitable or other community organisations which may be interested in the litigation.

(6) Disclosure of shareholding

[77] Shareholding in litigant companies or companies associated with litigants should be disclosed. They should always lead to disqualification if the shareholding is large or if the value of the shareholding would be affected by the outcome of the litigation. Where the shareholding is small, full disclosure should still be made.

(7) Circumstances in which Judge should consider disqualification

[78] The most important circumstances in which the Judge should consider disqualification are:

It is impossible to be categorical about relationships which give rise to disqualification but a Judge should always disqualify himself or herself whenever a party, lawyer or witness of disputed facts is a close blood relative or domestic partner of the Judge or a close relative of the Judge or where such person is a close friend or business associate of the Judge.

It is a good rule of thumb for a Judge to consider disqualification in cases where a witness of disputed facts is someone known to the Judge and about whom he or she has opinions. Former clients may well be people about whom the Judge has formed a view in the past. Friendship or past professional association with lawyers engaged in the case is generally insufficient to result in disqualification.

(iii) Although a Judge may be disqualified for strong views publicly expressed on a matter in issue, the case would have to be extreme before a reasonable observer would think the Judge not able to have an open mind. An expression of opinion in an earlier case is not a ground for disqualification.

(iv) In cases of uncertainty it may be desirable for the Judge to discuss the matter with the Head of Jurisdiction or another Judge. Where the Judge is uncertain as to whether disqualification is appropriate it will usually be necessary for the parties to be given an opportunity to make submission on the point after full disclosure of the circumstances giving rise to the question of disqualification. The consent of the parties is not determinative. The Judge must decide whether disqualification is appropriate. Disclosure of any matter which might give rise to objection should always be undertaken even if the Judge has formed the view that there is no basis for disqualification. There may be circumstances not known to the Judge which may be raised by the parties consequentially upon such disclosure.

G. SUPPORT FOR JUDICIAL INDEPENDENCE

[79] In their discharge of judicial functions Judges should be mindful always of the obligation to maintain the independence of the judiciary. That includes the independence of the institution and respect and support for judicial colleagues. Judges should not criticise or denigrate other Judges publicly or privately including, for example, to members of the legal profession. Collegiate support is important to the maintenance of judicial independence.

H. SUPPORT FOR COLLEAGUES

[80] In addition to judges observing high standards of conduct personally, they should also encourage and support their judicial colleagues to do the same, as questionable conduct by one judge reflects on the judiciary as a whole.

[81] Judges also have opportunities to be aware of the conduct of their judicial colleagues. If a judge is aware of evidence which, in the judge's view, is reliable and indicates a strong likelihood of unprofessional conduct by another judge, serious consideration should be given as to what action the judge should take, having regard to the public interest in the due administration of justice. This may involve counselling, making inquiries of colleagues, or informing the Chief Justice or Head of Bench of the relevant court.