

**JUDICIAL ETHICS AND JUDICIAL MISBEHAVIOUR:  
TWO SIDES OF THE ONE COIN?**

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**A Belated Interest in Judicial Ethics**

“*Judicial ethics*” is a topic that has received close attention in Australia only relatively recently. This is perhaps surprising since the occasional propensity of judges to stray from the path of rectitude and propriety – to which judicial ethics are intended to be an antidote – is hardly a novel phenomenon.

In 2008, the High Court of Australia held that there had been a miscarriage of justice in a criminal trial where the trial judge had been “*noticeably and repeatedly asleep or inattentive during the trial*”.<sup>1</sup> French CJ pointed out that public confidence in the judiciary, although a “*somewhat elusive*” criterion, incorporated the proposition that the parties to proceedings must receive and be seen to receive a fair trial. The appearance of a trial judge not attending to the evidence and arguments in court:

*“would ordinarily suggest to a fair and reasonable observer that the judicial process is not being followed.”*<sup>2</sup>

Although this was the first time the High Court had considered the consequences of judicial somnolence, the problem is by no means exclusively the product of the pressures faced by twenty-first century judges. Nearly two and a half thousand years ago, Plato lamented the indiscipline that led to litigation:

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<sup>1</sup> *Cesan v The Queen* (2008) 250 ALR 192, at [4], per French CJ. By the time the High Court handed down its decision, the trial judge had retired on the ground of permanent disability.

<sup>2</sup> *Id.*, [72].

*“for mean and unworthy ends, without any idea how far better it is to arrange one’s life so that one has no need of judges dozing on the bench.”*<sup>3</sup>

It would seem, therefore, that the issues confronting the High Court in 2008 would have resonated with the ancients.

Even more troublesome than a dozing judge is one who abuses his or her office. While in Australia this is a very rare phenomenon, it has been recognised as a potential problem at least since biblical times. Both Rubens and Rembrandt (among others) have given us memorable images of the story of Susannah and the Elders, a tale derived from a first century apocryphal addition to the Book of Daniel. Susannah was the wife of a magistrate who was spied on by two elders (or judges) while she was bathing. The elders demanded sexual favours from Susannah as the price for not falsely denouncing her as an adulteress. Daniel exposed the perfidy of the elders and justice prevailed. In a foretaste of hypocritical modern media portrayals of impropriety, Rubens (more so than the ever insightful Rembrandt) tended to paint his Susannahs as “*aphrodisiacs to revive [the] jaded libido*” of old men.<sup>4</sup>

The catalyst in Australia for sparking interest in the topic of judicial ethics was provided by allegations of serious misconduct against senior judicial officers in the mid-1980s. In particular, the ultimately unsuccessful prosecution in 1985 and 1986 of Justice Lionel Murphy, then a serving Justice of the High Court, and the subsequent Parliamentary Commission of Inquiry into whether his alleged conduct justified Parliament considering whether he should be removed from office,<sup>5</sup> shook the Australian legal world to its foundations.<sup>6</sup> The conviction and jailing in 1985 of a former Chief Magistrate of New South Wales for perverting the course of justice while in office added to the trauma.<sup>7</sup>

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<sup>3</sup> Plato, *The Republic* (H D Lee, translation, Penguin Books, 1955), 147. This illustration and the next are derived from D Pannick, *Judges* (Oxford University Press, 1987), 76-77.

<sup>4</sup> S Schama, *Rembrandt’s Eyes* (Allen Lane, The Penguin Press, 1999), 395-398.

<sup>5</sup> The *Constitution* provides in s72(ii) that Justices of the High Court and of other courts created by Parliament are not to be removed from office except by the Governor-General in Council, on an address from both Houses of Parliament in the same session:

*“praying for such removal on the ground of proved misbehaviour or incapacity”.*

<sup>6</sup> Justice Murphy was the subject of two Senate inquiries in 1984. He was subsequently charged with two counts of perverting the course of justice. He was convicted of one charge and acquitted of the other at a trial held in July 1985. The conviction was set aside on appeal in November 1985 and Justice Murphy was acquitted at the retrial in April 1986. The Parliamentary Commission of Inquiry into his conduct was established by the *Parliamentary Commission of Inquiry Act 1986* (Cth), but was wound up in August 1986 following Justice Murphy’s announcement that he was terminally ill. The *Parliamentary Commission of*

To some extent, the events in Australia paralleled a similar upheaval in the United States a decade and a half earlier. In 1964, Justice Abe Fortas resigned from the Supreme Court of the United States after *Life Magazine* revealed that he had accepted a lifetime annuity from a businessman who had been indicted later for stock manipulation. It also came to light that the businessman had consulted with Fortas on several occasions after his appointment to the Supreme Court. Matters were made worse for the reputation of the Court when the Senate rejected President Nixon's nominee to replace Fortas, Clement Haynsworth, the Chief Judge of the Fourth Circuit Court of Appeals. Haynsworth, so it emerged, had owned or acquired shares in corporations that had been parties to cases decided by panels on which he had sat without declaring his interest.<sup>8</sup>

Just as the resignation of Justice Fortas prompted intense debate in the United States about the extra-judicial activities of judges, so too the traumatic events of the mid-1980s in Australia prompted fresh consideration of the concept of "*judicial ethics*".<sup>9</sup> In particular, the publication in 1988 of a pioneering work, *Judicial Ethics in Australia*, by Justice J B Thomas, then of the Supreme Court of Queensland, focussed the attention of the judiciary on important issues that had previously escaped critical analysis.

Justice Thomas' book, apart from providing an instructive and at times entertaining catalogue of judicial misdemeanours (and worse), sprouting mostly from the fertile soil that nourishes

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*Inquiry (Repeal) Act 1986* (Cth) made the proceedings of the Commission secret for a period of 30 years. In consequence, the precise allegations that were said to have constituted "*misbehaviour*" have never been made public. A summary of the relevant events, together with references to the extensive literature on the saga, is provided by J B Thomas, *Judicial Ethics in Australia* (2<sup>nd</sup> ed 1997), 178-188. For a different perspective, coloured by the commentator's "*personal belief in [Justice Murphy's] innocence*", see A R Blackshield, "The Appointment and Removal of Federal Judges" in B Opeskin and F Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000), 410-422.

<sup>7</sup> Thomas, note 6 above, 179.

<sup>8</sup> P A Bell, "Extrajudicial Activities of Supreme Court Justices" (1970) 22 *Stanford L Rev* 587, 599-600.

<sup>9</sup> The United Kingdom has largely avoided similar experiences. In 2000, Sir Thomas Bingham attributed the neglect of the subject of judicial ethics in the United Kingdom partly to the fact that

"we have in this country been spared the scandals which have given life to the subject in the United States over many years and in Australia more recently."

He pointed out that no English Judge had been removed from office since the Act of Settlement, although he conceded that an unknown number would have been "*informally nudged or encouraged into retirement*": T Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000), 69.

the United States judiciary, argues that the concept of “*judicial ethics*” goes beyond “*mere expectations of voluntary decency*”. Rather it extends to:

“*expectations that a certain standard of conduct needs to be observed by a particular professional group in the interests of itself and the community*”.<sup>10</sup>

According to Justice Thomas, this is so because judges:

“*comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power ... [Citizens] 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 these expectations.*”<sup>11</sup>

Even before publication of Justice Thomas’ book, politicians in New South Wales, Justice Murphy’s home state, demonstrated that they would not be content to rely on judicial introspection alone to regulate the standards of behaviour to be expected of judges and magistrates. Emboldened by the Murphy affair, the New South Wales Parliament, amidst intense controversy, enacted the *Judicial Officers Act 1986* (NSW). This legislation, unique in Australia, created the Judicial Commission of New South Wales as an independent statutory body with power to receive and investigate complaints against judicial officers about any matter that “*concerns or may concern the ability or behaviour of a judicial officer*”.<sup>12</sup>

The most significant feature of the *Judicial Officers Act*, in the present context, is that it allows the Commission to investigate matters other than those which, if substantiated, “*could justify parliamentary consideration of the removal of the judicial officer from office*”.<sup>13</sup> In particular, the Commission is empowered to investigate a matter which, although (if

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<sup>10</sup> Thomas, note 6 above, 9.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Judicial Officers Act 1986* (NSW), s 15(1). The Commission is not to deal with a complaint about a matter arising before the judicial officer’s appointment: s 15(3). Other jurisdictions establish procedures for the investigation of allegations of facts that could amount to proved misbehaviour or incapacity such as to warrant the removal of a judicial officer: see, for example, *Constitution Act 1975* (Vic), s 87AAD; *Constitution of Queensland 2001*, s 61(3).

<sup>13</sup> *Judicial Officers Act 1986* (NSW), s 15(2)(a).

substantiated) might not justify parliamentary consideration of the removal of the judicial officer, nonetheless

*“warrants further examination on the ground that the matter may affect or have affected the performance of judicial or official duties by the officer.”*<sup>14</sup>

In New South Wales, therefore, complaints can be made about and action taken in respect of judicial misconduct or impropriety falling short of “*proved misbehaviour*” that would warrant Parliamentary consideration of the removal of a judicial officer under New South Wales law.<sup>15</sup>

This aspect of the legislation has attracted vehement criticism from judicial officers. Justice Malcolm McLelland, for example, writing in 1990, argued that:

*“the mere establishment of an official body with the express function of receiving complaints against judges as a first step in an official investigation renders judges vulnerable to a form of harassment and pressure of an unacceptable and dangerous kind, from which their constitutional position and the public interest require that they should be protected.”*<sup>16</sup>

This view, however, has not prevailed and the Judicial Commission remains an apparently permanent legacy of the Murphy affair.

## **Formulation of Guidelines**

In the aftermath of the Murphy affair and the enactment of the *Judicial Officers Act 1986* (NSW), the Australian judiciary itself began to give systematic consideration to the ethical

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<sup>14</sup> *Judicial Officers Act 1986* (NSW), s 15(2)(b).

<sup>15</sup> The *Constitution Act 1902* (NSW), s 53 provides that the holder of a judicial office cannot be removed except on an address from both Houses of Parliament in the same session seeking removal on the ground of “*proof of misbehaviour or incapacity*”. However a judicial officer cannot be removed in the absence of a report of the Conduct Division of the Judicial Commission to the Governor, setting out the Division’s opinion that the matters referred to in the report could justify parliamentary consideration of the removal of the judicial officer on the grounds of “*proved misbehaviour or incapacity*”: *Judicial Officers Act 1986* (NSW), s 41(1). The Conduct Division consists of three judicial officers, but one may be a retired judicial officer: s 22. For a discussion of the procedures, see *Bruce v Cole* (1998) 45 NSWLR 163, a case arising out of a complaint concerning delays by a Supreme Court Judge in handing down judgments. The events are outlined in E Campbell and H P Lee, *The Australian Judiciary* (Cambridge University Press, 2001), 106-108.

<sup>16</sup> M H McLelland, “Disciplining Australian Judges” (1990) 64 *ALJ* 388, 390.

principles that should govern or at least influence the behaviour of judicial officers. In 1996 the Australian Institute of Judicial Administration (“AIJA”) published a discussion paper on *Judicial Ethics*.<sup>17</sup> The paper noted that the general community appeared to be uncertain as to the standards of conduct appropriate to judicial officers and that judicial officers themselves were unsure as to where they stood on particular issues.<sup>18</sup> The author shied away from attempting to define “*judicial ethics*”, on the ground that the attempt could lead to “*arbitrary over-inclusion and under-inclusion*”.<sup>19</sup> Instead, the author confined himself to identifying a series of ethical issues worthy of consideration and making suggestions as to the approach that might be taken to each. The issues were classified under five broad headings: “*Official Conduct*”, “*Personal Conduct*”, “*Community Involvement*”, “*Financial Matters*” and “*Restrictions on Post-Resignation and Retirement Activities*”.<sup>20</sup>

The AIJA discussion paper squarely raised the question of whether the Australian judiciary should give consideration to introducing a “*code*” of judicial conduct.<sup>21</sup> Such codes have a long history in other common law jurisdictions, dating from 1924 when the American Bar Association formulated 36 *Canons of Judicial Ethics*.<sup>22</sup> The discussion paper warned, however, that a code faced twin dangers: it might be thought merely to state the obvious or, alternatively, to attempt to specify unduly rigid rules on issues that continue to be the subject of legitimate debate among judicial officers and the community. In keeping with its cautious tone, the paper refrained from making a firm recommendation as to whether a code should be introduced and, if so, by whom and with what authority.

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<sup>17</sup> D Wood, *Judicial Ethics: A Discussion Paper* (AIJA, 1996). Dr Wood was assisted by an advisory committee, including several judicial officers.

<sup>18</sup> *Id.*, 1.

<sup>19</sup> *Id.*, 6.

<sup>20</sup> *Id.*, ch 3.

<sup>21</sup> *Id.*, ch 4.

<sup>22</sup> Current examples are the American Bar Association (“ABA”), *Model Code of Judicial Conduct* (revised February 2007) (“*ABA Code*”) and the Canadian Judicial Council, *Ethical Principles for Judges* (1998) (“*Canadian Ethical Principles*”). Thomas reproduces the Wyoming *Code of Judicial Conduct*, which is based on the 1990 *ABA Code*, in App 3 to *Judicial Ethics in Australia*. The *Canadian Ethical Principles* is designed to “*provide ethical guidance for federally appointed judges*” (a class that includes judges of superior Provincial courts) and is “*advisory in nature*”.

The idea of a written code of judicial conduct, or at least the preparation of guidelines to assist judicial officers in adhering to appropriate standards of conduct, was widely discussed in the succeeding years. In a paper published in 2001, for example, the Chief Justice of South Australia suggested that there was a “*compelling*” case for written guidelines on judicial ethics.<sup>23</sup> How, he asked, could it be argued that written guidance was:

*“not preferable to the difficulties inherent in reliance upon access to collective experience through observation and through word of mouth”?*<sup>24</sup>

The proposal to formulate guidelines for judicial conduct was taken up by the Council of Chief Justices of Australia, a non-statutory body comprising the Chief Justice of the High Court and the heads of superior federal, State and Territory courts. Two retired judges were asked to undertake a limited survey of judicial attitudes to issues of judicial conduct and to prepare a “*succinct draft statement of principles affecting the conduct of members of the judiciary ... for [their] guidance*”.<sup>25</sup> This process led to the publication of a *Guide to Judicial Conduct* in 2002 and of the second (and current edition) in 2007.

The introduction to the *Guide* suggests that since the mid 1980s, the conduct of judicial officers has come under increasing public scrutiny. It notes that some judicial officers have responded to the greater scrutiny by adopting a “*monastic*” lifestyle, limiting their involvement in non-judicial activities and even their social contacts.<sup>26</sup> The *Guide* firmly rejects this approach since:

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<sup>23</sup> J Doyle, “Judicial Standards: Contemporary Constraints on Judges – The Australian Experience” (2001) 75 *ALJ* 96, 99.

<sup>24</sup> *Id.*, 100.

<sup>25</sup> Council of Chief Justices of Australia, *Guide to Judicial Conduct* (AIJA, 2<sup>nd</sup> ed, 2007), vii (“*Guide*”).

<sup>26</sup> The reference to a “*monastic lifestyle*” may be derived from a comment attributed to Chief Justice William Taft of the Supreme Court of the United States, to the effect that, upon appointment, the Chief Justice “*goes into a monastery and confines himself to his judicial work*”. In fact Taft, who chaired the committee that prepared the American Bar Association’s *Canon of Judicial Ethics* in 1924, was extremely active politically, advising three Presidents and openly supporting Calvin Coolidge’s 1924 Presidential campaign: Bell, note 8 above, 590-591, 593, 603, 604. The range of overt political conduct by many Justices of the Supreme Court is, by Australian standards, quite remarkable. Even so, Australia has its own well-known example of a Judge resigning to resume a political career. H V Evatt resigned from the High Court in 1940 to stand for election as a Labor candidate and subsequently became Attorney-General, Deputy Prime Minister and (from 1951-1960) Leader of the Opposition.

*“[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 is that judges:

*“should be, and be seen to be, involved in the community in which they live, and should enjoy the fundamental freedoms of other citizens.”*

The *Guide* emphasises that the principles stated in the document are not intended to be prescriptive unless so stated. It recognises that in cases of difficulty or uncertainty the primary responsibility for deciding whether a course of action is appropriate rests with the individual judge. Moreover, the *Guide* deliberately avoids the expression “*judicial ethics*”. It does so on the ground that, while it is possible to identify principles or standards of conduct appropriate to judicial office, their application to particular issues may sometimes reasonably give rise to different answers by different judges.

The endorsement by the Council of Chief Justices of the *Guide* poses a series of questions: What is meant by the expression “*judicial ethics*”, a term assiduously avoided by the *Guide*? Why has it taken so long for the Council of Chief Justices, or any similar body, to formulate a set of principles to guide the conduct of Australian judicial officers? Why have the principles been formulated in such a general, if not tentative manner? Is it not curious that judges apparently cannot agree on the content or application of ethical principles that presumably should govern the discharge of their professional responsibilities? Where is the borderline between judicial ethics and legal obligations, on the one hand, and judicial ethics and unconstrained personal choice on the other?

### **The Concept of Judicial Ethics**

The first dictionary meaning of the word “*ethics*” is a system of moral principles, by which human actions and proposals may be judged to be good or bad, right or wrong.<sup>27</sup> As this definition implies, ethical principles may be intended to govern virtually all of a person’s dealings with other people and even his or her private conduct.

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<sup>27</sup> *Macquarie Dictionary* (5<sup>th</sup> ed 2009).

Sometimes such principles may have a religious source. For example, Chapter XIX of *Leviticus* is regarded in Jewish thought as summarising the essence of the Law, including the Ten Commandments which are, in substance, reproduced in this part of the Old Testament. The precepts in *Leviticus* provide a template for standards of conduct that, if followed faithfully, permeate everyday working, family and private life. Ethics in this sense may also have a non-religious source, as in the Aristotelian model of virtue as a means of attaining happiness.

The second dictionary meaning of ethics is narrower. It refers to rules of conduct recognised in respect of a particular class of human action, such as the practice of a profession. The notion of professional ethics in this sense is a familiar one, although until competition principles made their presence felt in recent times, many so-called ethical rules governing the conduct of professionals served the interests of practitioners rather than the public they professedly protected.<sup>28</sup>

As Justice Thomas suggests, the concept of ethics is capable of being applied to the conduct of judges. All judges, at least in modern Australia, possess legal qualifications and have legal experience (albeit of a diverse nature). They are selected for office by a procedure established by law. Most importantly, they have a distinctive function to perform: the authoritative resolution of disputes by doing justice according to law. Judges can therefore be regarded as a discrete group of professionals whose conduct can be expected to reflect high standards of honesty, integrity and diligence.

The functions performed by judges, it should be noted, are fundamentally different from those performed by legal practitioners. The judge, unlike the practitioner, has no client or employer. Accordingly, the judge owes no fiduciary or other special duties to identifiable individuals, beyond the general duties that are inherent in the exercise of judicial power. Unlike the legal practitioner, the judge must be independent of governments, institutions and individuals and must be impartial in the discharge of his or her adjudicative responsibilities. Judicial ethics therefore cannot cover the same territory as legal professional ethics, although there may be some common concepts, such as those founded on basic requirements of honesty and integrity.

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<sup>28</sup> Examples are provided by now discarded restrictive practices adopted by barristers and solicitors, such as minimum fee scales, the two-counsel rule and restrictions on virtually all forms of advertising.

Judicial ethics do not purport to govern every facet of a judge's behaviour. It is no doubt possible to envisage a set of ethics governing a particular class of human conduct that requires the person concerned to conduct his or her life, professional and personal, public and private, in a particular manner. Perhaps the rules governing members of particular religious communities answer this description. But no one – not even those supporting a “*monastic*” judicial life – suggests that judicial ethics should go this far. In any event, as the *Guide* shows, any such conception of judicial ethics is alien to the role that Australian judges are expected to perform, one that requires an understanding of the aspirations and standards of the broader community.

The ethical principles applicable to judges, while not extending to all facets of the judge's conduct, nonetheless, overlap in certain respects with legally enforceable standards of behaviour. Egregious departures from basic ethical principles of honesty and integrity in office might well constitute, for example, “*proved misbehaviour*” for the purposes of s 72(ii) of the *Constitution* and thus warrant removal of federal judges from office. State judicial officers guilty of such conduct are in a similar position. As has been seen, in New South Wales inappropriate judicial conduct falling short of “*proved misbehaviour*” may attract disciplinary consequences under the procedures specified in the *Judicial Officers Act*. Similarly, the ethical principles relating to the circumstances in which it is appropriate for a judge to sit on a case overlap with the legally enforceable rules of apprehended bias that can lead to the disqualification of judicial officers.<sup>29</sup>

Moreover, ethical norms, over time, can be transformed from non-binding standards of expected judicial behaviour into binding principles of law, even constitutional norms. An illustration is the extension of Chapter III jurisprudence into areas previously widely thought to be governed, if at all, by purely ethical considerations. Thus in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,<sup>30</sup> the High Court held that the appointment of a Federal Court Judge as an investigator and reporter to a Minister on a politically sensitive issue was inconsistent with “*the perceived impartiality and neutrality of a Judge*” appointed

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<sup>29</sup> See, for example, *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

<sup>30</sup> (1996) 189 CLR 1.

pursuant to Chapter III of the *Constitution*.<sup>31</sup> Ethical principles governing the permissible scope of non-judicial activities of judges have thereby been overtaken, at least in part, by an implied constitutional prohibition.<sup>32</sup>

Notwithstanding the overlap between judicial ethics and legally enforceable standards of conduct, for the most part ethical principles operate in relation to behaviour that is not governed by binding rules. Few would dispute, for example, that a Judge is ethically obliged to exercise, in the words of the *Guide*, “[d]iligence and care in the discharge of judicial duties”.<sup>33</sup> Neither statute nor case law specifies, however, what this precept requires of a judge in relation to the timely preparation and delivery of reserved judgments.<sup>34</sup> Nor do they specify what a judge should do to “maintain and enhance the knowledge, skills and personal qualities necessary for effective judging”, let alone to perform non-adjudicative functions adequately, such as participating actively in committees of the court and contributing to other administrative tasks.<sup>35</sup> Similarly, judges are expected to adhere to standards of “punctuality, courtesy, tolerance and good humour” in their dealings in court with lawyers, litigants and witnesses.<sup>36</sup> A departure from the expected standards (which may require the patience of Job), however regrettable, will rarely involve any contravention of legally enforceable rules of law.

As *Cesan v The Queen* demonstrates,<sup>37</sup> there may come a point at which the failure of a judge, for whatever reason, to exercise due care and diligence, or to demonstrate courtesy and tolerance in the conduct of a trial, will lead to a miscarriage of justice, necessitating the intervention of an appellate court. But this merely illustrates that egregious conduct is always

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<sup>31</sup> *Guide*, note 25 above, 21.

<sup>32</sup> Extra-judicial activities may also be curtailed by legislation. The *High Court of Australia Act 1979* (Cth), s 10, for example, provides that a “Justice is not capable of accepting or holding any other office of profit in Australia”. See Campbell and Lee, note 15 above, 172.

<sup>33</sup> *Guide*, note 25 above, 7.

<sup>34</sup> *Id.*, 18.

<sup>35</sup> *Canadian Ethical Principles*, 17 (Principles 4.1, 4.2), 21 [12]. Neither of the last two ethical responsibilities is mentioned in the *Guide*.

<sup>36</sup> Such departures may involve breaches of enforceable rules or principles if, for example, the conduct of the judge manifests bias or constitutes a denial of procedural fairness to one of the parties.

<sup>37</sup> See text at notes 1-2 above.

liable to go beyond a merely ethical transgression and constitute a breach of legally enforceable standards of judicial behaviour. For the most part, however, the standards of diligence and forbearance expected of a judge are matters to be resolved without reference to formal rules that are capable of determining the outcome of litigation or that support disciplinary sanctions.

Ethical principles, although overlapping with binding rules and capable of being transformed into binding rules, are primarily designed to guide judges in making the behavioural choices available to them. Those choices may concern the manner in which judges control the courtroom or discharge their forensic responsibilities. Alternatively, the choices may concern non-forensic conduct, such as participation in public discussion of “*political*” subjects, or even personal behaviour, such as using a judicial title to gain preferential treatment.<sup>38</sup> Ethical principles, if articulated and observed, narrow the range of legitimate choices open to judges. The extent to which they are apt to do so will depend on the generality or specificity with which they are expressed.

### **The Advent of the Guide to Judicial Conduct**

The upheaval of the 1980s explains the timing in Australia of the upsurge in interest in judicial ethics. It does not explain why there was so little concern about the subject earlier and, in particular, why no attempt had been made previously to formulate a coherent set of principles, whether in the form of a code or guidelines. There were certainly precedents, notably the *Canons of Judicial Ethics* approved by the American Bar Association in 1924 and widely adopted in the United States. From time to time, too, judges had expressly addressed specific ethical questions. For example, in the so-called Irvine Memorandum of 1923, the Chief Justice of Victoria enunciated a policy precluding serving Judges of that State from accepting non-judicial functions such as presiding over Royal Commissions.<sup>39</sup>

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<sup>38</sup> *Guide*, note 25 above, 38.

<sup>39</sup> Letter of 14 August 1923 from Sir William Irvine to Sir Arthur Robinson. Part of the letter is quoted in K Hayne, “Letting Justice Be Done Without the Heavens Falling” (2001) 27 *Monash Uni L Rev* 12,15. The Kilmuir Rules of 1955 restricted the ability of English judges to speak publicly on controversial topics: Thomas, note 6 above, 104-105.

The conventional explanation for the reticence to formulate ethical principles is that until the 1980s “[p]eople trusted judges to do the right thing”<sup>40</sup> On this view, the events of the 1980s diminished public respect for judges and confidence in the judiciary generally, thereby compelling the judiciary to search for ways in which to re-establish the standing of judges. There may be some truth in this explanation, although Australia has a long, if not always honourable, tradition of public scepticism towards the integrity and competence of judicial officers.<sup>41</sup> It is certainly true that attacks on judicial decisions or behaviour, whether justified or not, are disseminated more rapidly and widely in the electronic age, even if they are not necessarily proportionately more frequent than in earlier days.<sup>42</sup>

A more convincing explanation is perhaps to be found in the significant changes in the size and composition of the Australian judiciary that occurred in the 1970s and thereafter. Before that time, the federal judiciary (other than the High Court) comprised very small specialist courts. State Supreme and District Courts (or their equivalent) had relatively few members and were largely drawn from a single source: senior male barristers. Local or magistrates’ courts were generally regarded by judges as, at best, bodies that were distinct and severable from the superior courts, since they were mostly staffed by public servants, not all of whom even had legal qualifications.

In this environment, judges of superior courts had confidence in their own ability to adhere to unwritten and even unformulated standards of propriety and diligence appropriate to maintaining the reputation and standing of the judiciary. Whether that confidence was necessarily well-founded is a moot point. It would be a brave commentator prepared to argue that judges of yesteryear were less prone than their modern counterparts to breach standards of behaviour reasonably to be expected of the judiciary. What would one think nowadays, for example, of a High Court Judge who wrote judgments for a colleague and sat on appeals from judgments he himself had written?<sup>43</sup> Or of a court the members of which “were reputed for their discourtesy towards counsel”?<sup>44</sup>

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<sup>40</sup> Thomas, note 6 above, 1.

<sup>41</sup> R Sackville, “The Judiciary and the Media: A Clash of Cultures” (2005) 27 *Australian Journalism Review* 7, 10-11.

<sup>42</sup> Bearing in mind that there are now so many more judges and therefore targets for attacks.

<sup>43</sup> The practice of Dixon J writing judgments for Rich J and sometimes sitting on appeals is discussed by P Ayres, *Owen Dixon* (The Miegunyah Press, 2003), ch 5. Sir Thomas Bingham observes that “much

The 1970s saw the creation of two major national courts, the Federal Court and the Family Court. State courts began to increase in size, often very rapidly. Magistrates courts were transformed from public service institutions to professional bodies, the members of which enjoyed security of tenure and independence from government and were appointed on merit. Judicial appointments were made from sections of the legal profession who had previously been largely or entirely excluded from judicial office, such as solicitors, academics and female practitioners. Appointments made by governments in the exercise of their virtually untrammelled executive authority, did not always meet with the approval of existing members of the courts concerned.

The changed character of the Australian judiciary diminished the confidence of senior judges in the ability of all their colleagues, if not in their own ability, to understand and adhere to appropriate standards of behaviour. Moreover, changes in social attitudes created uncertainty as to what these standards might be. A male-dominated judiciary had to confront an unfamiliar world in which women sought to play an equal part, including as members of the legal profession and the judiciary. More robust notions of social equality, reflected in anti-discrimination legislation and a more litigious world, gave rise to new and uncomfortable questions. Was it any longer acceptable, for example, to belong to a club that discriminated against particular ethnic or social groups, or that refused to admit women?<sup>45</sup> Was it appropriate for a judicial officer to accept a prestigious position, such as that of a University Chancellor, that might embroil the officer in future litigation, whether or not groundless?<sup>46</sup>

These far-reaching social changes brought home the need for the judiciary itself to formulate ethical guidelines for the assistance of judicial officers. In short, the guidelines emerged as a response to social changes and the more diverse composition of the judiciary, rather than as

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*judicial behaviour was tolerated in the past which would be regarded simply as unacceptable today*": Bingham, note 9 above, 80.

<sup>44</sup> M Kirby, "50 Years in the Law: A Critical Self-Assessment" (Paper delivered to the Supreme and Federal Court Judges' Conference, Hobart, 26 January 2009), 7.

<sup>45</sup> *Guide*, note 25 above, 82, says that it is generally accepted that a judge should not be a member of a club that practices "*invidious discrimination*" even if not illegal. It merely observes that different views are held about membership of clubs admitting only male or female members.

<sup>46</sup> *Id.*, 29, suggests that membership of the governing bodies of universities or large public institutions, "invite special attention". However, the *Guide* notes that many judges: "*hold or have held high office in such organisations without embarrassment by regulating the nature or extent of personal involvement in contentious situations*".

the product of a belief that published guidelines for judicial conduct would restore battered public confidence in the integrity of the judicial system or the standing of judicial officers.

### **Content of Guidelines**

The *Guide*, for the most part, limits itself to setting out general and somewhat tentatively expressed guidelines. This approach is consistent with the caveat expressed in the introduction that the document is not intended to be prescriptive (unless otherwise stated) and that the primary responsibility for determining appropriate behaviour must rest with the individual judge.

At first glance it may seem that this cautious approach is a little curious. One factor contributing to the caution is that, as the *Guide* recognises, community expectations as to appropriate standards of judicial conduct, whether in court or otherwise, can change over time, sometimes remarkably rapidly.<sup>47</sup> A second factor, also acknowledged in the *Guide*, is that any attempt to prescribe detailed rules governing the limits of acceptable judicial conduct runs the risk of undue interference with the independence of individual judges in making choices in relation to contestable issues.

A third factor is that there has been a pronounced reluctance in Australia to attempt to identify the underlying rationale (or rationales) for ethical guidelines for the judiciary. It is true that the *Guide* identifies three main objectives for the principles applicable to judicial conduct:

- *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.”*

However, each of these principles is formulated at a high level of generality and must therefore be interpreted according to the subjective judgment of the individual judge or

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<sup>47</sup> For example, the *Guide*, note 25 above, 13, notes that “*current community expectations*” mean that judges should be cautious about sitting on cases where there is a relationship with the counsel or solicitor having actual conduct of the matter. The emphasis on “current” expectations suggests that until recently a relationship of this kind would not have raised ethical concerns.

observer. It is difficult to see, for example, how “*public confidence in the judiciary*” can provide meaningful assistance in developing specific ethical standards, except perhaps in relation to egregious conduct.

The *Guide* does not, however, rest there. It also identifies:

*“three basic principles against which judicial conduct should be tested to ensure compliance with the stated objectives.”*

These are said to be impartiality, judicial independence and integrity, and personal behaviour. “*Impartiality*” and “*judicial independence*” provide useful touchstones against which to assess more specific ethical standards, although the reference to “*personal behaviour*” is more ambiguous and therefore less helpful. But it is both possible and desirable to go further in identifying the principles underlying a system of judicial ethics.

The *Canadian Ethical Principles* are set out under five main “*Statements*”. The five Statements are as follows:

- *“An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.*
- *Judges should strive to conduct themselves with **integrity** so as to sustain and enhance public confidence in the judiciary.*
- *Judges should be **diligent** in the performance of their judicial duties.*
- *Judges should conduct themselves and proceedings before them so as to assure **equality** according to law.*
- *Judges must be and should appear to be impartial with respect to their decisions and decision making.”*

The *ABA Model Code* states in the Preamble that the:

*“United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society”.*

The *ABA Model Code* establishes “standards for the ethical conduct of judges”. The standards include binding rules which are derived from four broad Canons of judicial behaviour. The four Canons are:

**“CANON 1**

*A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.*

**CANON 2**

*A judge shall perform the duties of judicial office impartially, competently, and diligently.*

**CANON 3**

*A judge shall conduct the judge’s personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.*

**CANON 4**

*A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”*

The five Statements in the *Canadian Ethical Principles* and the four Canons underlying the *ABA Model Code* each provide a coherent framework within which more specific ethical guidelines or rules can be drafted. They incorporate the fundamental values essential to the protection and preservation of an independent and impartial judiciary, yet avoid some of the vagueness and uncertainty inherent in amorphous notions such as “*public confidence*”, “*respect*” or “*reputation*”.

All statements of judicial ethical principles must recognise that community and judicial expectations will change. Perhaps the most obvious illustration is the extent to which many judges now regard themselves as free to contribute to public discussion on important policy issues, not always entirely devoid of political content.<sup>48</sup> It is difficult to imagine that in

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<sup>48</sup> *Guide*, note 25 above, 23, counsels that considerable care should be exercised to avoid using the “*authority and status of judicial office for purposes for which they were not conferred*”. A judge “*must avoid involvement in political controversy*” unless the controversy itself concerns aspects of the administration of justice.

earlier times senior serving judges would publicly lay blame for the “*maddening*” failure to implement reforms in what are said to be uncontroversial areas of law on “*officials who fail with due speed to advise governments and with ministers and members of Parliament who fail to pay heed to well-reasoned law reform reports*”.<sup>49</sup> It is equally difficult to imagine earlier Chief Justices of Australia proposing “*modest*” legislative changes to controversial legislation, such as the *Native Title Act 1993* (Cth), that would have the effect of introducing presumptions favourable to a particular class of applicants.<sup>50</sup> Yet comments of this kind nowadays hardly raise an eyebrow. They illustrate that although the core ethical responsibilities of the judiciary remain intact, changes frequently occur at the margins.

The *Guide* proceeds on the basis that there are difficulties in attempting to give ethical principles the status of binding rules, except insofar as they have been incorporated into the general law in the manner outlined earlier. The *Guide* accepts that on many questions, ranging from public commentary and involvement in charitable or communal activities to dealing with recalcitrant lawyers or parties in Court, there is room for legitimate differences of opinion and approach. The assumption is that general guidelines can be helpful to judges seeking to conduct themselves appropriately, but that more specific rules, assuming them to be constitutionally permissible, may generate disputation and resentment for little discernible gain in the standards of judicial behaviour.

### **The Borderline Between Unethical Conduct and Misbehaviour**

The Murphy affair raised issues of profound constitutional importance. A Parliamentary Commission of Inquiry was established in 1986 to advise Parliament whether, in the opinion of the Commissioners (all three of whom were retired Judges),<sup>51</sup> any conduct of Justice Murphy had been such as to amount to “*proved misbehaviour*” within the meaning of s 72(ii) of the *Constitution*, thus warranting consideration of his removal. Since Justice Murphy had been acquitted of the criminal charges brought against him and since none of the fourteen

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<sup>49</sup> M D Kirby, “More Promises of Law Reform – An Antipodean Reflection” (Address to the Law Reform Commission of Ireland, Dublin, 17 July 2007) 18-19.

<sup>50</sup> R S French, “Lifting the Burden of Native Title: Some Modest Proposals for Improvement” (2009) 93 *Reform* 10,13.

<sup>51</sup> Sir George Lush (Presiding Member), Sir Richard Blackburn and the Hon Andrew Wells QC.

allegations ultimately pressed apparently related to misconduct in judicial office,<sup>52</sup> the Parliamentary Commission had to determine whether the concept of “*proved misbehaviour*” is limited (as Justice Murphy’s counsel contended) to misconduct in judicial office or conviction for an “*infamous offence*”.

The Commissioners rejected the narrow construction of s 72(ii) advanced on Justice Murphy’s behalf. They expressed the opinion that “*proved misbehaviour*” cannot be limited to misconduct in office (whatever that term might mean) or proven criminal conduct.<sup>53</sup> Sir George Lush was adamant that judges cannot:

*“be protected from the public interest which their office tends to attract. If their conduct, even in matters remote from their work, is such that it would be judged by the standards of the time to throw doubt on their own suitability to continue in office, or to undermine their authority as judges or the standing of their courts, it may be appropriate to remove them.”*<sup>54</sup>

Sir George accepted that it is for Parliament to determine what is “*misbehaviour*” in the light of “*contemporary values*”. He acknowledged the risk that a judge might be subjected to spurious allegations. He argued, however, that if a matter raised against a judge is not capable of constituting misbehaviour such as to warrant removal, the High Court would have power to intervene, presumably by halting the process or quashing any unlawful determination.<sup>55</sup>

The remaining members of the Commission expressed similar views, although Mr Wells QC was a little more cautious. Mr Wells acknowledged that there may be departures from acceptable conduct, such as the “*fervent proclamation of personal views upon some matter of public concern*”, that fall short of “*misbehaviour*” in the relevant sense. Accordingly, questions of fact and degree will necessarily be involved.<sup>56</sup> He expressed the opinion that:

*“the word ‘misbehaviour’ must be held to extend to conduct of the judge in or beyond the execution of his judicial office, that represents **so serious a departure from standards of proper behaviour ... that it must be found to have destroyed public***

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<sup>52</sup> As noted earlier (note 6 above), the precise allegations have never been publicly revealed.

<sup>53</sup> *Parliamentary Commission of Inquiry, Special Report*, Parl Paper 443/86, (1986).

<sup>54</sup> *Id* (Sir George Lush), 8.

<sup>55</sup> *Id*, 9.

<sup>56</sup> *Id* (The Hon A Wells QC), 11.

*confidence that he will continue to do his duty under and pursuant to the Constitution*".<sup>57</sup> (Emphasis added.)

Others have reached similar conclusions. The Constitutional Commission, reporting in 1988, said that behaviour warranting the removal of a judge included any

*“conduct that, according to the standards of the time, would tend to impair public confidence in the judge or undermine his or her authority as a judge”*.<sup>58</sup>

A later Parliamentary Commission in Queensland, whose report recommended the removal of a Judge of the Supreme Court of Queensland for misbehaviour, explicitly followed the views expressed in the Murphy Parliamentary Commission.<sup>59</sup> Even critics of the approach taken to the investigation of allegations against Justice Murphy accept that the broader interpretation of *“proved misbehaviour”* is correct.<sup>60</sup>

If the broad construction of *“proved misbehaviour”* is indeed correct, conduct that is neither criminal nor directly connected with a judicial officer’s adjudicative responsibilities may warrant removal of the officer concerned. Unethical but not illegal conduct – even conduct not involving the discharge of judicial responsibilities – may therefore justify removal from judicial office. It is true that the conduct would need to be sufficiently serious, in Sir George Lush’s words, to undermine the authority of the judicial officer concerned or perhaps, in Mr Wells’ words, to have destroyed public confidence that the Judge can continue to perform his or her duty. Nonetheless, the line between conduct that merely contravenes ethical standards and conduct that amounts to *“proved misbehaviour”* is blurred.

The blurring of the lines between breaches of ethical standards and *“proved misbehaviour”* is carried further by the *Judicial Commission Act 1986* (NSW). If the Conduct Division of the

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<sup>57</sup> *Id.*, 12.

<sup>58</sup> *Final Report of the Constitutional Commission* (1988), vol 1, 403.

<sup>59</sup> Perhaps not altogether surprisingly as Sir George Lush was a member of the Queensland Commission: see *First Report of the Parliamentary Judges Commission of Inquiry* (Queensland Govt Printer, 1989), 7-11. The other members were Sir Harry Gibbs (the Presiding Member) and the Hon M M Helsham. The Judge concerned was removed from office on 8 June 1989. See Campbell and Lee, note 15 above, 105-106.

<sup>60</sup> Blackshield, note 6 above, 421.

Judicial Commission decides that a complaint against a judicial officer is substantiated, but that the conduct complained of does not justify consideration of the removal of the officer, it must send a report to the relevant head of jurisdiction.<sup>61</sup> The report may include any recommendations as to what steps might be taken to deal with the complaint.<sup>62</sup> These include counselling the judicial officer or taking

*“such other steps as the relevant head of jurisdiction considers appropriate in relation to the administration of the court or courts for which he or she is responsible.”*<sup>63</sup>

Presumably the steps include a formal rebuke by the head of jurisdiction.

In practice, relatively few complaints about judicial conduct are made to the Judicial Commission and only a small proportion of complaints is found to be substantiated.<sup>64</sup> Nonetheless, the legislation contemplates that departures from ethical standards, including those requiring diligence, courtesy and fairness, can lead to disciplinary consequences short of removal from office. A rebuke by a head of jurisdiction, sanctioned by the Judicial Commission, can be a serious matter for a judicial officer.

The Australian Law Reform Commission, although initially favouring a standing federal body along the lines of the Judicial Commission of New South Wales, ultimately retreated from that position, largely because of the constitutional obstacles confronting such a proposal.<sup>65</sup> If the New South Wales model is adopted elsewhere in Australia, whether at

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<sup>61</sup> *Judicial Officers Act 1986* (NSW), s 28(2).

<sup>62</sup> *Judicial Officers Act 1986* (NSW), s 43AA(1)(a).

<sup>63</sup> *Judicial Officers Act 1986* (NSW), s 43AA(2). The Judicial Commission, after conducting a preliminary examination of a complaint, may refer the complaint directly to the relevant head of jurisdiction if it thinks that the complaint, although substantiated, does not warrant the attention of the Conduct Division: ss 19, 21(2).

<sup>64</sup> In 2006-2007, the Judicial Commission received 51 complaints about 42 judicial officers. The vast majority were summarily dismissed under s 20 of the *Judicial Officers Act 1986* (NSW), for example because the complaint was deemed frivolous or related to the exercise of a judicial function which was subject to adequate appeal rights. Five complaints were referred directly to the head of jurisdiction and one to the Conduct Division. See Judicial Commission of New South Wales, *Annual Report 2006-2007*, 28-35.

<sup>65</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89, (2000), pars 2.243-2.297.

State or federal level, the distinction between unethical behaviour and misconduct liable to attract disciplinary sanctions will become even more blurred.

## **Conclusion**

It is inevitable, even without legislation like the *Judicial Commission Act 1986* (NSW), that there can be no bright line distinguishing between unethical conduct that does not contravene any rule of law or procedure and misbehaviour that can lead to the miscarriage of a trial or disciplinary sanctions for the judicial officer concerned.

The publication of the *Guide* is an important development for the Australian judiciary. The *Guide* recognises and responds to the need of judicial officers for guidelines as to the behaviour expected of them, both in and outside court. The publication of a second edition so soon after the first demonstrates that the process of formulating ethical standards is dynamic and is informed by experience.

The *Guide* has both the virtues and vices of a set of heavily qualified and tentative guidelines. But as the Australian judiciary expands and the qualifications and experience of judicial officers becomes ever more varied, the pressures that have prompted the preparation of the *Guide* are likely to generate support for the drafting of more precise ethical standards. Indeed, the long American experience with the *ABA Model Code* may encourage moves to formulate ethical principles that are not merely advisory, but are binding on judicial officers, in the sense that serious breaches can attract disciplinary sanctions.

Any such moves will be tempered by three important considerations. First, the infinite range of circumstances that can generate ethical questions, not to mention the various foibles that affect judges just as much as any other group of fallible human beings, militates against attempts to draft a truly comprehensive code of judicial ethics. In consequence, as the *ABA Model Code* recognises, any code or set of guidelines cannot cover all circumstances and must allow for some degree of flexibility and a “*reasonable and reasoned*” application of the standards. Secondly, any formulation of ethical guidelines or rules must take care not to curtail unduly the freedom of choice and action that is an inherent part of the independence entrusted to judicial officers. Guidelines or rules will always need to be interpreted and applied in a manner that does not “*impinge upon the essential independence of judges in*

*making judicial decisions*".<sup>66</sup> Thirdly, the constraints imposed by Chapter III of the *Constitution* limit the extent to which federal judges and, perhaps, any judges exercising federal jurisdiction can be subjected to binding ethical standards, breach of which can attract disciplinary sanctions.

Even if full force is given to these considerations, there is a strong case for regarding the *Guide* as a step along the path in Australia to a less tentative and more precise statement of ethical principles applicable to judicial officers. Independently of the question of whether published guidelines for judicial conduct should be binding, the experience in North America suggests that the *Guide* would be strengthened by a more refined statement of the rationale for judicial ethical guidelines and more specific standards for the guidance of an increasingly diverse Australian judiciary.

Any further moves in this direction should remain primarily (but not solely) the responsibility of the judiciary and will require careful consultation with judicial officers themselves. But the process should be informed by systematic attempts – sadly lacking in Australia – to ascertain public expectations of the judiciary and by contributions from members of the wider community. If “*public confidence in the judiciary*” is to be more than a slogan reflecting the instinctive feelings of the sloganeer, public attitudes towards the judiciary and standards of judicial behaviour need to be explored more methodically than hitherto.

All of which leads to a final point. The obvious place for much of this work to be carried out, in conjunction with the judiciary, is a University. Independently of the problem of resources, judges have neither the expertise nor the experience to assess community expectations and attitudes. The necessary experience, expertise and spirit of independent inquiry can be found in Universities. The formulation of standards of judicial ethics is a task too important and complex to be left exclusively to the judges.

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<sup>66</sup> *ABA Model Code*, note 22 above, Preamble.