Is 'Professional Courtesy' an anachronism in the context of changing societal norm?

The answer is a clear no. In fact what the question usefully suggests is a revisiting of the rules of professional courtesy to ensure that they achieve their aims rather than protecting anachronistic values.

What do I mean? When I first started at the bar, it was considered appropriate for barristers to address each other by their surnames. Thus I opened a letter once from another barrister which properly informed me of his objections to my pleading which was addressed, "Atkinson". No doubt men who were boys in public schools felt at home but such practices excluded not only women but excluded those not of the same social class.

It is clear that the rules of professional courtesy must be based on the principles which are central to the administration of justice and role that each participant plays. Each professional is required to act honestly, fairly, skilfully, diligently and fearlessly. These qualities are not and never can be anachronistic.

Professional courtesy is based on the rules of professional conduct to client, other practitioners and the court and the public.

1. Duty to the client:

A legal practitioner must seek to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person, and always in accordance with the law.

This is a corollary of the barrister's duty to act which is usually known as the cab rank rule and a judge's duty to sit on a case no matter how unpleasant or controversial that case might be.

However, a legal practitioner must not act as a mere mouthpiece of the client and must exercise the forensic judgments called for during the case independently, and after the appropriate consideration of the client's desires where applicable.

Having a duty to act does not make a lawyer just a puppet or ventriloquist's dummy. The lawyer must exercise an independent judgment.

2. Duty to opponent

A barrister must not knowingly make a false statement to the opponent in relation to the case (including its compromise).

3. Duty to the court

A barrister must not knowingly make a misleading statement to a court on any matter. This particularly applies to ex-parte matters.

Practitioners have been struck off for being untruthful in court including ex-parte applications. This is central to the relationship between the legal practitioner and the court.

An exemplar of the rule of professional conduct applicable when a client is dishonest can be found in rule 32 of the *Queensland Barristers' Rules* which provides:

"32. A barrister whose client informs the barrister, during a hearing or after judgment or decision is reserved and while it remains pending, that, upon an issue which may be material the client has lied to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:

(a) must refuse to take any further part in the case unless the client authorises the barrister to inform the court of the lie or falsification;

(b) must promptly inform the court of the lie or falsification upon the client authorising the barrister to do so; but

(c) must not otherwise inform the court of the lie or falsification."

4. Responsible use of court process and privilege

Rules 35 – 38:

"35 A barrister must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the barrister on the barrister's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:

(a) are reasonably justified by the material then available to the barrister;

(b) are appropriate for the robust advancement of the client's case on its merits;

(c) are not made principally in order to harass or embarrass the person; and

(d) are not made principally in order to gain some collateral advantage for the client or the barrister or the instructing solicitor out of court.

This is also true for judges. It is easy to criticise without thinking of the consequences of one's criticism. It is a matter of natural justice not to be critical unless the allegation has been put to the person being criticised. With judicial power comes great responsibility.

5. Integrity of evidence

Rules 43; 48

"43 A barrister must not suggest or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.

48. not speaking to a witness under cross-examination."

6. Integrity of hearings

As a general rule a barrister must not publish, or take steps towards the publication of any material concerning current proceedings in which the barrister is appearing or has appeared except in limited circumstances.

The restriction on a judge is even greater. One may not comment in public on a case which the judge has decided. The reasons are twofold. The judge's reasons for decision are revealed in the reasons. Secondly, the judge should not engage in the controversy or make special pleading for the decision.

In addition, there are more contemporary rules of good manners.

The *Queensland Barristers' Rules* state that:

> "A barrister must not in the conduct of the barrister's practice discriminate against a client, solicitor, or another barrister on the basis of the person's religion, age, race, impairment, political belief or activity, trade union activity, sex, marital status, pregnancy, parent status, [lawful] sexual activity or association with, or relation to, a person identified on the basis of any of the above."

This was taken from the grounds of discrimination under the *Anti-Discrimination Act*. And encapsulates in many ways rules of basic courtesy.

This should extend to the language used. Barristers used to be referred to as gentlemen. However, it is not courteous to use language that excludes. Like it or not, and I assume there is no one here who would own to regretting it, one half of the population is female. This realisation has an inevitable effect on the language we use. The objective test, for example, is no longer likely to be that of the reasonable man on the Clapham omnibus or even of the woman driving it but of the reasonable person. Judges and magistrates, legal practitioners, clients and witnesses are all entitled to the basic etiquette of not being addressed as if they were all of the one sex and that sex were male. Unless it be relevant, it is always preferable to use terms which apply equally to men and women rather than using terms that distinguish between them.

Conclusion

It serves the public interest that the professionals in the legal system, whether barristers, solicitors, legal academics or judges behave honourably. Indeed, the honesty and integrity of our system depends upon it.