Back to Basics:

Professional Conduct in and with the Courts.

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BACK TO BASICS: PROFESSIONAL CONDUCT IN AND WITH THECOURTS.

Professional integrity is essential for making a good impression. This is especially true for the courtroom advocate and attendees.

Many conduct mistakes involve poor etiquette, mannerisms, tone, talking, dress, presentation and electronic devices being used in court. Good manners and proper courtroom conduct will impact the judge (including magistrates and tribunal members) and their disposition to your case, or during the hearing itself. Good professional conduct necessarily involves the fundamentals of ethical conduct in practice, including:[1]

- Your paramount duty is to the administration of justice;
- You owe duties to the courts, your clients and to colleagues;
- You must maintain high standards of professional conduct;
- Advocates must act honestly, fairly, skilfully and with competence and diligence;
- Lawyers must act in the best interests of their client, be honest and courteous, be competent, diligent and prompt, and never compromise integrity and professional independence;
- advocates must not act as their client's mouthpiece, but must exercise their forensic judgments and give advice independently and for the proper administration of justice, notwithstanding any contrary desires of their clients;[2]
- Barristers must accept briefs to appear regardless of their personal beliefs and must not refuse briefs to appear except on proper professional grounds.

With these in mind we have devised practical rules about how to behave in and with the courts, including the time before, during and after courtroom work, dealing with court registry and staff, entering the court, when addressing the court, when in court otherwise, after court and outside court.

Before Court

PREPARATION … PREPARATION … PREPARATION

1. Being prepared for your court appearance is of utmost importance.

- By this, we don't just mean preparation by knowing your facts and law, or your preparation of clients and witnesses, but you must also **prepare your actual performance**. Take time to plan how you will deliver your case and perform your advocacy.
- As part of your performance preparation, you should also take account of the judge's idiosyncrasies and court procedure. Ask your colleagues. Poor performance preparation is not only negligent; it is insulting to the court.
- Talk to the court officer and/or associate about your procedural requirements, for example: early notice of bulk arraignment, copies of admissions or statements to be read to the jury, visual

1 Solicitors Conduct Rules, rr 3 & 4; Barrister Conduct Rules, r 5

2 Solicitors Conduct Rules, r 17; Barrister Conduct Rules, r 41

aides, etc.

- Preparing clients, defendants & interpreters about where and when to stand or sit, procedural expectations, and any responses required when addressed by the court. *Eg. for bulk arraignments ensure the defendant has actually read (or has had read to him or her) the charges; provide interpreters with the indictment, schedule of facts etc. for their use.*

- Advocates are expected to be sufficiently familiar and conversant with the matter to provide detail of the case to assist the court. In particular, bring the file to mentions/reviews/directions hearings - be ready (whether you have carriage of the matter not) by quickly accessing file notes and correspondence to provide informed responses the judge. Similarly, instructors are expected to have a working knowledge of the case to assist counsel, and not merely 'keep the seat warm'.

2. Advocates be ready.

- A barrister may refuse or return a brief to appear in court if the barrister reasonably thinks that the time and effort required for the brief threatens to prejudice the barrister's practice, other professional or personal engagements.[3]

- A barrister **MUST NOT** return a brief for a serious criminal case **UNLESS**: the barrister believes on reasonable grounds that the circumstances are exceptional and compelling and there is time for another to be briefed; or the client gives informed consent.[4]

- A barrister **MUST NOT** return an appearance brief for another appearance brief, **UNLESS** the first solicitor or client gives informed consent, and there is enough time for another to take over the case.[5]

- A barrister **MUST NOT** return an appearance brief to go to a **social event** without the solicitor's informed consent.[6]

- **Be properly instructed**. Barristers ought be appearing with the instructing solicitor during the substantive disposition of the case because it is the solicitor (not the client) who gives the barrister instructions. Whilst uninstructed barristers may deal with minor mentions and civil applications, this is not appropriate for case for substantive hearings involving cross examination and sentences where risks of miscommunication is high.

3. Don't be greedy.

- An advocate who double-books across different courtrooms (in the same or across jurisdictions) is not only unprofessional, but foolishly risks reputational damage in the eyes of the court, solicitor and client, poor representation and outcomes and professional complaint. It is unacceptable.

- A barrister **must promptly** inform the solicitor or client as soon as s/he reasonably believes that there is a **real possibility** s/he will be unable to appear or to do the work in time.[7] And, must **always** allow enough time for another barrister to do the brief, and **do not** hand on a brief to

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3 Barrister Rules, r 99(b)
4 Barrister Rules, r 101
5 Barrister Rules, r 102
6 Barrister Rules, r 103
7 Barrister Rules, r 10

without the solicitor's informed consent.[8]

- It is not relevant or excusable that an advocate choses to delay a lower court in preference to a high court appearance. Of course the more senior judge or court takes priority, but you should not be in that situation unless by unavoidable surprise. In those unusual circumstances, you may be allowed a "not before time" to facilitate an earlier appearance.

TIMELINESS IS BASIC COURTESY

4. Be ready.

- Know the courtroom and the time. Have your papers in order, tabbed and readily accessible so they can be placed on the bar table quickly, quietly and efficiently, and ensure audio/visual facilities are tested and ready.

- Be nearby and alert to the call of your case by the court officer or associate. If the hearing before you is in 'open court,' then sit in the public gallery inside court, ready to move to the bar table when called.

5. Be punctual and arrive on time. Timeliness is a basic courtesy.

- Get to court **well before** your hearing time. Have your appearance slips prepared or noted. Plan to arrive 15 minutes early. Arriving early is much better that arriving late, and a late arrival will be seen as being utterly disrespectful. Allow flexibility for possible delays in traffic or taking a wrong turn, and allow time to talk to court officers about electronic testing, arrangements or logistics **to start on time**.

- If you are likely to be late, then get a message to the judge's associate with your opponent's informed consent. The judge is not interested in your "good excuse" for running late.

WELL GROOMED AND DRESSED

6. Clean and tidy appearance is appropriate like most business and formal occasions.

- Put simply, appropriate grooming will make you look and feel 'the part'. Be clean, neat and tidy in your appearance and grooming. Expressions of 'out of the ordinary' individualism such as outlandish hairstyles, disheveled facial hair, eccentric make up, bizarre piercings and exposed tattoos are less appreciated in the conservative setting of the court.

7. Dress appropriately with dignity.

- Court proceedings are formal occasions. Excepting for the robe, you should dress as the judge dresses. You are holding yourself out as an organised, prepared professional – again look the part! Wear clothing that would be appropriate for business.

- **Barristers** may need to be formally robed in certain hearings. Wear them correctly. No hair should be shown at the forehead under wigs. Bibs are worn over the lapels of the bar jacket, jabots are also worn out but the under garment should be neatly tucked in (if not attached to a white shirt). Under garments (pants or skirt) should be dark to match the robes. Robes etc should be pressed. Never wear dirty or stained jabots and bibs. Old and tattered robes do not

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[8] Barrister Rules, r 106

display wisdom, but rather a shabby advocate. Ill-fitting robes should be tossed and replaced.

- **For other hearings and solicitors' attire** - While it is not strictly necessary to wear a suit (especially for women), you should always **wear a jacket**. Colours should be conservative, and generally subdued. Court is not a fashion parade and bright colours and patterns can be distracting for the judge.

- Short sleeve shirts or blouses, stringy or strapless tops, and loose ties are a definite '**No No'**.

- You should **remove your sunglasses and/or hat** before entering the court. That is, remove them completely – don't rest sunglasses on your head as if you're going to the café.

ELECTRONIC AND TELEPHONE PROTOCOLS

8. **Turn off mobile phones** and electronic devices before entering the courtroom. At least switch phones and electronic devices to silent mode. Remember vibrations can be audible and annoying, especially when the phone or device is resting on the bar table. Be aware of court practice directions as to the use of electronic devices.

9. **You are responsible for advising** clients, witnesses, and associates about proper courtroom etiquette and behavior. If they are to appear remotely, ensure they are in the right place at the right time, and readily contactable. Leave children and domestic pets at home.

10. **You are also responsible for the readiness of electronic equipment** in consultation with the registry, bailiff or appropriate court officer. It is all too late once the start time arrives, and the judge is left waiting for you.

11. **While you are waiting**, you can sit in the public seating area at the back of the courtroom.

- Reduce conversation to the bare minimum, quietly and only when necessary. Joking, sniggering, laughing, gesticulating, facial reactions etc must be avoided at all cost. The judge can see and hear you! Go outside the court if you need to talk, etc.

- Remember, the judge has a bird's eye view of the court, and can see and hear nearly everything happening in the courtroom.

12. **No eating or chewing or drinking**

- Gum chewing, lollies (even cough lozenges or mints), medication, food, beverages, or newspapers are **NOT** allowed in court. That includes your own bottle or flask of water, or a takeaway coffee. If you require a throat soother or medication, seek permission from the judge first.

MOVE SILENTLY, DIRECTLY AND QUICKLY

13. **Be silent on entering.** If there is a hearing in progress, those parties are entitled to have the judge's full attention without distraction by your bustling entry. Besides, the courtroom is likely to be 'live' and any remark you make will be digitally recorded.

14. **Move directly and quickly** to the bar table when your case is called and sit at the bar table in **order of seniority from right to left.**

- **Seniority** will generally be determined by the advocate's date of admission, but remember Queen's Counsel/Senior Counsel are more senior than junior Barristers, who have seniority of Solicitors, who have seniority of clerks and self-represented parties.

- **Representatives of the Crown** (eg. Director of Public Prosecutions, the Attorney General or Solicitor General) trump all and are entitled to the most senior place at the bar table.

- **An independent children's lawyer and representative** will sit in the middle of the bar table and should try to be equidistant between the parties so it does not look like you are sitting with one or the other. Some ICLs have developed a practice of alternate seats with counsel to sit next to a different party each day.

- **Parties and witnesses** should not be sitting at the bar table with their legal representatives unless permitted by the court. Of course an **unrepresented party** should be at the bar table, usually at the junior end.

During Court

STAND AND BOW RESPECTFULLY

15. **The judge is the main focal point**. The judge not only represents the ultimate authority in the court, but also the law.

- **Rise immediately** when the judge enters and leaves the courtroom, remain **absolutely silent**, with **complete attention** until the judge take his/her place.

- Too often, practitioners are completing a conversation, or fiddling with books and papers, or moving to the bar table as the judge enters. It is simply disrespectful, and will be noticed.

16. **Bow respectfully** to the court and do not sit down until the judge is seated. The bow is by a respectful and measured nod of your head (and shoulders). If the judge is already in the court when you enter, stop and bow respectfully to the judge from the doorway of the court before proceeding to your seat. It is neither amusing nor respectful to bow too low and deep or quick and shallow.

COURT PROCEDURES & PROTOCOLS

17. **Efficiency** of the court hearing depends upon simple and clear rules about orderly procedure. These may vary in different jurisdictions and depending upon the nature of the hearing. Take your turn in **addressing in accordance with traditional protocol**. This is even more important when appearing by telephone, or when juggling multiple clients in a busy mentions court.

18. **Announce your appearance** in a clear and respectfully loud voice, and in accordance with the court protocol. Avoid familiar introductions like "*Good morning Your Honour …".*

19. **Be silent and minimise all movement** when the oath or affirmation is administered to a witness, juror, interpreter or bailiff AND during your opponent's submissions.

- A witness is entitled to be sworn to give evidence in absolute silence. And ought never be distracted during their testimony. If a witness is lying through his teeth, you will get your opportunity to present the truth later.

- You must not divert from this protocol except with leave or invitation of the judge. Don't bounce to your feet to interrupt your opponent's address. Sit still and quiet. Your opponent is entitled to make submissions without interruption. You will get your chance to make address with the reciprocal courtesy.

20. Address the court constituted by the judge, NOT 'for the record'.

- Too often advocates announce their appearances 'for the record', or tender a document 'for the record', or identify a page or part of a document 'for the record', or provide information (usually some tittle tat on their opponent) 'for the record'. It is poor advocacy, disrespectful, and utterly unnecessary.

21. Paramount duty to the court.

- **Practice full and frank disclosure in ex parte or undefended hearing**s. If you are appearing in an **ex parte** or undefended hearing, you must disclose to the court all factual or legal matters which: **(1)** are within the your knowledge; **(2)** are not protected by legal professional privilege; and **(3)** you have reasonable grounds to believe would support an argument against granting the relief or limiting relief adversely to the client.[9]

- **Advocates must inform the court** of (a) any binding authority; (b) if none, any other Australian appellant authority; (c) applicable legislation, known and reasonably thought to be directly on point;[10] **except** if the opponent discontinues their whole case before that time.[11]

- These guidelines are just as pertinent when appearing against an **unrepresented party**. Remembering that a barrister ought **not confer or deal with an unwilling unrepresented party**.[12]

22. Know and be confident using court terminology.

- Improper use of court terminology will expose you as either inexperienced, clumsy or flippant.

- Never seek permission to tender an admissible document saying: "*I seek to tender …"* rather when you are entitled to tender (subject to objections) then say "***I tender…*** ''.

- When referring to a case, you should do so carefully and precisely saying the **case name and its citation.** Whenever citing cases always refer to the authorized reports where available.

- When **referring to a judge** in a case, do so respectfully and properly. Reference to "Keane J" should be "*Justice Keane*", and "Holmes CJ" should be referred to as "*The Honourable the Chief Justice*" and thereafter, "*Her Honour said"*. Court of Appeal Judges, eg. Mullins JA may be referred to as "*Judge of Appeal, Justice Mullins*". Do not say "Keane … J" or "Homes … JA" or "the CJ", or some short cut like that.

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9 Barristers Rules, rr 29 & 30

10 Solicitors Rules, r 19.6; Barristers Rules, r 31

11 Solicitors Rules, r 19.7; Barristers Rules, r 32

12 Barristers Rules, r 52

- References to the judge's associate should be: **"Mister Associate" or "Madam Associate"**, or the court Bailiff use **"Mr Bailiff" or "Madam Bailiff"** and similarly for the court officer (who performs the traditional role of bailiff).

- Forewarn the bailiff and court officer about the preferred declaration of your witness. Know whether your witness prefers an oath or affirmation or some other religious declaration.

- If you wish to have a brief adjournment whilst retaining priority in the list, you may ask for the proceeding to be "**stood down …"** to permit the parties to have discussions, do not say, for example, "stand aside …".

COURTESY & DECORAM

23. Observe courteous and orderly behavior.

- You should yourself, and you should admonish clients and witnesses to, **never show any overt reaction** to anything said or done in the courtroom. Facial expressions and body language must be kept in check.

- Likewise, the delivery of judgment or taking of a verdict, commands absolute silence. Do not move about or leave the courtroom when judgment is being delivered or reasons are given. Nodding or shaking your head, talking to others, reading, or otherwise distracting yourself or others is a grave discourtesy.

- **Don't blatantly pass notes, whisper, snigger or sleeve tug counsel.** Work this out in advance. It distracts the examiner. It distracts the judge. It gives the appearance that you lack confidence in the examiner

24. Make no side-bar remarks or informal objections.

- Give your opponent the respect and courtesy that you wish to be accorded. Once you're in the court arena play by the rules, do not '*play the person instead of the ball*'.

- When your opponent is addressing the court, when s/he has the floor, s/he is entitled to be fully and fairly heard. No side remarks, do not interrupt, and do not object unnecessarily.

- Avoid disparaging remarks and acrimony toward counsel and discourage ill will between the litigants. Counsel must abstain from unnecessary references to opposing counsel, especially peculiarities.

25. Be organised at the bar table. **Never put your brief case or bag on the bar table** as you unpack. Organise and plan the timing to tender and have documents ready for tender. Fumbling advocates look foolish and distract the court from attention to flow of evidence and argument.

26. Sit up straight with good posture. Do not slouch, rock or lounge at the bar table. There is nothing impressive about looking like the disinterested, lazy and recalcitrant kid in the class room.

27. Stand with good posture behind the lectern. Stand still, do not leave the bar table, and never approach a witness or the judge without permission (eg. to hand a document in the absence of a court officer). Lose the theatrics. Never rest a knee or foot on the chair, and never drape yourself over the lectern. Use minimal and appropriate hand gestures. And keep your hands out of pockets.

PROSECUTORS

28. Prosecutors must **fairly assist the court to arrive at the truth, seek impartiality, and legal submissions**.[13]

29. **Prosecutors must not be over zealous** by: pressing for conviction beyond a full and firm case presentation;[14] inflame or bias the court against the accused;[15] arguing irrelevant and weightless positions of fact or law;[16] delaying or withholding undisclosed material unless believed to seriously threated justice or personal safety;[17] or purport to rely on unavailable evidence.[18]

30. Prosecutors **must protect against error** by: correcting an opponent's erroneous address on sentence; alert the court of any relevant case or legislative authority; avoiding appealable error in sentence; nature and range of sentence.[19]

REMEMBER YOUR AUDIENCE …

31. Use good plain English.

- In Australia we are trilingual. We speak slang, formal English (taught in schools), and the Queen's English. You should communicate with the court using **formal English**. The aim is to be clearly understood, not to appear aristocratically clever or learned.

- **Educate yourself** in written and oral communication in plain English. Never use a long word where a short one will do. Never use a complex and long-winded sentence structure when simplicity makes the point. Never use an unusual, scientific word or jargon when an ordinary everyday word of phrase will do.

- **Avoid prolixity in written submissions.** There is no need to reproduce quotations from documentary evidence, transcripts and judgments. An accurate reference to the source will suffice. Use headings, sub-headings, page and paragraph numbers and good grammar.

32. Use an appropriate oratory tone, pace and volume.

- The tone and volume of your voice may be received as being disrespectful if you fail to conform to the court convention and etiquette vis-à-vis communication with the judge, or witnesses.

- **Don't speak too rapidly**. Your speech will become blurred and indistinct at above 200 words per minute. Practice in front of a mirror, or record yourself by video or do an audio recording.

- **Self review your oratory skills**, for example: Are you too soft and quiet, or too loud? Are you talking too quickly? Or frustratingly slow? Or in a dull and boring monotone? Are you too melodic (you are not in an opera)? Or do you have appropriate fluctuation? Do you pause enough and at the right places? Are you pronouncing words correctly and clearly? Are you too 'whingy whiny'?

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13 Solicitors Rules, r 29.1; Barristers Rules, r 82
14 Solicitors Rules, r 29.2; Barristers Rules, r 83
15 Solicitors Rules, r 29.3; Barristers Rules, r 84
16 Solicitors Rules, r 29.4; Barristers Rules, r 85
17 Solicitors Rules, r 29.55 & 29.6; Barristers Rules, r 86
18 Barristers Rules, r 91
19 Solicitors Rules, rr 29.11 & 29/.12; Barristers Rules, r 93

- **Annotate your notes** to prompt you to "slow down" or "speak up".

- **No need to be theatrical**. The judge is not interested in an academy winning acting performance that may (but usually doesn't) impress a client or a jury.

33. Present your argument to the judge, but never ever argue with the judge. There is a significant difference.

- You are there to advance a proposition and develop or argue your point by way of submissions in support of that proposition accurately, concisely and courteously.

- Beware of lapsing into the trap of arguing **with** the judge. You must not say to the judge: "*You are wrong*", or "*No, no , no",* as much as you might think it!

- Instead respond with circumspection: *"In my respectful submission, Your Honour, the evidence is otherwise",* or "*May I hold Your Honour's attention a little longer as I develop my point, that whilst Smith v Jones remains good law, it is unlikely to assist Your Honour in the circumstances of this case.*"

34. Make submissions but don't talk at, or be rude to, the judge. Not one of us, especially judges, reacts well to rudeness.

- Forms of rudeness include: using a raised voice or aggressive tone, arrogance in stance, tone and delivery, being inconsiderate, insensitive, deliberately offensive, impolite, obscenity, profanity, violating taboos, and deviance.

- You are not there to forcefully shove your case down the judge's throat or deliver a forthright Toast Masters speech or make a positive argument in a debate team, instead the art of advocacy is engagement and persuasion. No judge likes **being told what to do or think** about the case, but judges are receptive to being guided on how to think about the case.

- Avoid catchphrases like – "*I hear what Your Honour is saying*" which conveys to the court that you disagree, and you will press on regardless. Or commencing "*With respect …"* which forewarns that you are about to be disrespectful and insulting to the judge. Judges hate it.

35. Address the judge politely and respectfully as "Your Honour", for example, on "Your Honour ordered that …".

- **Never address the court in second person, ie.** "*As **You** said a moment ago …*", instead say: "*As your Honour said …".*

- Remain **polite to the judge, opposing counsel and court staff**. It is how you are perceived, not how you think you ought to be perceived, that's important.

- **Stand promptly when speaking to the judge**, or when the judge is speaking to you, making or meeting an objection. **Never sit** during any exchange with the judge as some petulant act of protest or exasperation. Of course, sit immediately when your opponent makes an evidentiary objection or is addressing the court.

- **Do not interrupt** or **speak over** others while they are talking, especially the judge. This is even more important when appearing by telephone when advocates often lapse into informality. You should frame any **request or question to the judge indirectly**. For example:

(a) Being aware of the judge's preferred time for breaks and luncheon adjournment, you may ask: *Is that a convenient time, your Honour?"* rather than a direct question *"Do you usually stop for lunch about now?"*

(b) Directing the judge to a page of the transcript or bundle of documents, you may ask: "*Might I invite your Honour to turn to document 45 of the bundle of documents, and then to page 20 of that document?"* instead of asking "*Now just look at document page 20 in document 45?"*

- Direct all submissions and **remarks to the bench** and not the opposing advocate.

36. Remain respectful and courteous to the judge at all times, even if you feel unfairly victimized or you disagree with the judge's ruling on an objection or motion.

- Once a ruling or order has been made it should be **accepted respectfully and graciously**. It is rude and discourteous to vocalise or act out some form of discontent, anger or disagreement with the ruling, for example – swearing or remarking under your breath, banging the bar table, packing up loudly, or shoving the chair.

- **Don't continue any argument when the case is over**. Once the issue or case has been determined you do not have a right of rebuttal or 'second bite of the cherry'. Any overtly unaccepting behaviour is not only disrespectful, it may well be contemptuous.

- If the judge makes an **accidental slip or obvious omission** in the process of giving reasons - you may only and politely draw the court's attention to a slip or error in the decision (to avoid the need to apply the slip rule).

37. Never ever pack up before the case is finished, especially during the judge's final words, ruling or extempore decision. Give the judge the respectful attention deserving of the office. There is plenty of time to pack up your books and papers after the case is finished. But then, do so quickly, quietly and efficiently so the next matter can proceed without undue delay and noise.

38. Remain in attendance until excused.

- It is a long standing convention that the bar table must never be left unoccupied during the hearing of a court list.

- At the conclusion of your case, **just wait silently and patiently**. Remain at the bar table until excused by the judge, **or** until the next matter is called and others arrive, **or** until the court adjourns **and** the judge leaves the court room.

- Advocates who prematurely and pre-emptively ask to be excused embarrass themselves, and the court. Such a request may be appropriate: (a) if the judge is clearly about to take the next matter; (b) there is a significant delay in the next parties arriving after their matters is called; or (c) at the end of a closed court hearing to facilitate the entry of the next matter.

Outside Court

39. Fair dealings with witnesses.

- **Never communicate with a witness under cross examination** UNLESS the cross-examiner has given informed consent, or there are special circumstances (eg. compromise) having informed the cross-examiner beforehand or as soon as possible if done.[20]

- **Never discourage or prevent** a witnesses conferring with the opposition, **except** the witness can be advised that s/he need not agree, or about confidentiality.[21]

- **Preparing witnesses by properly proofing**, explaining the process of giving evidence, their preference for an oath or affirmation, and orientation around the court and court room.

40. **Know how to manage your conflicting diary obligations** when allocating further hearing dates for part heard matters, and if you become aware of an insurmountable conflict you ought contact the court immediately with your opponents informed consent.

- **Always bring your diary (electronic or paper form) to court!**

- The court is not obliged, although will try its best, to work around other commitments of practitioners, especially other court appearances, including in the same court with more than one judge listed.

- The court will recognise that there is an inherent unfairness if the court imposes a date for a continuation of a part heard matter which eliminates the continuation of competent and cost effective presentation of a client's case.

- **If the judge inquires of availability** then you ought fully inform the court, politely and deferentially, about legitimate diary commitments, including: pre-existing court matters, and the type of matter (part heard trials, civil, criminal, trials, interim hearings etc) and any period of absenteeism that is impracticable to change, for example: childbirth, surgical procedures, and overseas holidays.

- **Criminal trials** involving serious criminal offences require special consideration. A practitioner is obliged to retain the brief unless:

    1. the practitioner believes on reasonable grounds that – the circumstances are exceptional and compelling; **and** there is enough time for another practitioner to take over the case properly before the hearing; **or**

    2. the criminal client has consented after the practitioner has clearly and fully informed the criminal client of the circumstances in which the practitioner wishes to return the brief.

- Social occasions, personal convenience, witness conferences, conferences and holidays are **generally not sufficient** to resist the allocation of a part heard trial date.

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20 Solicitors Rules, r 26; Barristers Rules, r 72

21 Barristers Rules, r 73 & 74

- **The hierarchy of priority of court commitments can be simply stated**:

1. **If the judge has not yet imposed a date** for the continuation of the part heard trial, then **all other court commitments and absenteeism** have priority.

2. **In any event, a pre-existing part heard trial** will have priority over a later one. You must tell the court if this applies to you.

3. **If the judge imposes a date** for the continuation of the part heard trial, then you must make all necessary arrangements to be available at the next hearing date

   Except - You will be obliged to seek excusal from the proceeding if you are committed to a pre-existing part heard trial, or a criminal trial for a serious offence (see above) on the same date as the imposed date.

41. Inform the court of binding, relevant and legislative authority unknown to the court pending delivery of reserved decisions by letter copied to the opponent limited to that reference (or more if your opponent consents); or requesting a relisting for further argument **only** after notifying and informing your opponent.[22]

42. Never speak openly disparagingly of a judge. We have all been disappointed, or felt angry and victimised when landed with an unfavourable judgment or ruling.

- **Your courtesy and demeanor** must be maintained even when the hearing has finished and the judge has departed. You may still be recorded in the courtroom, and on short circuit security cameras in the court precincts. Besides, court staff, security officers and other practitioners are watching you.

- **There is no excuse, or reason, for being unduly critical of the judge.** This is particularly important when the criticism amounts to a personal attack on a judge or is founded on your subjective perception and a serious lack of understanding about the role of the judge. This includes giving a presentation of your opinionated critique of a judge or conduct of a case at a legal conference.

- Such criticism is not only unfair to judges personally, but can **improperly undermine public confidence in the justice system**.

- Take a moment to analyse how your advocacy and presentation of the case may have produced a more favourable outcome. More often than not, no matter what your subjective aspirations for your client, you are only as good as your brief.

- Of course, it is sometimes appropriate and encouraged that you report to the appropriate authorities or senior colleagues if you are concerned about judicial bullying or misconduct.

43. Never criticize or purport to "correct" your opponent's skills or conduct of their case.

- Criticism or remarks about your opponent's advocacy style or conduct are rarely welcomed, particularly if your opponent has lost the case, and the instructor and client are within hearing distance. It may be interpreted as bullying. It is not your place to "correct" some skill of your

[22] Barristers Rules, rr 31 & 34

opponent that you think should be improved or done differently.

- If you have **appropriate seniority**, or your opponent is your pupil, then it may be appropriate to lend support, counsel and give assistance. Sometimes friendship and professional camaraderie may permit some sort of debrief, but usually when it is sought.

44. Know how to address the judge informally and outside court.

- Outside court you should address a judge as **"Judge"**, the Chief Justice as "**Chief Justice**" and a Chief Judge as "**Chief Judge**", and "**Magistrate"** for magistrates UNLESS expressly permitted otherwise, for example, personal or friendly contact in the absence of other practitioners. And avoid the temptation to display personal familiarity with judicial officers when professionally conversing with other judges, colleagues or clients.

- In any event, you should avoid direct and personal contact with the judge if you are involved in a proceeding that is part heard or otherwise reserved for decision by that judge.

45. Never communicate about a case with the judge or court.

- Never communicate with the court, in the opponent's absence, about any matter of substance in connection with current proceedings (eg. voluntarily delivering written submissions to the associate, or engaging in correspondence) **unless**:

  (a) The court has first communicated with you requiring your response; or

  (b) The opponent has consented beforehand to you dealing with the court in a specific manner notified to the opponent by you,[23] and only limited to that matter.[24]

- **And** "court" includes the registry, the clerk or associate or judges' chambers. You must promptly tell an opponent what passes between you and a court in any such communication.[25] Even if from some remarks as you pass in the street.

- An event in the criminal jurisdiction requires the impremada of the judge and cannot be "*administratively adjourned*" at the whim of the parties. There are rules and practice directions governing consent orders and adjournments for civil and planning matters, but there is no such procedure for criminal matters.

46. Communicate with your opponent properly.

- **Aggressive communication** is a form of bullying, clearly inappropriate and unprofessional conduct. Overzealous ultimatums may be interpreted as extortion (*Criminal Code,* s 415). Retain your professional objectively and focus on the real issues and their resolution.

- Avoid protracted, unnecessary and inflammatory exchanges. There is little need for **adjectives** in correspondence (eg. Our client is *insulted and astounded* about your client's *appalling*

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23 Solicitors Rules, r 22.5; Barristers Rules, r 53

24 Solicitors Rules, r 22.7; Barristers Rules, r 55

25 Solicitors Rules, r 22.6; Barristers Rules, r 54

conduct".

- **Communication, especially written correspondence,** should be measured, based on instructions and clearly conveyed **on behalf of your client** (it is not your case). You are not your client's megaphone and much of what a client wishes to bark about is inappropriate to communicate. Remember, your communication may be used as evidence in the proceedings to prove your client's prior inconsistent or unreasonable conduct, or in relation to an issue for costs orders.

- **Never ever knowingly make a false statement to an opponent** in relation to the case (including its compromise).[26] Take all necessary steps to correct any false statement as soon as possible after you become aware that the statement was false.[27] A failure to be completely candid and honourable in your dealings with your colleagues will harm your reputation and haunt you for your entire career.

47. Avoid publicly discussing your client's case, part heard cases and interim hearings (subject to final hearing and determination).

- These matters are not public fodder or open to discussion at legal conferences.

- You tread a very dangerous tight rope risking breaching your client's confidentiality, being improperly critical of judges and/or fellow practitioners, and misrepresenting facts (albeit by giving your subjective perception of the case and its management).

- Such events are not only unfair to those involved, including your client, witness, judges and opponents, but can **improperly undermine public confidence in the justice system**.[28]

48. Remain true to your paramount duty to the court and administration justice.

- The proper administration of justice depends on you to faithfully explain the relevant law governing the facts of the case to enable the judge to make a decision based on truth and precedent.

- It is professional misconduct to mislead, divert, trick or 'hoodwink' the judge with bad law or some 'red herring' under the guise of advocating your client's case. If you are appearing in a directions hearing, don't provoke or encourage the judge to slip into a merits hearing of the substantive issues.

- **Never lead the court into error.** At the appropriate time in the hearing of the case, if the court has not yet been informed of that matter, inform the court of: any binding authority; where there is no binding authority any authority decided by an Australian appellate court; and any applicable legislation known to the advocate and which the advocate has reasonable grounds to believe to be directly on point, against the client's case.[29]

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26 Solicitors Rules, r 22, Barristers Rules, r 48

27 Solicitors Rules, r 22; Barristers Rules, r 49

28 Barristers Rules, r 11(c)

29 Solicitors Rules, r 17; Barristers Rules, r 31

- Alert the opponent and if necessary inform the court if any express concession made in the course of a trial in civil proceedings by the opponent about evidence, case-law or legislation is contrary to the true position and is believed to have been made by **mistake**.

49. Be uncompromisingly ethical in every respect.

- You are an officer of the court first and foremost before being a fearless and zealous advocate. You are expected to act with **competence, diligence and candor** when dealing with the court.

- Your conduct towards the court must be **exemplary**, and there is an expectation of honesty and frankness in all court proceedings.

- You must **correct any misleading statement** made by you to a court as soon as possible after you become aware that the statement was misleading.[30]

- Read, re-read and **know and comply with your ethical guidelines and rules**. **Family lawyers** should know and comply with the "***Best Practice Guidelines for Lawyers Doing Family Law Work*****"** prepared by the Family Law Council and Family Section of the Law Council of Australia.

Judge Dean P Morzone QC
Magistrate Robert Spencer

19 February 2020

[30] Solicitors Rules, r 19; Barristers Rules, r 26