# HOW TO INFURIATE A JUDGE

**Paper delivered at the Bundaberg District Law Association's Conference**

**Lady Elliot Island**

**11 November 2022**

**Judge Michael Rackemann**

## Introduction

[1] The topic of this paper suggests perhaps, that there is a well-defined line between conduct that will infuriate a judge and that which will not. As we all know however, judges, like any other group of human beings, are not homogonous or completely predictable. They exhibit varying degrees of patience and tolerance, have various likes and dislikes and their own idiosyncrasies. There are some things which particularly "push the buttons" of some judges, but do not ruffle the demeanour of others.

[2] It is not possible to provide a complete catalogue of conduct which will, or might, have the result of infuriating a judge. This paper however, aims to provide some examples. The examples are drawn from actual experiences. As they say in the movies, they are based on true stories. In preparing this paper I asked fellow judges of the District Court to provide some examples of conduct which they had found infuriating. They were only too happy to oblige. One thanked me for initiating and facilitating the discussion, suggesting that it had been "one of our better judicial well-being sessions".

[3] I should, at the outset, acknowledge two things. First, judges are not perfect and I am sure that there are things that judges do that infuriate practitioners. In fact, having practised as a barrister, I know that there are. This paper is not intended to be a 'holier than thou' rant at the legal profession. Secondly, the paper's focus on the things that infuriate should not be taken to be a lack of appreciation for the great assistance that the judges obtain from the members of the legal profession that appear before them. The purpose of the paper is to assist, by pointing out things to avoid.

**Know your judge**

[4] I have already observed that judges are not all alike. One of the most important rules of advocacy is to know your judge. That is, to have regard to what you know from experience, or what you can glean from enquiry from others, about the judge who is to hear your matter and, in particular, what the judge expects of practitioners appearing before him/her and whether there is anything else of which you should be aware. Sometimes a judge will have particular ways of dealing with matters or a particular preference in relation to a matter of practice, procedure or conduct in the courtroom. For example there was once a Supreme Court judge who required silence after a practitioner formally read material to be relied on. That was to enable the judge to read the material for himself, without its effect being summarised by the practitioner.

[5] Sometimes the judge will have a condition which you should to be sensitive to. For example, there was once a District Court judge who had a strong addiction to cigarettes, such that he would become agitated if you did not ask "would this be a convenient time?" for a brief adjournment after an hour of sitting time. There was another who would be prone to agitation close to lunchtime, when his blood sugar level was affected. There was another whose painful back condition would affect the judicial temperament late in the day, after hours of sitting time. These kinds of things will be well enough known if you ask experienced practitioners. Doing due diligence will assist you to avoid doing something that infuriates the particular judge.

**Inappropriate unilateral communication**

[6] You do not need to appear before a judge in order to infuriate one. An increasingly popular way of doing so is by sending inappropriate unilateral communications to the judge or the judge's associate. This is a matter dealt with in sections 22.5 to 22.7 of the Australian Solicitors' Conduct Rules (ASCR). In essence, unilateral communication (not invited by the court) concerning any matter of substance in connection with a proceeding, should not occur without the prior consent of the opponent. The most common ways of breaching that rule are by ignoring it or by erroneously thinking that it is satisfied by copying the opponent into an unauthorised unilateral communication. The rule requires prior consent, not contemporaneous notice.

**Mistreating or misappropriating the judge's associate**

[7] Another way of infuriating a judge, without appearing before the judge, is to mistreat the judge's associate. Judges are usually quite protective of their associates, as they should be. Any discourtesy, rudeness or verbal abuse of the judge's associate will, of course, incur the wrath of the judge. An emerging (and most unwelcome) trend is to treat the judge's associate as a de facto extension of the practitioner's staff. This can be manifest in a number of different ways. One is by sending emails to the associate, well outside of business hours, seeking, or worse demanding, responses before the next business day. Leaving to one side any problem with the content of the email, this presumes that the practitioner can, in effect, require the judge's associate to work out of hours, at the practitioner's direction.

[8] Another example is emailing, without request from the court or judge,[1] bulky material, sometimes including colour copies of plans or other documents, to the judge's associate in the expectation that the associate will copy and collate them to provide to the judge. This not only presumes upon the associate but also upon the judge, who may require the associate's assistance otherwise. There also appears to be a misapprehension by some that emailing material to a judge's associate has the same effect as filing it. The associate is not your filing clerk.

**Late delivery of material**

[9] Late delivery of outlines of argument or other documents forwarded in advance of a hearing is also irritating. The reason for requiring, directing or requesting (as the case may be) such material in advance is to provide the judge with sufficient time for pre-reading. Late delivery not only shows disrespect for the timeline, but presumes upon the judge that he/she will either find time, presumably out of hours, to do the pre-reading to suit your convenience (as a consequence of your tardiness) or suffer their preparation for the hearing being adversely affected by not completing the pre-reading.

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1 There is no criticism of the parties sending material, such as sentencing material or an outline of argument, requested by the court or the judge.

**Disobeying court orders or directions**

[10] Where a proceeding has been the subject of orders or directions, including by way of case management, it is infuriating for a judge to see, on the next occasion the matter is before the court, that the previous orders or directions have been flouted, without the matter having been brought back before the court to seek excusal, together with such further orders as may be appropriate in the circumstances. To fail to comply with a court order or direction, without seeking excusal is tantamount to assuming the power to grant yourself an extension of, or excusal from, compliance with the order. Agreeing with your opponent that there ought be an extension of time does not excuse the non-compliance or effect an extension. That is a matter for the court. Particularly where a proceeding is subject to case management, the judge might not be prepared to accept the timetable that the parties agree between themselves.

[11] It should be remembered that a failure to comply with an order of the court, without lawful excuse, is a contempt of court.[2] Even where the order is directed to your client, the contempt may, depending on the circumstances, be one to which you, as the legal practitioner responsible for the conduct of the litigation on behalf of the client, is a party.

**Punctuality and failing to appear**

[12] The most obvious way of infuriating a judge before actually appearing is by being late or not turning up at all. This most commonly occurs in relation to callovers and mentions/reviews. One way I have dealt with that is to direct the bailiff to telephone the practitioner (usually a solicitor) and put them on loud speaker in the courtroom. I then introduce myself, tell them that the court is sitting, that the matter is being dealt with and that everything they say is being recorded. I proceed to ask for an explanation as to why they have not appeared. That is usually the last time they fail to appear before me.

[13] You should always allow a generous time to get to court on time, allowing for some unforeseen delay. On rare occasions however, there will be a genuine reason why you have been unavoidably delayed. In such circumstances an immediate apology and frank explanation will usually suffice. Unfortunately however, that is not always the case. Sometimes a practitioner appears late due to tardiness, and offers little, if

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2 S 129 *District Court of Queensland Act 1967*.

any, explanation or apology. That is not only disrespectful to the judge and indeed to the court, but also to everyone else involved in the hearing, including the opponent.

[14] A particularly infuriating circumstance of a practitioner not appearing on time, or at all, is when they have double-booked themselves and not made an arrangement for another to step in to take over the matter. The Barrister's Conduct Rules (BCR)[3] prohibits a barrister from accepting a second brief where, in the normal course of events, the barrister would not be able to appear on it. Sadly, that is a rule which is not always observed. There are, in the criminal jurisdiction, circumstances in which a prior request by the lawyers, through the list manager, for the allocation of sentences for a particular day in the one court to take account of the fact that some counsel are in more than one matter is accommodated. There are however, too many instances of unacceptable double-booking. For example, I recall one instance where I was simply informed, in court, on the morning of a criminal sittings in Southport, that a practitioner could not appear on the matter listed before me until after lunch, because that practitioner was instead appearing in the Beenleigh Magistrates Court that morning. That showed a high level of disrespect. It should hardly need to be said that a judge should not be expected to sit to suit the diary commitments of a legal practitioner, nor to maximise the revenue that the practitioner can generate in the day. Further, the efficient conduct of the court's work is not to be compromised in this way.

**Suitable and respectful attire**

[15] When you appear in court, do so appropriately and respectfully attired. Barristers should be robed or not, depending upon what is appropriate. The courts publish a robing policy on the website.[4] That is subject to the practice of the particular judge. Any doubt can be resolved by contacting the judge's associate in advance. Your appearance should be neat and respectful, whether you are robed or not. For example, a male dressed in a suit, but with his top button undone and tie half undone signifies a lack of respect. The judges show respect for the institution and for their office by dressing appropriately and expect practitioners to do likewise.

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3 R 98.

4 https://www.courts.qld.gov.au/about/news/news233/2022/robing-policy-queensland-courts-and-tribunals.

**Proper preparation**

[16] It is infuriating to encounter a practitioner who is unable to provide the basic level of assistance that the judge is entitled to expect. This may be due to an obvious lack of knowledge or preparation or both. An example is a practitioner for an applicant who cannot identify all of the following:

- what (the relief) is being sought;
- the statute, rule or other source of the court's power to do as it is asked;
- the things of which the court must be satisfied in order to make the order/s sought;
- the leading authority or authorities which establish any relevant principle the court ought apply or take into account;
- the affidavit material (identifying the relevant parts) and/or evidence otherwise which establishes the relevant facts, and
- the reasons the court should find as requested and/or exercise any discretion in the way sought.

[17] It is also infuriating to find that the person appearing has not brought the relevant statute/rules/copies of authorities with them, for their own reference, as well as copies for the judge (offers to hand up the practitioner's iPad do not count and, at least in my case, are only likely to further infuriate). Worse still are the occasions where it becomes clear that the practitioner has not even read the relevant provisions/authorities/material.

**Proof of facts**

[18] Asking the court to consider relief without properly attending to proof of the facts upon which you rely can also be irritating. This is something which often affects pre-trial applications in the criminal jurisdiction and certain civil applications, including those for substituted service. It was the subject of my paper at last year's conference.[5] Trying to overcome this defect by proving something in an inadmissible way simply adds to the irritation. Asserting facts in submissions does not prove them. It is not

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5 M Rackemann DCJ, 'Evidence in pre-trial applications'—paper delivered at the Bundaberg District Law Association's Conference, Lady Elliot Island, 22 October 2021

only wrong, but irritating as well, because it undermines the judge's confidence in what the submissions otherwise say about the relevant "facts", without cross-checking everything with the affidavit material. Attempting to solve the problem by "handing up" documents does not assist. Affidavits can be filed and read (by leave if necessary). Some documents can be tendered as exhibits. Witnesses can give testimony. Facts can be formally admitted. Whilst a copy of an authority might be "handed up", one does not prove facts by "handing up" things. A further difficulty is that some practitioners cannot explain the relevance of the affidavit material or exhibits they rely on.

[19] Where an ex parte application (e.g. for substituted service) is requested to be determined on the papers, but is supported by inadequate affidavit material, the judge is left with the option of dismissing the application or going to the trouble of asking the solicitor to appear, so that the deficiency can be explained and the application adjourned to enable the defect to be cured. It is disappointing to be put in that position when the affidavit material could have been formulated in an appropriate way in the first instance. I have usually adopted the second option. I have done so in order to save the costs of a fresh application. It is irksome that my preparedness to give the solicitors the opportunity to cure the defect, rather than dismiss the application, is rarely met by apology and gratitude. I suspect most just wish I had overlooked the deficiency.

**Document management – swamping the judge**

[20] Document management is another area prone to infuriate. Rule 435 of the *Uniform Civil Procedure Rules 1999* requires that, where an exhibit to an affidavit is comprised of a group of documents or there is more than one documentary exhibit to an affidavit, the documents are to be prepared in a way that will facilitate the court's efficient and expeditious use of them. That is an approach that you should apply not just to exhibits to affidavits, but to all bulky documents or masses of documents, of any significant length, that you intend to put before the court in any way.

[21] The first step is to sequentially paginate the document/s from the very first page to the very last page, inclusive of any schedules or appendices and provide an index.[6]

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6 R 435(11) of the UCPR requires, as far as practicable, an indexed paginated book of exhibits to affidavits to which r 435(9) applies.

Otherwise everybody, including the judge, will become frustrated in trying to fossick through the document in order to find the particular page to which someone is referring at a particular point in time. Whilst one would imagine that pagination is a simple skill to master, I have come to realise in my time on the bench, including in my time on the Planning and Environment Court, where practitioners are frequently reminded of the need for correct pagination in that document heavy jurisdiction, that it is a skill that eludes some. Some do not paginate at all. Some only paginate the judge's copy or the judge's copy and their own. That is unhelpful because the witness and the opponent will still be left behind, trying to find the relevant page and no one will be able to progress until everyone is on the same page. Others stop paginating after the substantive text, leaving annexures and appendices unpaginated.

[22] Another basic step is to make sure that all copies are of every page of the document/s. The problem of having copied only every second page of a document, the original of which is two-sided, still raises its ugly head from time to time.

[23] If a failure to paginate a single lengthy document or bundle of documents can cause justifiable irritation, the failure of practitioners to exercise proper judgment about the extent of documentation necessary to be put into evidence can cause judicial meltdown. Recently one of my fellow judges was confronted with an agreement between the parties to tender, on the first day of a hearing, over 1,000 documents. Whilst I have no knowledge of the specifics of that matter, one must immediately question how many of those documents could possibly be influential to the final outcome of the case. Judges are not there to receive every document that has ever been produced in relation to a matter. They are there to determine the real issues. They rely on the exercise of professional skill and judgment, by the legal practitioners, to focus their cases on what is necessary for that purpose. Judicial "pushback" should come as no surprise when parties bury the judge in a mountain of documents where it is not absolutely necessary to do so. It is also poor advocacy. Comprehension is a prerequisite to persuasion. It is difficult to see how burdening a judge with mountains of documents is conducive to having the judge comprehend your case, so as to be persuaded of it.

**Mouthpieces**

[24] Whilst legal practitioners have a duty to their client, they have a higher duty to the court. A judge is likely to become infuriated when a legal practitioner acts simply as the mouthpiece of their client, contrary to r 41 of the BCR and r 17 of the ASCR. The practitioner's role is not to run every point the client wishes, no matter how meritless. Rather, the role is to make forensic judgments, in an independent way, so as to confine any hearing to the real issues, whilst presenting the client's case as quickly and simply as may be consistent with its robust advancement. The practitioner should also draw the court's attention to any persuasive authority which is against the client's case.[7] Because the lawyer who acts as the client's mouthpiece runs their arguments in an unfiltered way, those arguments are prone to be variously irrelevant, unsupportable on the facts or at law or even positively misleading or otherwise improper. At the very least they tend to muddy the water, rather than clarify the issues and to elongate, rather than expedite, the consideration of the real issues.

**Frankness**

[25] Any conduct of a misleading or deceptive nature will not only infuriate, but is apt to result in a referral to the Legal Services Commission. It is important that you are not only truthful with the judge, but that you do not mislead, including by withholding something which renders your communication misleading. Frankness is, of course, particularly important in ex parte applications where there must be disclosure of legal or factual matters which would support an argument against granting the relief sought, or support placing limitations on the relief.[8] Trust is the most valuable commodity a legal practitioner has. You do not want to be a practitioner whose honesty and frankness is in doubt.

**Etiquette**

[26] Non observance of court etiquette can also infuriate. These may be thought to be small things, but none is unimportant and it is easy to do the right thing. By not following etiquette you show that you are either ignorant of what to do or sufficiently

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7 ASCR r 17.2, BCR r 42.

8 See r 19.4 of the ASCR, r 29 of the BCR. The duty to disclose is subject to legal professional privilege. There are however, obligations to seek instructions for the waiver of that privilege – see r 19.5 ASCR, r 30 BCR.

ambivalent about the dignity of the court to care. Neither is likely to be welcome. Examples of what not to do include:

(i) positioning yourself at the wrong end of the bar table;

(ii) standing when it is not your turn to speak. That includes when your opponent has stood to make an objection and whenever the judge is speaking to someone else;

(iii) speaking when a witness is being sworn;

(iv) talking over a witness – this is rude, makes it difficult for people to understand what is being said and affects the transcript;

(v) talking over the judge – same problem as with talking over the witness but adds a layer of insolence;

(vi) saying what "we" submit if you do not have a leader or are not leading another barrister;

(vii) telling the judge what you "think" or what your "opinion" is rather than what you "submit"[9];

(viii) making audible informal comments/objections, including about a witness or your opponent (you may ask the judge for permission to approach your opponent);

(ix) leaving your place, without permission, to speak to your opponent or for any other reason;

(x) looking at and/or addressing your opponent, rather than the judge, when making your submissions;

(xi) using "slang" expressions in addressing a judge – a barrister recently responded "my bad" to a judge pointing out a pleading deficiency;

(xii) not thanking the judge if the judge has sat extended hours in order to accommodate a request or to finish a witness or even the entirety of a hearing;

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[9] Indeed r 43 of the BCR provides that a barrister must not make submissions or express views to a court on any material evidence or issue in the case in terms which convey or appear to convey the barrister's personal opinion on the merits of the evidence or issue.

(xiii) leaving the judge with an empty bar table without first being excused (by leaving the bar table once your matter is finished when those appearing in the next matter are not yet ready to take your place and the judge has not excused you);

(xiv) addressing the judge as "you" instead of "your Honour", and

(xv) chewing gum or eating in court.

**Submissions**

[27] Judges can be irritated by submissions when:

(i) outlines are delivered late – for the reasons discussed earlier;

(ii) outlines exceed any limitation on length;

(iii) textbooks are relied on for propositions of law, without checking the cases relied upon by the authors for the relevant proposition;

(iv) the effect of the evidence is mis-stated;

(v) important evidence or relevant law, particularly that contrary to your case, is ignored rather than confronted;

(vi) reliance is placed on provisions, authorities, exhibits or anything else the advocate has evidently not read;

(vii) they are, or include, things for the benefit of the client's satisfaction, not focused on the real issues in the case – for the reasons discussed earlier, or

(viii) they are either exaggerated or overly insistent. For example, in a case where it is open to a judge to make different findings of fact and/or to exercise a discretion in different ways, it is both irritating to the judge and poor advocacy to tell the judge what he/she "must" find lest he/she fall into error. If you effectively dare the judge to find against your client you risk the challenge being accepted.

**Time estimates**

[28] The time estimates by legal practitioners determine, or at least influence, the time allocated to hearing matters in the various lists. Whilst it is not possible to estimate the length of hearing time with absolute precision, the efficiency of the court depends upon the estimates being reasonable approximations. It is infuriating for a judge to discover, part way into a hearing, that the time estimate (and hence the time allocated for the hearing) is grossly inadequate such that it could never have been a properly considered approximation.

[29] In the case of a civil application a gross underestimate might mean that the matter should have been put on the list for civil hearings rather than civil applications. In the civil or planning and environment jurisdictions it means that the matter might be part heard, disrupting the hearing and compromising the court's calendar for future sittings. In the criminal jurisdiction it might imperil a trial being completed within the allocated time for a circuit or the time for which the jury panel was otherwise required. There might be consequences for trials set down to follow it.

[30] Time estimates should not be gut reactions. They should be genuine estimates, after an earnest consideration of the time likely to be required for each component of the hearing, including the time for each witness. In the case of a criminal trial the estimate ought include time for jury deliberation.

**Disputation without substantial purpose or value**

[31] High on my personal "hit parade" of things that infuriate is needless disputation with no little agitation, but no clear purpose or benefit for the parties. I have encountered this most frequently when hearing civil applications. The first indication is a file, usually in multiple parts, sitting about 30cm or more high on the bench. The matter will often have commenced some years ago, following which there will have been a number of interlocutory fights about pleadings, disclosure and the like. It will be evident that the costs built up are already approaching, if not have already exceeded, the amount in dispute, thereby rendering the litigation uneconomic. In that context the application that falls for me to consider will usually be yet another procedural fight, the resolution of which will probably just be the precursor to yet another.

[32] It is apparent, in such cases, that great time, energy and cost has been committed to various preliminary fights, without much thought to whether it is worthwhile having

them. It is not necessary to litigate every pre-trial disagreement. It is because of cases such as these that I often have the civil trial calendar with me when I sit in civil applications. When dealing with such matters I often take ten deep breaths (to recover my composure) and then ask why I ought not dispense with (or truncate) further pre-trial steps and immediately set the matter down for trial.

**Model litigants**

[33] Those who advise and act for the Crown or for a government body, which ought behave as a model litigant, should be particularly conscious of their client's position when commencing or pursuing litigation. I cannot recall being more infuriated than during the hearing of an originating application brought by a local government for declarations and orders against an elderly retired couple who had purchased a property with the intention of both residing there and earning an income from a certain activity. The local government had told them, prior to purchase, that the activity was permitted on the land. After they had purchased, the council informed them that, in fact, they needed an approval, which they duly obtained. The council then instituted proceedings for declarations and other orders to the effect that the activity required a different approval, which was unlikely to be granted.

[34] There was no suggestion that the activity was causing any adverse impacts or generating any complaint. The retired couple had always been open with the local government, had acted in accordance with its advice and were doing no harm. There was nothing before the local government that required it to address the issue in relation to the retired couple's property. Counsel for the local government ultimately conceded that the proceeding was brought in order for his client to get clarity on the proper construction of part of its planning scheme (a matter about which it was otherwise interested). I was concerned (to put it mildly) that a retired couple, who had done all they could to ensure that they purchased a property with the appropriate use rights, were being dragged through a court process by a local government not because of a genuine concern about the activity on their property, but rather because their circumstance was deemed, by the local government, to be a convenient (for it) vehicle to clarify an interpretation issue otherwise of interest to it. The retired couple were, in a sense, collateral damage to the local government's curiosity about a point of interpretation. I questioned, in strong terms, why, in the circumstances, I would consider granting the local government relief that is discretionary in nature. I

adjourned briefly, to permit the council to consider its position. When I returned, the council consented to the application being dismissed and to an adverse costs order against it.

[35] Sometimes your client will have broader responsibilities. Local governments, for example, make appealable decisions on development applications that are assessed against, amongst other things, their respective planning schemes. As the local planning authority, a local government also has a wider interest in the broader application of its planning scheme, beyond any decision on a single development application. When, as a barrister, I acted for a local government in appeals to the Planning and Environment Court concerning its decisions on development applications, I was always conscious of that. Consequently, I sought to make submissions in relation to the meaning and effect of the provisions of its planning scheme that were consistent from case to case, unless there was a good reason to alter the submission (e.g. a recent court decision dealing with the proper interpretation of the provision).

[36] I have, as a judge, expressed some concern, when, without good reason, inconsistent submissions have been made, from case to case, on behalf of a single local government. I do not know the particular reason for the inconsistency in every case. I suspect however, that it has sometimes happened because different lawyers have been engaged who have made different submissions without consideration of the broader role of their client and without ascertaining or giving due consideration to the submissions made to the court, on their client's behalf, in other cases. I should acknowledge that such instances are now relatively rare in the Planning and Environment Court.

**Conclusion**

[37] As an advocate your primary goal is to persuade. Infuriating the judge is not a good start towards achieving that goal. There will be occasions when a judge has a bad day and is more easily agitated than usual or than he/she should be. If the judge is agitated however, you should, before too quickly laying blame at the feet of the judge, critically examine what you have done that might have triggered or exacerbated the response. It might be that by being more aware of what potentially infuriates a judge,

you can avoid or minimise such experiences in the future and find the goal of persuasion that much easier.