Learned Friends Vietnam Legal Conference 7 – 14 January 2012

Legitimate Forensic Behaviour – Observations from the Bench on Ethics and Etiquette in Court

Hanoi, Friday 13 January 2012

His Honour Judge Richard Cogswell S.C.

District Court of NSW

Introduction

1. What if your client wants to continue to be known by the false name they gave to the police when arrested for drink driving? What do you tell the judge if you want the judge to issue a subpoena to a doctor to produce their records - tomorrow? And perhaps the most vexed one: do you say “Good morning your Honour”?
2. Let me qualify myself to address these questions. I’ve been a District Court Judge for nearly 5 years and my job is to sit in court all day and observe and participate in the courtroom behaviour of professional advocates. Before that I spent 26 years at the New South Wales Bar and 3 years as a solicitor.
3. Hence the title of my paper emerged: *“Legitimate Forensic Behaviour – Observations from the Bench on Ethics and Etiquette in Court”.* The paper will address behaviour in the courtroom drawing on the expectations of ethics and etiquette.
4. Structure always helps me in preparation and presentation as well as listening to a paper so I’ve divided the topics into four areas: You and the Court, You and your opponent, You and your client and Your manners. The first three areas derive from the expectations of ethics. The last is more concerned with polite behaviour or etiquette.

5. I've drawn on three sources for the substance of the paper –

    - The *Barristers' Conduct Rules* (issued by the New South Wales Bar Association on 8 August 2011).
    - My own experience.
    - Responses to an email I circulated to my colleagues (and no, I am not going to identify any contributors from the last source and references will be gender-neutral).

You and the court

The general proposition

6. Your overriding duty is to the court, to act independently and in the interests of justice. It goes without saying that you must not deliberately (or even recklessly) deceive the court. If you find that you have innocently misled the court then you must make sure that the misconception is corrected as soon as you realise. It makes a good impression on the judicial officer when an advocate makes a point of correcting something that was misleading.

Some examples

7. One of my colleagues emphasises in this context the importance of being fearless when necessary before a judicial officer. "Too many advocates" my colleague points out "seem to want to placate the judicial officer ". There are some fine lines here of course. You do not do this rudely or arrogantly. You do it with respect. You need to be sure that you understand what the judicial officer's point is before you disagree or point out an error. But it is important, if you think the judicial officer is heading down

and erroneous path, that you make your position clear. My colleague says that a practitioner "should be able to walk away without thinking, I should have told the judge what I really thought."

8. Another illustration of your duty to the court is assisting a judicial officer who may be new in the particular jurisdiction where you are appearing. I regularly ask for assistance in civil cases. Although I practised in civil when I was at the private bar, that was in the 1980s. Some of my colleagues have come to the bench from a civil background and will be sitting in crime. It is very important that you assist them. It is part of your primary responsibility being to the court.
9. If your client has a record which has been overlooked by the prosecution, you must tread very carefully. You cannot try to lead evidence which suggests that your client has no record. Nor can you continue to let your client appear by the false name they gave to the police when they were arrested. As the interstate colleague who provided me with the case (*Hatty v Pilkington* (No. 2) (1992) 35 FCR 433) where this happened said, your client can always be “potentially one’s worst enemy”.
10. If it is apparent to you that the court has misunderstood the effect of an order which it has made then it is your duty to draw that to the court’s attention.
11. Avoid the risk of becoming a witness in the case. A barrister can’t. A solicitor should be careful. If you are the author of an affidavit and also appearing, make sure there won’t be anything controversial in the affidavit. You can hardly make a disinterested submission to the court about your own credibility or apparent meaning in the affidavit.
12. It is important that you provide the court with the relevant authorities, even if they are against you. This is part of your duty to the court not to knowingly let it fall into error. If there is binding authority or legislation directly against you, you must draw this to

the court’s attention. You have to be ready to deal with it. It’s no good when the judicial officer is sitting alone in chambers and comes across an authority provided by the other side which contains a killer point against you and which you’ve said nothing about. One of my colleagues observes that "one is frequently given a case in a sentence matter which has nothing in common with the case at hand or is under a different provision with a difference max." The colleague refers to a waste of judicial time reading these cases and how the High Court "has emphasised that consistency is achieved by comparing like cases." If you are going to refer to an authority, posing to yourself these two questions first will assist: "What does this case stand for?" and “How will this case assist the judicial officer in reaching a decision in our case?"

13. Submissions on sentence are important. If you are for an offender it is important to make realistic submissions and to have informed your client of the real likely outcomes and not just your hopes. Do not ask for a bond or a suspended sentence when it is clear that there must be a full-time custodial sentence. Part of your preparation will indicate that, if you are asking for an outcome such as a home detention or intensive corrections order, it will need an assessment first. If you are for the Crown the judicial officer will sometimes ask you (I do) if a particular sentence will mean the judicial officer falls into appealable error. Your response must be considered. It is not a submission which should be lightly made.
14. With a few exceptions, your personal opinion is irrelevant to the court. The court wants your submissions.
15. Avoid behaviour which gives the impression that you and the judicial officer know one another personally even if this is so. This is especially important if one of the other parties is unrepresented. It not only gives the impression to others present that they are “outsiders” in this process, but more fundamentally it gives the impression

that you might enjoy a special favour with the court which is denied to them and would be unfair if it existed. This extends to your dealings with the associate or the court officer before the judicial officer comes on to the bench. Always bear in mind the impression you are giving to the untutored onlooker who is expecting equal treatment from the process that you are both engaged in.

16. The *Barristers' Conduct Rules* require a barrister not to communicate directly with the court "concerning any matter of substance" unless the court has first communicated with the barrister requiring a response or unless the barrister's opponent has agreed beforehand. If you find you need to communicate with the court about a procedural matter (or indeed any matter) then without exception provide a copy of that communication to your opponent.

Statutory intervention

17. Note what s 56 of the *Civil Procedure Act 2005* does. It provides for an "overriding purpose". It imposes an obligation on the court. It imposes two obligations on parties to proceedings. It prohibits certain conduct by "any solicitor or barrister representing [a] party". You have a statutory obligation: you must not put your client or another party in breach of their statutory obligations to assist the court in its obligation to give effect to the overriding purpose of the *Civil Procedure Act* to facilitate the just, cheap and quick resolution of the real issues in dispute.

18. You have a further obligation to narrow the issues in dispute. Professor Dal Pont, author of *Riley's Solicitor's Manual*, argues that such legislation views lawyers as "collaborators in the administration of justice" who are "expected to have a moderating influence on their clients" (Professor Dal Pont, 'Lawyers increasingly

required to assist in administration of justice. Collaborators in due process', *Law Society Journal*, May 2010, 38-39).

19. Legal practitioners vary in the importance which they place on their discharge of these obligations. You must seek leave to excuse any non-compliance.
20. Examples include the standard directions given in personal injury cases in the civil jurisdiction of the District Court. The discharge of your statutory obligation to the court also means confining your evidence, cross-examination and submissions to the issues which are genuinely in dispute. A barrister has an additional duty to "limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case". Gleeson CJ used to say in advocacy lectures to readers that an advocate had an obligation to exercise their professional skill in selecting the issues to run. You don't run everything in the hope that something will get up but you exercise your professional skill in selecting the real issues to run. You make a forensic judgement. You must be on time and ready to run the case when it is due to commence. You must be prepared. You may not have absolutely everything in place when the case starts but you need to have done enough preparation to commence the case, to know where you are going and to be able to anticipate any questions from the bench which may arise at the start.
21. Another of my colleagues points to the importance of practitioners communicating with one another to discharge their obligations. The colleague points out that it used to be that "members of the profession regularly communicated with each other and many issues in litigation were resolved without the filing of multiple notices of motion, bulky affidavits or lengthy arguments". The colleague observes that "there seems to be a reluctance to use the telephone and the preference is for acrimonious and

aggressive e-mails and correspondence." It is important that you do not just sit in court in a busy call over or motion list without speaking to your opponent and attempting to identify the issues which will be in dispute so that the time spent arguing the point can be minimised. It is not meant to be you and your opponent who do not like each other but your respective clients. Make sure you provide your opponent with any written submissions, authorities or additional affidavits before you get to your feet. It is simply a waste of court time for those to be handed over to your opponent when you both stand up.

22. You are in a very privileged position in being able to make serious allegations against people in public. That position is entrusted to legal practitioners who are educated, trained and bound by their obligations. The armoury of forensic weapons available to practitioners are usually wielded in public and can cause damage.

Examples from the court processes

23. Before alleging matters of fact in pleadings or submissions, you must have reasonable grounds for believing that there are facts which provide a proper basis for the allegation. This is an obligation to the court because if you make a submission about a fact and the court finds that fact in accordance with your submission but there is no reasonable basis for the finding, then the court has been led into error and the parties may be put to the unnecessary expense of an appeal.
24. You must exercise care in seeking to invoke the coercive powers of the court. Examples include the short service of subpoenas and an order to the Corrective Services Commissioner to bring a prisoner to court. The invocation of power must be reasonably justified and appropriate for the advancement of your client’s case.

Obviously it must not be made to harass or embarrass anyone or to obtain some collateral advantage.

25. You must exercise great care in making allegations against people. You have to be sure that the allegations are reasonably justified and appropriate for the advancement of your client's case. Obviously they cannot be made to harass or embarrass someone. If you must make an allegation that somebody has been engaged in criminality, fraud or other serious misconduct then you must be sure that there is a reasonable basis for the allegation and your client wishes the allegation to be made after having been advised of the seriousness of the allegation and, as the *Barristers' Conduct Rules* say, "of the possible consequences for the client and the case if it is not made out." One of my colleagues points out that they sometimes encounter lawyers accusing each other in court of lying in affidavits or submissions on motions. As the colleague says, that is really an accusation of professional misconduct when what is really meant is misinterpretation or misunderstanding.
26. The obligations extend to cross-examining a witness on credit. You must always think carefully before asking a question in cross-examination. It assists to ask yourself this question: how will I use the answer to this question in my closing address? In cross-examining a witness on credit you must be sure of how the answer will assist you in a submission on credit at the end of the case. If the answer cannot assist you then the question should not be asked. The test suggested by the *Barristers' Conduct Rules* is whether "acceptance of the suggestion would diminish the credibility of the evidence of a witness".
27. Another example is where you are conducting a plea in mitigation and have instructions which involve making allegations of serious misconduct against another person where that person is not able to answer the allegations. You must seek to

avoid identifying that person unless disclosure of the person's identity is necessary for the proper conduct of your client's case.

28. Always be careful of making allegations against persons who are not in a position to answer them. Remember that you are in a public place and a record is being made of your allegations which is available to the public. It is blatantly unfair for you to make an unnecessary claim discrediting a person who cannot answer that claim.

You and your opponent

29. When you realise that you may be making an application to adjourn a hearing, you must take steps to inform your opponent as soon as possible. You should let your opponent know the grounds of the application. With your opponent's consent you should notify the court of the application.

You and your client

30. If you are appearing for an offender in sentence proceedings, it is vital that you know the options which are available to the court. You must have considered all of the available options in advance of deciding which ones you will propose. You must note any pre-requisites for a particular option, such as assessment reports.
31. Make sure you have instructions from your client before applying for a discharge of the jury. This is a forensic decision. Another jury may be far less sympathetic to your client. I have presided over a case where defence counsel opposed the discharge despite a question from a juror which potentially compromised his client.

32. Despite your client's wishes, your obligation is to exercise your forensic judgement and give advice independently and in accordance with the proper administration of justice. You are more than a mouthpiece of your client. You may have to exercise forensic judgement contrary to your client's wishes. I have seen one barrister advance an explanation for his client's conduct which was contrary to his client's evidence. The barrister acknowledged that and then proceeded, properly, to make the submission. You may consider your client's wishes but you are not a mere mouthpiece.

33. It is your decision whether or not to call your client in sentence proceedings. I am occasionally asked whether or not I "wish to hear from the offender". That is a matter for the practitioner's forensic judgement. There are very good reasons for calling your client in sentence proceedings and some good reasons not to. You are paid to make those decisions and to exercise that judgement.

Your manners

34. I circulated an email to my colleagues inviting them to provide me with pet hates. Here is a selection.

- Bickering/sledging. Avoid this if you can. I say "if you can" because you may have an opponent who persists in the practice. The judge will notice it and will also notice how you handle that. Judicial officers don't like having to act as parents disciplining unruly children.
- Interruptions. One of my colleagues complains about interrupting answers being given in cross-examination. The complaint extends to not allowing

the witness to finish answering and excessive speaking over witnesses by practitioners which, the colleague observes, is not only discourteous but leads to confusion in the transcript.

- Eye contact. Look at the judicial officer when bowing.
- Greetings. “Good Morning”. This topic causes some division. Palmer J was very critical of the practice in *Wilson v The Department of Human Services-re Anna* [2010] NSWSC 1489 at [106]-[113]. I respectfully think his Honour has a good point about the greeting being offered to a witness whom you are cross-examining. Whether or not you offer it to the judicial officer depends on a number of factors including whether it is that judicial officer’s practice or not. It is not my practice because I am a little conservative in that regard. One of my colleagues has pointed out that it is "a bad look especially if the other party is unrepresented".
- Fast talking. Always keep an eye on the judicial officer and whether or not he or she is writing. You want them to be able to keep up. If you have just handed a lengthy document to the judicial officer to read then don't keep talking while the judicial officer is obviously reading it.
- Timeliness. If late, or if you have another commitment, communicate. It is a simple matter of courtesy to contact the judicial officer and your opponent if you are unavoidably delayed.
- Patience. Wait your turn in addresses. I often have to remind practitioners that we are not in America and that the custom here is that, in addresses, the first finishes their address before the second commences. Remember the custom is that one simply does not interrupt an opponent’s address. Also remember of course that you do not address until all your evidence is

completed. You do not want to be in a position where you are making a submission during your address which is not supported by evidence which you could have called. That is another way of saying that you must be prepared.

- Being excused. There is no need to ask to be excused when appearing in a busy call over or mention list.
- Oath/affirmation – silence. You do not move or speak while the oath or affirmation is being administered. In fact I was taught that you sit down during that process. Make sure that anyone in the court for whom you are responsible observes that as well.
- Oath/affirmation – choice. The *Evidence Act* provides that a witness has the choice between an oath or an affirmation. The court officer should have explained that to the witness but it often does not happen or the witness does not understand. You should explain the choice before any witness you call goes into the witness box and announce it as the witness is approaching the witness box. By the way, it goes without saying that anyone in court who refers to the witness box as the "stand" will face summary execution.
- Mobile phone. It also goes without saying that you turn off your mobile phone before coming into court to or, at least, put it on silent. Alert clients, witnesses and family.
- Jammed. If you are jammed, let the judicial officer know and they will often try to accommodate you. It is when you simply don't turn up and there is no explanation that it causes annoyance. When asked where you have been, be frank. Do not be tempted to invent an explanation. Information

gets back to judicial officers and you can be caught out and it will affect your trustworthiness.

- Introductions. There used to be a custom whereby Counsel would introduce themselves to a judicial officer before appearing before that officer for the first time. It seems to have fallen into disuse. Do not be afraid to do it before me. If you are appearing before a judicial officer who does not know you, then make sure they know your surname and spell it clearly to them. That helps them and keeps the transcript accurate.
- Client turning up. I am told that some practitioners will make an adjournment application for a client on bail and have told their client not to come to court. That is an affront to the court because it takes for granted the decision which the court will make and also means that your client is not there to sign the bail continuation slip or for you to take instructions regarding any variation in bail conditions.
- Robing. If you are a member of the Bar don't be too lazy to robe if you are mentioning your matter and the judge is robed.
- Explain reasoning. One of my colleagues complains about practitioners who "want to explain the rationale or the reasoning process behind their decisions/tactics". I agree with that colleague although I do appreciate that it is sometimes important for a practitioner to have something on the record. But as a rule the judicial officer just needs to know your application or position without necessarily knowing why you are making that application or taking that position.

35. His Honour Judge Stephen Walmsley S.C. provided me with a copy of his excellent paper *"Some observations on District Court advocacy: A judge's perspective"* which was a valuable source for some of these, and other, points.

Conclusion

36. So how do you behave in a forensically legitimate way? Overall you need to be honest with yourself, the court, your client and your opponent. But you will also need to be courageous, courteous and cautious, to communicate well and to use your common sense.

R.C.

13.1.12