

**THE HON T F BATHURST AC**  
**CHIEF JUSTICE OF NEW SOUTH WALES**  
**TOONGABBIE LEGAL CENTRE SEMINAR**  
**DON'T BE COURT OUT: THE BASICS OF COURT ETIQUETTE**  
**SATURDAY 28 MARCH 2020\***

1. I would first like to acknowledge the traditional custodians of the land on which we would have meet today but for these difficult circumstances, the Darug people and pay my respects to their elders, past, present and emerging. We acknowledge the legacy of the law on the discrimination, disempowerment and dislocation of Aboriginal peoples from their land and communities and the barriers to justice that Aboriginal peoples have faced and continue to face.
2. It is with great pleasure that I was invited again by the Toongabbie Legal Centre to speak today after having spoken at the Centre's Annual Fundraising Dinner in 2013. As I did then, I continue to commend the excellent work of organisations such as the Toongabbie Legal Centre in promoting access to justice for the most vulnerable and disadvantaged members of our communities.
3. I was however, surprised to be asked to speak on etiquette. I do not know what the word 'etiquette' conjures up for you, but I can't help but think the notion seems a bit antiquated, evoking images of girls at finishing school balancing books on their heads and stern headmasters disciplining unruly children. Rules of etiquette govern almost every aspect of our lives, from how to eat tricky food like peas, to clinking glasses to make a toast, and an important one in today's climate, covering your nose when sneezing.
4. A quick search reveals that books have been published on everything from 'Church Etiquette' to 'Golf Etiquette' to my personal favourite, 'Punk Rock Etiquette'. Upon discovering this, I was certainly relieved I wasn't asked to speak on any of those topics.
5. Court etiquette, whilst perhaps not as interesting as punk rock etiquette, is simply another body of rules developed over centuries that govern one's

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\*I express my thanks to my Research Director, Ms Jessica Elliott, for her assistance in the preparation of this address.

conduct in the courtroom. The Oxford Companion to Law defines 'legal etiquette' more broadly as:

“the code of honour and customary rules of behaviour within the legal profession. To a large extent this is unwritten, customary, and assimilated by entrants to the profession and inculcated by the example of their seniors as much as by precept”.<sup>1</sup>

6. Of course, court etiquette is a subset of wider 'legal etiquette'. Although one might describe etiquette as proscribing certain “rules”, they are really conventions and practices that are not set down in stone. I think that court etiquette is the courtesies, customs and good manners extended between lawyers appearing in court, and between those lawyers and the Bench, court staff and other persons involved in the court process. These courtesies and conventions range for example across things such as when to sit and stand, when to bow and what to say. By and large, these are matters of common sense. However, there are more peculiar aspects of court etiquette that one does not learn growing up. I don't know about you, but I certainly wasn't taught to bow or address my opponents as my 'learned friend' in the schoolyard. If you'd asked me as a teenager what a Bar table was, I would have given you a very different answer to today.
7. I think that a large part of court etiquette comes down to good manners. The relationship between court etiquette and manners is certainly not new. A former United States Federal Judge, Frank Irvine commented in 1913, “the lawyer should bring his manners into the court room. If he possesses none, he should borrow a set for court room use”.<sup>2</sup> Please forgive Judge Irvine's use of the male pronouns, although perhaps he was simply indicating that female lawyers would never need to “borrow a set of manners” as they, of course, had them already.
8. Now, this may come as a surprise to you, but my first time in Court was quite a long time ago. However, even after five decades of being in courtrooms, I still remember that the early days of appearing in court can be a daunting experience for us all. When do I sit and when do I stand? Am I meant to bow? How do I even bow? I assure you that these questions have all flitted across the mind of even the most battle-scarred trial lawyer or experienced judge at some stage in their careers.

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<sup>1</sup> David M Walker, *The Oxford Companion to Law* (Oxford University Press, 1980) 434.

<sup>2</sup> Deane Frank Irvine, *Ethics of the Trial Court* (1913, Cornell University) cited in Thomas F Gaffney, 'Borrowed manners: Court etiquette and the modern lawyer' (2012) 86 *Australian Law Journal* 842, 842.

9. The aim of this seminar is to demystify the courtroom by providing a set of practical do's and do not's. I will focus on the basics of etiquette that apply to solicitors. I should say that even some of the more experienced lawyers here today could sometimes use with a reminder. This etiquette applies equally to barristers, in addition to an additional set of conventions. My favourite being that a robed barrister should not be caught eating meat pies walking down Macquarie Street.<sup>3</sup> I hope that this session will make you a more confident advocate when you are next in court and eliminate any worries about committing any faux pas.
10. In this seminar, I will first discuss why court etiquette is important. I will then turn to address the substance of court etiquette. I will address in turn the etiquette that applies before, during and after you step foot into a court.

### **Professional conduct rules**

11. I must first emphasise that one should remain familiar with the *Australian Solicitor Conduct Rules*. Generally speaking, the 'unwritten' rules of etiquette are not specifically encapsulated in these professional duties. Despite this, one must remember that members of the profession owe a paramount duty to the Court and to the administration of justice.<sup>4</sup> Furthermore, pursuant to the *Australian Solicitor Conduct Rules*, solicitors are required to avoid conduct that would "be prejudicial to, or diminish the public confidence in, the administration of justice" or "bring the profession into disrepute".<sup>5</sup> One must remember that discourtesy can amount to unsatisfactory professional conduct or professional misconduct.<sup>6</sup>

### **Why is court etiquette important?**

12. Now, I imagine that many of you are sitting here asking why is court etiquette important? I don't blame you. Many may view court etiquette as anachronistic or unnecessary. Some critics go so far to say that court etiquette is designed to be exclusionary. They might say that etiquette serves

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<sup>3</sup> The Hon Mark Speakman SC MP, Attorney General of New South Wales, 'Swearing-In Ceremony for the Honourable Justice Andrew Bell as a Judge of the Supreme Court of New South Wales and President of the Court of Appeal' (28 February 2019) [12] <[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell\\_20190228.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Bell_20190228.pdf)>.

<sup>4</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* rule 3.1.

<sup>5</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* rule 5.1.

<sup>6</sup> For two recent examples in New South Wales see *Griffin v Council of the Law Society (NSW)* [2016] NSWCA 364; *Council of the Law Society of NSW v Donnelly* [2017] NSWCATOD 34.

to *exclude* members of the public from court who are not familiar with its quirks. I recognise that court etiquette has been described as “part of the self-seeking mystification of the legal process by lawyers”.<sup>7</sup>

13. Despite these views, I do not think that court etiquette is simply a relic of the past or an exclusionary tool. These rules of etiquette are not simply antiquated rules of behaviour that are out of step with modern court room realities. In fact, I think court etiquette has an important role to play in our modern justice system for four reasons.

14. First, complying with court etiquette is a sign of respect. Respect for the court as an institution, and respect for all those involved in the court process, whether that is the bench, your opponent or court staff. The demonstration of this respect is in turn important for instilling public confidence in the administration of justice more broadly.

15. Second, I think that complying with court etiquette plays an important functional role that is often overlooked. Court etiquette facilitates the efficient and orderly conduct of proceedings by providing a set of well-known conventions and customs.<sup>8</sup> For example, when all practitioners comply with rules on when to stand and speak, and when to sit down, this helps in the speedy resolution of disputes. These rules ensure that each lawyer has an opportunity to put their case and command the focused attention of the bench. An older, albeit still relevant New South Wales Solicitor’s Manual stated that:

“Professional courtesy, within the ambit of one’s duty to a client, should always be observed; otherwise the law of the jungle would result. The principles involved rest on etiquette and make life tolerable in what would otherwise be a bitter existence”.<sup>9</sup>

The functional role of etiquette is particularly important in our adversarial system of justice where judges are heavily reliant upon lawyers and are unable to undertake independent inquiries.

16. The third reason why I think court etiquette is important is that it prevents any appearance of bias or partiality. Conduct in a courtroom should be courteous, however, not overly familiar or friendly. To take an example, no matter how well-intentioned you may be, a lawyer should not commence an address to a

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<sup>7</sup> John McKechnie, ‘Basic Trial Advocacy: A Survival Guide to Court Etiquette’ (2015) 42(4) *Brief* 36, 37.

<sup>8</sup> Thomas F Gaffney, ‘Borrowed manners: Court etiquette and the modern lawyer’ (2012) 86 *Australian Law Journal* 842, 842.

<sup>9</sup> Roger J Atkins, *The New South Wales Solicitor’s Manual: A Collation of the Law and Practice Relating to the Profession of the Solicitor in New South Wales* (Law Society of NSW, 3<sup>rd</sup> ed, 1975) 54.

judge with the introduction of 'good morning'. Now, why are these two words so problematic? Such a familiar greeting can compromise the public perception of the judge as an impartial and independent arbiter. For example, one can imagine that if a self-represented party thought their opponent was overly friendly with a judge, this would understandably compromise their confidence in the impartiality of our justice system. Consequently, one should avoid announcing your appearance in court with the salutation of "Good morning". It is best to avoid any such personal flourishes, and instead commence with the uncontroversial introduction of 'if the court please' or its variant, 'may it please the court'.

17. In fact, a decision of the Supreme Court in discussed the use of this greeting and the problems it presents for the appearance of impartiality.<sup>10</sup> In this case, solicitor routinely greeted the judge in the Magistrates' Court with the salutation of "Good morning, your Honour" or "Good afternoon, your Honour". In accordance with court etiquette, the opposing solicitor did *not* greet the judge in such a way. Palmer J stated that the solicitor's "apparent familiarity with the Judge could have caused a misapprehension in the mind of [the plaintiff]" that the solicitor "enjoyed a relationship with the Judge which was something more than merely professional".<sup>11</sup> Palmer J concluded that "such a suspicion should never be allowed to arise".<sup>12</sup>

18. The last, but certainly not least, reason why court etiquette is important is that it goes hand in hand with good advocacy. Advocacy, as has been often said, is the art of persuasion. A lawyer who has won the respect of the bench and his or her opponent is, because of that fact, likely to be more persuasive than someone who has not. Conversely, a lawyer who fails to comply with court etiquette signals their inexperience to the bench, and equally may put the bench, court staff and their opponent 'off side'. An American judge once claimed that

"civility is to the courtroom and adversary process what antiseptic is to a hospital and operating room. The best medical brains cannot outwit soiled linen or dirty scalpels – and the best legal skills cannot either justify or offset bad manners".<sup>13</sup>

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<sup>10</sup> *Wilson v Department of Human Services – re Anna* [2010] NSWSC 1489.

<sup>11</sup> *Wilson v Department of Human Services – re Anna* [2010] NSWSC 1489 at [108].

<sup>12</sup> *Wilson v Department of Human Services – re Anna* [2010] NSWSC 1489 at [108].

<sup>13</sup> Chief Justice Warren E Burger, 'The Necessity for Civility' (Speech delivered at the American Law Institute, 18 May 1971).

19. I think that complying with court etiquette is one of the easiest, quickest and cheapest ways to be a more persuasive advocate. Even the infamous character Cleaver Greene from the ABC television series *Rake* was always courteous, even if often disingenuously.

### ***The basics of court etiquette***

20. I will now move on to what basic court etiquette requires. I will first address the etiquette that applies before you even enter into the courtroom, second the etiquette that applies in the courtroom itself, and finally, the rules of etiquette that persist even once you have left the courtroom.

### ***Etiquette before you enter the courtroom***

21. Although the majority of the rules of etiquette concern behaviour within the courtroom itself, there are a few tips to help you put your best foot forward before. The first point that must be made is about your clothing and personal appearance. Fashion dilemmas have vexed lawyers for centuries. If you thought getting the perfect knot in your tie was hard, in ancient Rome, the exact way in which an advocate should wear his toga was prescribed: “The left arm should only be raised so far as to form a right-angle at the elbow, while the edge of the toga should fall in equal lengths on either side”.<sup>14</sup>

22. Now, I am the last person that anyone would go to for fashion advice. Fortunately for you, I won't be spouting any pearls of wisdom in the fashion department. Instead, my advice is simply to emphasise that you do not want your appearance to distract from the task at hand. You do not want to be in the position of a barrister who was summoned before the Attorney-General for England and Wales, Sir Richard Bethell in the mid-nineteenth century for appearing in court wearing a waistcoat with gold buttons.<sup>15</sup> In another story, Mr Justice Byles, a nineteenth century judge once complained to a barrister, Mr Coleridge, (who would later become Lord Chief Justice of England) that “I have very little pleasure in listening to the arguments of Counsel whose legs are encased in light grey trousers”.<sup>16</sup> Rest assured no judge in 2020 will criticise your legs being encased in grey trousers.

23. Obviously, you should be wearing business attire and if in doubt, erring on the side of dressing more conservatively. It is always handy to have a jacket, and if you are a man, a tie in your office in case you are required to pop into court.

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<sup>14</sup> Gary Slapper, *More Weird Cases: Comic and Bizarre Cases from Courtrooms around the World* (Wildy, Simmonds & Hill Publishing, 2011) 104.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

24. Like in many areas of life, men have it so much easier than women in simply being able to wear a suit and tie. Indeed, the Patron of the Toongabbie Legal Centre, Her Excellency the Honourable Margaret Beazley, Governor of New South Wales told a humorous story at her Farewell Ceremony as the President of the New South Wales Court of Appeal. Her Excellency described that when she was appointed to the Bench, she had heard that one of her judicial colleagues did not approve of women in pants.<sup>17</sup> Not letting that stop her, she wore a red pants suit to her first judges' meeting. Fortunately, a lot has changed since this time and dress codes, particularly for women, have modernised.
25. However, do not think that dress codes for lawyers have relaxed altogether. There was an unusual case in the Federal Court in New York concerning whether a lawyer had a constitutional right to appear in court dressed as if he were at a baseball game.<sup>18</sup> The lawyer in question appeared in the civil court in Queens wearing denim jeans, an open-neck casual shirt, and a baseball cap printed with the words, 'Operation Desert Storm'. The judge denounced his choice of clothing, and the senior court clerk told him to remove his baseball cap. The lawyer subsequently alleged that he had a constitutional right to dress as he wished in court. The District Court of Eastern New York ruled that the lawyer did not have a constitutional right to express himself as he pleases because, "a courtroom is not a public forum for the expression of ideas". The Court ruled that unless someone has a religious reason to have his or her head covered, it is "generally accepted etiquette to remove an everyday hat when entering a courtroom".
26. The Australian National Imams Council has published a useful explanatory note which states that Muslim women wearing a headscarf (whether a Hijab, Burka or Nikab) does *not* present an obstacle to participation in the courtroom process.<sup>19</sup>
27. I would like to make one final point on the etiquette governing your conduct before you enter the courtroom. It is stating the obvious; however, the

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<sup>17</sup> Justice Margaret Beazley, 'Farewell Ceremony for the Honourable Justice Margaret Beazley AO as a Judge of the Supreme Court of New South Wales' (27 February 2019) [93] <[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Beazley\\_20190227.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2019%20Speeches/Beazley_20190227.pdf)>.

<sup>18</sup> See Gary Slapper, *More Weird Cases: Comic and Bizarre Cases from Courtrooms around the World* (2011, Wildy, Simmonds & Hill Publishing) 103.

<sup>19</sup> Australian National Imams Council, *Explanatory Note on the Judicial Process and Participation of Muslims* (2017) 6-7 <<https://www.anic.org.au/wp-content/uploads/2018/02/Explanatory-Note-on-the-Judicial-Process-and-Muslims.pdf>>.

importance of being punctual cannot be understated. The court will not wait for you. Double check the time and the particular court room in advance. Court lists are usually available late in the afternoon of the preceding day. This list will provide you with all the necessary detail. One should aim to be in the courtroom at least 10 minutes prior to when the proceedings are due to commence to give yourself enough time to complete an appearance slip and set up.

### ***Etiquette in the courtroom***

28. I will now move onto the core part of the rules of court etiquette: the rules that apply once one is inside the courtroom. I will address 6 points of etiquette concerning entering and leaving the courtroom, the Bar table, when to stand, forms of address, interactions with the Bench, conversations during court and finally, technology.

#### ***(a) Entering and leaving the courtroom***

29. Onto my first point, entering and leaving the courtroom. To someone unacquainted with courtroom etiquette, it would quite rightly seem absurd to have rules of etiquette governing the act of walking in and out of a courtroom. However, this simple act is in fact a symbolic gesture as the entry of the judge or judges into the courtroom marks the formal opening of the Court. Consequently, it is marked by distinct rules of etiquette. This means that if the Court is not yet in session, there is no need to bow.

30. The entrance of the judge or judges into court is typically preceded by three loud knocks on the back of the door leading from the judge's chambers into court and the announcement 'all rise' by the court officer. This is the cue for everyone in the court to rise from their seats and stand up in silence. The door will be opened by the tipstaff or associate and the judge or judges will walk to their seat. It is then customary that everyone in the courtroom bows their head at the same time as the judge bows and remains standing until the judge has taken his or her seat.

31. As with the opening of the Court, when the Court adjourns, everyone must stand and remain silent until the Judge has left. If you need to leave or enter the courtroom, bow to the Coat of Arms as you do.

32. I think that it is a common misunderstanding for people to think that the bow is directed to the judge. However, in fact it is in fact directed to the Coat of Arms located behind the judge. This tradition comes from the practice in the United Kingdom of bowing to the Royal Coat of Arms. The Royal Coat of Arms symbolises that justice comes from the monarch, and bowing therefore shows "respect for the Queen's justice".



33. Now, I know from experience that bowing is not always as easy as it sounds, especially when you are wrangling a stack of folders or an unwieldy trolley. For those of you familiar with the period television series *Downton Abbey*, do not feel like you have to do your best impersonation of the Butler Carson. Instead, a much simpler and so-called 'neck bow' is appropriate.

**(b) *The Bar Table***

34. My second point concerns the peculiarities of the Bar table. Who would have thought that what is ultimately just a piece of furniture could attract so many unusual rules of etiquette. These rules govern everything from which side of the Bar table to sit, to what objects you can place onto it, and when you can leave it. In fact, it is these rules that transform what is essentially just a desk into an indispensable feature of the courtroom.

**(i) *When and where do you sit at the Bar table?***

35. The first question that must be answered is when do you sit at the Bar table? The first rule of etiquette concerning the Bar table is that if counsel has been instructed to appear in a matter, they will sit at the Bar table and the instructing solicitor should sit behind. The exception to this is if counsel obtains the court's leave for the solicitor to sit at the Bar table, which will typically be granted. It is becoming increasingly common for solicitors to sit with barristers at the Bar table. For my part, I don't find it the least objectionable.

36. The second rule is that more senior members of the profession are given precedence at the Bar table. The most senior practitioner takes the centre chair. If in doubt, it is always a good idea to assume that you are the most junior member sitting at the table.

37. As a general rule, your client should not sit at the Bar table, except for in particular courts which require that the client and lawyer sit together at the Bar table, for example, in certain proceedings in the Family Court. Of course, litigants in person are another exception to this rule.

38. So let us assume that counsel has not been instructed in this particular matter. You approach the Bar table. The next question arises: which side of the Bar table do you sit on? Well, that all depends on whom you are representing. The rule is that the lawyer representing the applicant or plaintiff sits on the left-hand side of the Bar table and the lawyer representing the respondent or defendant sits on the right-hand side of the Bar table. A further rule to note is that in common law or crime, if counsel for if there is a jury box in the courtroom, the plaintiff or prosecutor sits nearest the jury box.

**(i) *Other quirks of etiquette governing the use of the Bar table***

39. Another rule of etiquette surrounding the Bar table is that you must stay behind the Bar table. You should not walk between the Bar table and the Bench. If you need to hand something up to the Bench or the Associate or Tipstaff, ask for permission and stay behind the Bar table while a member of the court staff takes the item.
40. A further unusual rule of etiquette is that the Bar table must not be left unattended while the judge is sitting. Sometimes, this will mean that you remain at the Bar table due to the absence or delay of counsel appearing in the subsequent matter. If for some reason the next matter has been called and there is no immediate appearance by another lawyer, remain seated until there is an appearance or until the judge excuses you. This avoids what has been described as “the discomfort of presiding over an empty Bar table”.<sup>20</sup>
41. It may seem petty, however, the rules of court etiquette even go so far as to govern what you can and cannot place on the Bar table. The key rule is that nothing unrelated to the case should be placed on the Bar table. This includes handbags, umbrellas and the like.

***(c) Standing when addressing the Bench or being addressed***

42. I will now step away from the Bar table and move onto the important rule of etiquette that one must stand when you are addressing the Bench or being addressed. Why is this particular rule of etiquette so important? Aside from the obvious advantage that it makes you easier to hear and see, it also displays courtesy to the bench and assists in maintaining the attention and focus of the court.
43. At the start of the proceedings, after the matter has been called, one should stand to announce your appearance. This essentially means providing your name and who you represent to the bench, and importantly, for the court record. One should state something along the lines of, “May it please the court, Bathurst, spelled b-a-t-h-u-r-s-t, for the defendant”.
44. A further, related rule of etiquette is that there should normally be only one lawyer standing at any one time, unless both lawyers are being directly addressed by the judge. If you are speaking, and another person starts speaking, you should cease speaking immediately. This means that when your opponent wishes to make an objection, you should sit whilst he or she stands to make their objection.

***(d) Forms of address***

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<sup>20</sup> Thomas F Gaffney, ‘Borrowed manners: Court etiquette and the modern lawyer’ (2012) 86 *Australian Law Journal* 842, 851.

45. I will now turn to how you address the bench and your opponent whilst you are in court. When you are appearing in what are described as the 'superior courts' and the District Court and Local Court a judge on the bench should be addressed as 'Your Honour'. This means that the judge should be referred to as 'Your Honour' irrespective of whether you are in the High Court or the Land and Environment Court. The exception to this rule is if the judge is the Chief Justice of a particular court, in which case they should unsurprisingly be addressed as 'Chief Justice' or 'Chief Judge'.
46. In court, judges should always be referred to in the third person, not in the second person. For example, one should say, "Your Honour will find the evidence of..." rather than "You will find the evidence of...".
47. If one is addressing quasi-judicial officers, such as a Registrar or Prothonotary, they should also be addressed as 'Registrar' or 'Prothonotary'.
48. Now for the sake of completeness, if you were to address a judge outside court, you should address them as 'Judge', or 'Chief Justice' or 'Chief Judge' rather than 'Your Honour'.
49. Turning now to how one addresses their fellow lawyer. When referring to a fellow lawyer, they should be referred to as 'Mr' or 'Ms' or 'my friend'. If the lawyer is a barrister, they should be referred to as 'my friend' or 'my learned friend'. 'Learned' simply means qualified to practise and is traditionally reserved for members of the bar.<sup>21</sup> In criminal proceedings, when the opposing barrister is appearing as the Crown Prosecutor, he or she is traditionally referred to as 'the Crown' or 'Mr Crown' or 'Ms Crown' rather than 'my learned friend'.

#### **(e) Interactions with the Bench**

50. I will now turn to the important rules of etiquette governing your interactions with the Bench. I will make three points: first, the importance of unwavering courtesy, second, interruptions, and third, questions from the bench.

##### **(i) Unwavering courtesy**

51. No matter how displeased you are with a ruling by the Bench, or how obtuse you think your opponents are, you must never show any sign of discomposure. One must always remain courteous and polite, no matter the situation. One might say that court teaches lawyers to be skilled actors, or have flawless poker faces. The unwavering courtesy expected of you extends not only to the judge, but also to your opponent, to witnesses and to court

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<sup>21</sup> J L Glissan, *Advocacy in Practice* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2011) 217 [10.13]

staff. It is also worthwhile noting that this courtesy should go both ways in the courtroom. The bench should also treat you politely and with courtesy.

52. If you disagree with a judge on a point of law or the evidence, you must argue that point.<sup>22</sup> One should never simply say to the judge, 'I think that is wrong'. A lawyer in court never 'thinks' or expresses personal opinions, instead you 'submit'. Instead, you should express your disagreement using a phrase such as, 'In my respectful submission, your Honour, the case is not authority for that proposition...'. If a judge rules against you, you should simply accept the ruling and move on. Where you have had the opportunity to make a submission on a particular point and the judge has ruled, it is both poor advocacy and poor manners to try to continue the debate.
53. One should treat your opponent as you wish to be treated. For example, do not make disparaging comments whilst your opponent is on his or her feet or object unnecessarily.
54. It is valuable to keep in mind that courtesy in no way diminishes the strength of one's advocacy. As an American judge has stated,

"a lawyer can be firm and tough-minded while being unfailingly courteous. Indeed, there is a real power that comes from maintaining one's dignity in the face of a tantrum, [and] from returning courtesy for rudeness".<sup>23</sup>

**(ii) Avoid interruptions**

55. A related, yet discrete, point that should be emphasised is that an advocate should never interrupt the judge. This is both impolite and a poor tactical decision. One should wait until the judge has completely finished. I learnt from experience that it is always better to simply jot down your reply and wait to respond until the judge has finished. This way, you are not putting the judge off side by your poor manners.
56. A study published earlier this year revealed that female High Court judges were interrupted far more frequently than their male colleagues.<sup>24</sup> In 2017, the three female judges on the High Court, Kiefel CJ, Bell and Gordon JJ received 69 per cent of the total interruptions, whereas their four male counterparts received only 31 per cent. In 2017, 46 per cent of interruptions

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<sup>22</sup> Ibid 220.

<sup>23</sup> Justice M B Durant, 'Views from the Bench: Civility and Advocacy' (2011) *Utah Bar Journal* 35.

<sup>24</sup> Amelia Loughland, 'Female Judges, Interrupted: A Study of Interruption Behaviour during Oral Argument in the High Court of Australia' (2019) 43(2) *Melbourne University Law Review* (advance).

were classified as pre-emptive where “the advocate intentionally cuts off a judge’s speech by answering a question before it has been asked or diverts oral argument with their own point”.

57. The study did not examine whether this phenomenon occurred in relation to judges in other courts. However, I would not be surprised if this was the case. Such interruptions are undoubtedly impolite and reproduce gendered behaviours and attitudes towards speaking dominance. The author of the study stated that these “intrusive interruptions ...[are] not just zealous advocacy but an assertion of conversational dominance, which undermines the female judge’s capacity to ask meaningful questions of counsel”.
58. You should avoid interrupting the judge entirely, and particularly aware of any unconscious bias and gendered norms of behaviour and speech you may have. All judges, male or female, should be afforded the same level of courtesy and deference.

### ***(iii) Questions from the Bench***

59. Court etiquette also prescribes a particular way of responding to questions from the Bench. It is Murphy’s Law that the Bench will inevitably ask you the one question you do not know how to answer. Listen closely to comments or questions by the Bench. If you do not understand a question, do not be afraid to politely ask the judge if they would mind clarifying or expanding upon the question.
60. If you do not know the answer to the question, the worst thing you can do is guess. Instead, indicate to the judge that you are not able to currently provide an answer to that, or do not have instructions in relation to that point. Tell the judge that you will seek to obtain the answer immediately, or ask if the judge is willing to stand the matter down for a short time for you to seek instructions. Alternatively, if circumstances allow, you may ask to send up a note on the point at a later point.

### ***(f) Technology***

61. I will now turn to the etiquette governing the use and pitfalls of technology in the courtroom. With some courts offering free Wi-Fi, such as the Federal Court, and many Bar tables featuring inbuilt power points, it is becoming increasingly common for solicitors and barristers to bring a laptop or iPad to court.
62. Whilst these devices are undoubtedly helpful in some circumstances, they can also be distracting. Make sure that the sound of these devices is muted before you turn it on, and whilst you are using it. Furthermore, even if the judge cannot see you reading your emails or even worse, playing ‘candy

crush', it is almost certain that someone else will. I promise you that your screen will be visible to the people seated behind you, including potentially, your client.

63. Furthermore, mobile phones should be turned off or set to silent. Some courts may have a stricter rule that mobile phones must be switched off, so follow that. The ringing of a mobile phone is invariably disruptive. Let me assure you that you do not want the 'bring bring' of a mobile phone to be coming from your pocket.

***(g) Conversations during court***

64. A final note on the etiquette governing private conversations in court. The obvious rule is that one should avoid having any conversations that are not absolutely necessary in the courtroom. If you must have a particular conversation, it is preferable to step outside the courtroom, well out of ear shot of the court. If you must have the conversation in court, the conversation should be as discreet and quiet as possible.

65. Furthermore, it is important to keep in mind that there are particular occasions in which absolute silence is required, namely, when a witness is sworn in, when a plea is entered, a sentence is handed down, appearances announced and a judgment is delivered.

***Etiquette after you leave the courtroom***

66. You can take a sigh of relief as we have now waded through the basics of etiquette that apply in the courtroom itself. However, before you become too pleased, remember that court etiquette also governs your conduct even after you leave the courtroom.

67. I must emphasise the importance of not saying anything in the vicinity of the court about the case or the judge that you would not want shared. It is remarkable how often a private conversation between lawyers will simply continue as they enter an elevator in the court building. Let me assure you that that lift is not as private as you think. Almost undoubtedly, your conversation about the obtuseness of the judge or the unfairness of the verdict will be overheard by your opponent or court staff and will likely wind its way back to the bench. I think that it is best to err on the side of saying nothing. It is one of those rare occasions where the best topic of conversation is the weather.

68. Furthermore, remember that the doors to Court rooms are often left open in accordance with the principle of open justice. Be conscious of the volume of your conversations held outside the court room that may still be heard within the court room itself.

69. You should avoid any interactions with the judge that may compromise the appearance of impartiality whilst you are appearing before them in a matter or a judgment is being reserved. For example, if you for example run into the judge in the street, it goes without saying that you should not discuss any aspect of the case with the judge.
70. Finally, I must mention the etiquette concerning the use of social media by lawyers to comment on your courtroom experience. Standards of etiquette and more specifically the rules of professional conduct apply equally to an individual's use of social media, as they do in their day-to-day professional and personal lives. Although it goes without saying, a practitioner should refrain from publishing anything on social media which "expresses an opinion (for example, about a judicial officer or a solicitor) that is likely to diminish public confidence in the legal profession or in the administration of justice or which otherwise brings the legal profession into disrepute". Consequently, a solicitor may breach the rules by "post[ing] a flippant or sarcastic comment on Facebook or Twitter about a fellow member of the Bar, the judiciary, one's client or a matter in which counsel is briefed".

### ***Conclusion***

71. We have now covered what may be described as the basics of court etiquette. The main thing to take away is that court etiquette is to a large degree synonymous with respect. Respect to the bench, to your opponent, and to the administration of justice more broadly. We should not lose sight that when we, as lawyers, uphold what some may describe as exquisite, and others excruciating rules of etiquette, we are facilitating the fair and efficient administration of justice and maintaining public confidence in our justice system. And if it is any comfort, I can assure you from personal experience, that not even the best lawyer upholds court etiquette perfectly all of the time.