

LEVEL

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TWENTY  
SEVEN

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C H A M B E R S



# **Court Etiquette – Working with the Bar and Persuading the Bench**

**Kristi Riedel and Sophie Gibson**

**Thursday 15 April 2021**

## >> **Crash and burn scenario**

<https://app.animaker.com/animo/SOiLa1Kj5JKNG2VA/>

## >> Check applicable practice directions

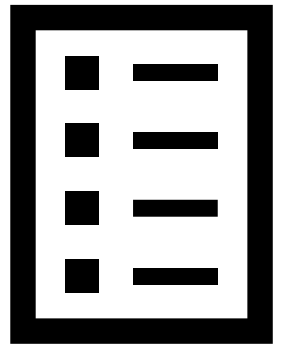
> Check whether there are practice directions relevant to your hearing

> Practice directions can be found at:

<https://www.courts.qld.gov.au/court-users/practitioners/practice-directions>

> Practice directions = useful guide to what the Court will expect at the hearing

> **NB** practice directions vary between jurisdictions



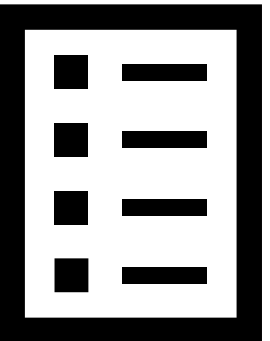
## >> Check whether there are protocols in force

> Check whether the relevant Court has issued any protocols which would vary the effect of a practice direction

> Protocols are published on the daily law list

<https://www.courts.qld.gov.au/daily-law-lists/daily-law-lists>

> The Court will expect that you have reviewed the law list and are aware of any protocols currently in force



## >> Corresponding with the Court prior to hearing

✗ Never correspond with the Judge or his or her associate directly – particularly if it concerns matters of substance

✓ **Always** send proposed correspondence to the other side and obtain their consent prior to it being sent

✓ **Always** copy the other side in

> The Federal Court publishes useful guidelines if you are ever unsure about the appropriate course to take

<https://www.fedcourt.gov.au/going-to-court/chambers-staff>

## >> Afternoon before the hearing

- > Check and print the daily law list

<https://www.courts.qld.gov.au/daily-law-lists/daily-law-lists>

- > Pack your “court kit”

- Bull dog clips
- Stapler
- Highlighters
- Post-it notes
- Spare pens
- Court ID card
- Copy of the *Uniform Civil Procedure Rules 1999 (Qld)* or *Federal Court Rules 2011 (Cth)*

- > Print all necessary material for Court and speaking notes

# >> Day of the hearing

- > Arrive at work early
- > Review speaking notes
- > Ensure you print all necessary material
- > Double check court list
- > Barristers - confirm whether you are required to robe  
<https://qldbar.asn.au/baq-cms/court-dress>
- > Arrive at Court at least 20 minutes prior to the hearing



## >> Case Study 1: Adjournment Application

- > **Scenario:** Mary is informed that her client's barrister is now unable to attend a hearing for a summary judgment application set down for two days' time.
- > Mary decides to request an alternative date for the application.
- > It is unknown to Mary that the other side's legal team are only available on the day the hearing is scheduled.
- > **What Mary did:** Mary emails the judge's associate to inform her that the hearing date for the summary judgment application needs to be adjourned to an alternative date. She copies in Jamal, the lawyer acting for the applicant.

**Was this appropriate?**

## >> Answer - No

> Mary had not checked with Jamal whether the request for an adjournment would be opposed by the respondent. Therefore, her communication was not uncontroversial.

**What should have occurred?**

## >> What should have occurred?

- > Mary should have contacted Jamal, explained the situation and sought consent to adjourn the summary judgment application to another date.
- > If Jamal's client would not consent to an adjournment, Mary should have explained that her client intended to file an application seeking an adjournment.
- > Mary should have then prepared a draft email to the judge's associate explaining the situation, and identifying that her client would soon file an application for an adjournment. That email should have been provided to Jamal to obtain his client's consent prior to being sent to the judge's associate.



## >> Case Study 2: Consent Orders

- > **Scenario:** The applicant was ordered to file its expert evidence by a certain date. Wei, the lawyer acting for the applicant, informs Rami, the lawyer acting for the respondent, that the applicant's expert evidence is likely to be three weeks late.
- > **What Wei and Rami did:** Rami emails the judge's associate (copying in Wei) informing the Court that the applicant's expert evidence will not be filed in time, and that the respondent is disappointed with the delay as it would push out the Court ordered timetable.
- > Wei and Rami subsequently send multiple emails to each other (copying in the judge's associate), discussing an updated timetable of next steps.

## >> Answer- No

- > One party should not express views on the conduct of the other party to the Court.
- > Parties should not copy chambers in on correspondence that does not require involvement of the Court or that is unnecessarily burdensome on the Court.

## >> What should have occurred?

- > Rami should have respectfully told Wei that the respondent was disappointed with the applicant's failure to file evidence within the Court ordered timetable, and explained what prejudice his client may suffer.
- > Rami and Wei ought to have discussed an updated timetable given the likely delay in the applicant's expert evidence, and incorporated that timetable into draft consent orders.
- > Wei should have emailed the judge's associate, copying in Rami, briefly informing the Court that the applicant's expert evidence will not be filed in time, and attaching signed consent orders for the judge's consideration and approval.

A blurred, grayscale image of an office environment with desks, computers, and office chairs, serving as a background for the text.

## >> **At Court (15 minutes before the hearing)**

- > What are you wearing?!?
- > Have you found your opponent?



# >> At the call over: entering the Court room

- > Court room protocols
- > Is your phone switched off?



## >> At the call over: at the Bar Table

What's your case about?

> What does your client want?

> How long is it going to take?

# >> At the call over: at the Bar Table

## > Communicating with the Court

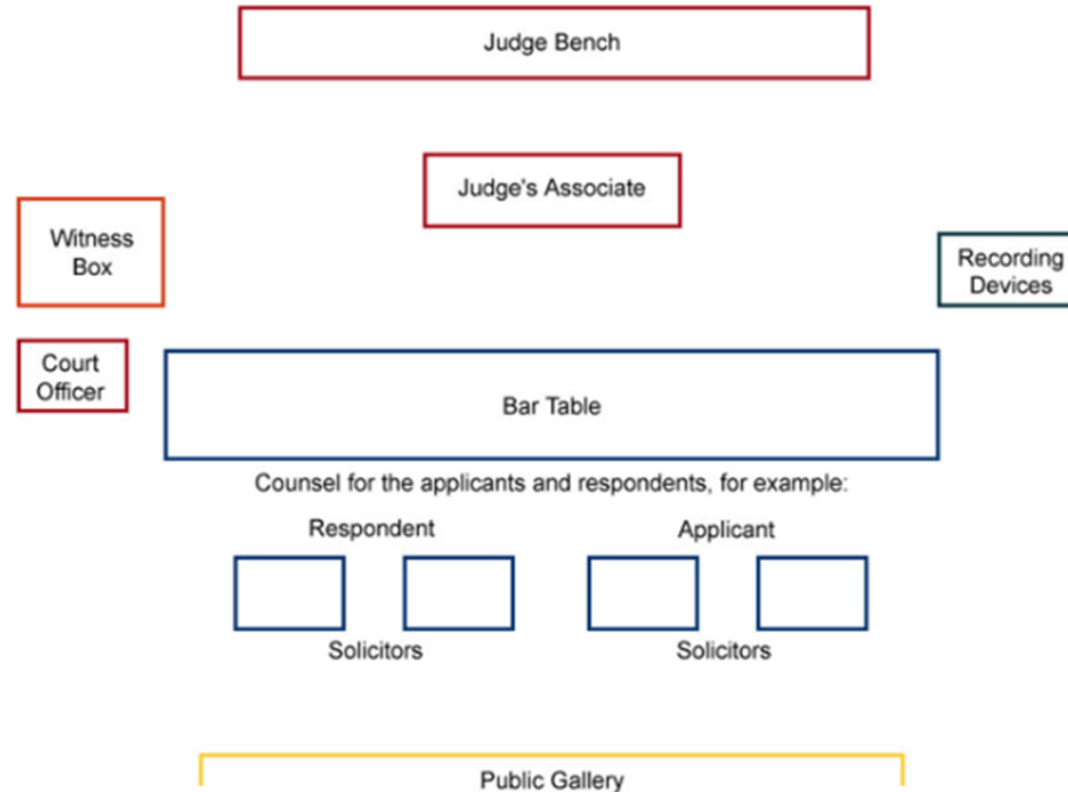
- *Dispute Resolution Associates Pty Ltd v Selth* [2020] FCA 844

*[114] Fourth, whilst the primary Judge was perhaps sharp in saying to Mr Minus, “don’t talk over me, mister, or you will have a trip to the cells” (transcript p 10 ll 31-32), the statement in context fails to evidence bullying or harassment by the primary Judge. As examination of the transcript clearly shows, this statement by his Honour was made in the context of Mr Minus persisting in making submissions concerning the timing of the adjourned hearing. This was after his Honour had already considered Mr Minus’ submissions concerning his need to commute from Camperdown to the Court, and after his Honour had already ruled on the time and date of the adjourned hearing. I also note that Mr Minus is not an inexperienced litigant in person, but rather an experienced legal practitioner, and ought properly have understood appropriate Court etiquette (including that parties and Counsel in Court should not speak over the Judge).*

## > Leaving the Bar Table

# >> During the application/substantive appearance

> Know where to go in the Court room





## >> **During the application/substantive appearance**

> Court protocol

> Do you have everything you need?



# >> What about Covid-19?

> Appearing over the telephone



# >> What about Covid-19?

> Appearing via videolink

## US lawyer accidentally turns on cat filter during court hearing via Zoom

Posted Wed 10 Feb 2021 at 12:21pm



Texan lawyer Rod Ponton had to ask for help to remove the cat filter during a virtual court hearing.

## >> What about Covid-19?

> Appearing via videolink

> Broward Circuit Judge Dennis Bailey:

*'it is remarkable how many attorneys appear inappropriately on camera. One male lawyer appeared shirtless and one female attorney appeared still in bed, still under the covers'.*

*'putting on a beach cover up won't cover up you're poolside in a bathing suit'.*



# >> What about Covid-19?

## > Appearing via videolink

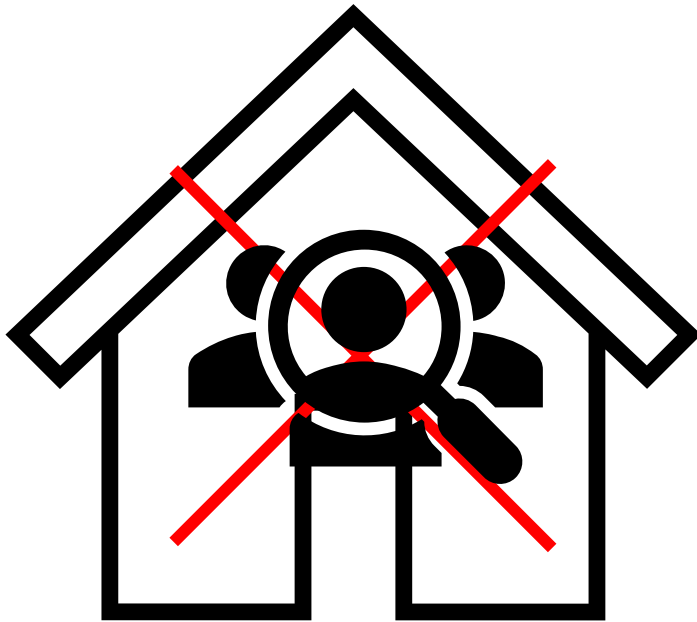
- Kalil v Eppinga [2020] NSWDC 407



## >> What about Covid-19?

- Appearing via videolink

- *SafeWork NSW v McConnell Dowell Constructors (Aust) Pty Ltd* [2020] NSWDC 330



## >> After the hearing

> Follow through

> Speak no evil!



## >> Case Study 3: Errors in Court

- > Seamus is in court representing his clients in the context of an application to strike out parts of the plaintiff's statement of claim.
- > In the course of his preparations for the application, he came across a decision which supported his client's argument perfectly, only to find that it had been set aside on appeal!
- > It is such a good decision though, that he brings it to the Court's attention but does not mention that it has been overturned.
- > Also, in his flurry to finalise his preparations for the application, he misread the content of one of the affidavits sworn in support of his client's case. He prepares his argument based upon the mistaken facts, and makes representations to the Court on the basis of that mistaken understanding. After he finishes his oral submissions, he realises his error. But no one has noticed! So Seamus says nothing and lets the hearing progress uninterrupted.
- > Is the approach taken by Seamus the right one?

# >> Answer - No

- > Legal practitioners have a duty not to deceive or knowingly or recklessly mislead the Court.
  - Solicitors' Conduct Rules: rule 19.1.
  - Barristers' Conduct Rules: rule 26.
- > Legal practitioners must also inform the court, if it has not already been informed, of any binding authority, appellate court authority and applicable legislation that they have reasonable grounds to believe to be directly on point, against the client's case.
  - Solicitors Conduct Rules: rule 19.6.
  - Barristers' Conduct Rules: rule 31.
- > Seamus should have:
  - Informed the Court that the decision he referred to had been overturned on appeal.
  - Advised the Court of his mistaken understanding of the facts as soon as he became aware of his oversight.

## >> Case Study 4: Difficulties in Court

- > Gabriella was appearing in Court on an application for urgent injunctive relief.
- > Unfortunately, the judge before whom Gabriella was appearing, was having a bad day.
- > The judge was not receptive to Gabriella's arguments and would not let her present her client's case.
- > The judge appeared (to Gabriella) to favour her opponent and permit all of their objections to her client's evidence.
- > In fact, the judge was having such a bad day, they adjourned the matter for an early break before Gabriella had finished her argument.
- > Gabriella was furious!
- > At first, during the application, Gabriella started speaking over the judge, interrupting, in an attempt to get her argument across.
- > Then, as the judge spoke louder to overcome Gabriella's interruptions, Gabriella started shouting! She threw down her pen in a huff and exclaimed 'why won't you listen to me your Honour?'
- > When the judge adjourned the matter, Gabriella was so made that she refused to stand and simply sat at the Bar Table as the judge left the court room.
- > Did Gabriella do the right thing?



# >> Answer - No

- > Sometimes people have bad days, we simply need to take it all in our stride.
- > Legal practitioners have a duty to the court and the administration of justice is paramount. They also have duties to act in the best interests of a client and be honest and courteous.
  - Solicitors' Conduct Rules: rules 3, 4.
  - Barristers' Conduct Rules: rules 5, 12.
- > Remember that you are trying to be persuasive. Be patient and polite. Listen to what you are being asked by the judge. Perhaps you are saying it wrong and you are at cross purposes? Try rephrasing your argument.
- > Remember that you have a duty to assist the Court, and think about how you can make the judge's job easier. Being well prepared, knowing the rules and protocols and trying to sort out administrative matters with your opponent beforehand (so as to not burden the judge with them) are all useful things to do.
- > Above all, don't get angry or show any frustration!

## >> Gold standard scenario

<https://app.animaker.com/animo/MQFsuzJElaQZnNix/>



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