Ethics and etiquette

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The public and the judiciary trust that legal practitioners will conduct themselves in accordance with ethical rules and obligations. An effective courtroom advocate must be mindful of the ethical principles guiding his or her practice and also have regard to the etiquette appropriate to courtroom appearances. Expanding on the presentation given by the Hon Justice Graham Hiley at the 2015 Criminal Lawyers Association of the Northern Territory Conference, this article provides both newly admitted and more experienced practitioners with a sound basis for understanding the origins and sources of legal ethics and the potential consequences for practitioners who fall foul of their duties. Particular reference is made to the Northern Territory jurisdiction but the principles guiding professional conduct are applicable to all Australian practitioners. Justice Graham Hiley of the Northern Territory Supreme Court also offers tips on courtroom etiquette from the perspective of the bench.

INTRODUCTION

The main focus of this article is the appropriate conduct for lawyers appearing in court. All counsel have obligations to the court, to their client and to others including their opponent. Some, for example prosecutors and counsel appearing for model litigants, and counsel appearing for clients with limited mental or intellectual capacity, have additional duties. Breaches of ethical obligations can have serious consequences both for the lawyer and the client.

Detailed information about such obligations is to be found in professional conduct rules, articles and texts, and in decisions of various courts and tribunals.[1] This article is intended to remind readers of those obligations and expectations, and to indicate where such further information might be obtained.

The topic of etiquette covers conduct which is not necessarily the subject of professional rules but which comprises some of the courtesies and conventions of legal practice.

ORIGINS OF RULES AND ETHICAL OBLIGATIONS

Many centuries ago, indeed probably beyond eight centuries ago when the *Magna Carta* was sealed, disputes were settled by use of force, and, for those

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[1] See eg, *Attorney-General (Qld) v Colin Lovitt QC* [2003] QSC 279; *Re Morel* [2015] SASCFC 20; *Law Society Northern Territory v Ian John Rowbottam*, (12 September 2008) (Disciplinary Tribunal: see http://lawsocietynt.asn.au/images/stories/documents/Reasons-for-decision.pdf); *Connop v Law Society Northern Territory* [2016] NTSC 38.

wealthy enough, by battle. The practice of the warring parties engaging expert warriors to conduct the battle on their behalf has become more civilised over the years, with parties now having greater access to guns for hire in the form of lawyers trained to represent them in courts and tribunals.

Nowadays, most laws are made by Parliament, and courts and tribunals[2] have been established to provide a forum for the conduct of battles when disputes arise between people subject to those laws. In addition to what a statute says about the powers, functions and duties of particular courts and tribunals, most courts and tribunals have their own rules, and practice directions, which set out the manner in which the battles are to be conducted between the litigants. Many of those rules and practices are designed to ensure that litigants can fight their battles on a level playing field irrespective of the size of their respective resources.

Rules of ethics and etiquette have been developed in an endeavour to ensure that those who represent the litigants in court, whom we shall refer to as advocates, conduct themselves in accordance with standards that have been recognised and defined over many years as the kind of standards expected of a person who has been admitted to practice as a lawyer, and thus as a member of the legal profession. All members of a civilised society should be able to have the utmost faith in the justice system, which necessarily requires that those who participate in that system conduct themselves in accordance with the professional standards so recognised and defined.

Consistent with the aim of providing justice to all, rules and practices have been developed in relation to those performing particular roles in particular forms of litigation. These include the "cab-rank rule" that has applied to barristers for centuries[3] and special obligations upon prosecutors in criminal matters.[4]

SOURCES OF ETHICAL RULES AND OBLIGATIONS

Any person who practices in the Northern Territory as a lawyer falls within the jurisdiction of the *Legal Profession Act 2006* (NT) (LPA). A "lawyer" is a person who has been admitted to the legal profession by the Northern Territory Supreme Court under the LPA, or by another Supreme Court under a corresponding Act.[5] A "local legal practitioner" is an Australian lawyer who holds a current local practising certificate, and an "interstate legal practitioner" is an Australian lawyer who holds a current interstate practising certificate but not a local practising certificate.[6] The term "legal practitioner" applies to barristers and solicitors.

The Northern Territory Supreme Court has the power to admit a person as a lawyer under the LPA unconditionally or on any conditions it considers

[2] The word "tribunal" is used to include bodies that may not have been established pursuant to a statute, eg, bodies which regulate issues involving members of a club or other organisation to which people belong.

[3] Thomas Erskine's role defending Thomas Paine for seditious libel in December 1792 is celebrated as an early example of the "cab rank" rule in action.

[4] See eg *Rules of Professional Conduct and Practice* (NT) 17.46–17.57.

[5] *Legal Profession Act 2006* (NT) s 5.

[6] *Legal Profession Act 2006* (NT) s 6.

appropriate.[7] Once admitted, the person's name is entered on the local roll,[8] and the person becomes an officer of the Court.[9] An interstate legal practitioner engaged in legal practice in the Northern Territory also has all the duties and obligations of an officer of the Supreme Court, and is subject to the jurisdiction and powers of the Court in respect of those duties and obligations.[10]

A person is not permitted to engage in legal practice or hold him or herself as entitled to engage in legal practice in the Northern Territory unless he or she holds a practising certificate.[11] Practising certificates are granted and renewed each year by the Law Society Northern Territory (Law Society).[12] The Law Society has the power to amend, suspend or cancel a practising certificate.[13] It maintains a register of the names of lawyers to whom it grants local practising certificates.[14]

Chapter 4 of the LPA deals with discipline and complaints. Its purposes are set out in s 461 of the LPA. In broad terms it defines and deals with "unsatisfactory professional conduct" and "professional misconduct", by reference to standards of competence and diligence expected of a reasonably competent legal practitioner and other conduct that might concern the person's fitness to engage in legal practice.[15]

Most of those standards have now been set out in professional conduct rules. Chapter 8, Pt 8.1 of the LPA provides for legal profession rules. The purpose of that Part is set out in s 688:

> The purpose of this Part is to promote the maintenance of high standards of professional conduct by Australian legal practitioners and Australian-registered foreign lawyers by providing for the making and enforcement of rules of professional conduct that apply to them when they practise in this jurisdiction.

The primary source of information for those practising in the Northern Territory is the *Rules of Professional Conduct and Practice* (NT) (NTPCR) made by the Law Society pursuant to its rule making powers in ss 689–695 of the LPA. The NTPCR apply to all legal practitioners save for those practising solely as barristers. Barristers would be expected to behave in accordance with the Australian Bar Association *Barrister's Conduct Rules*[16] as adopted by the Northern Territory Bar Association's *Barristers' Conduct Rules* (Barristers' Conduct Rules NT).[17]

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[7] *Legal Profession Act 2006* (NT) ss 25–26.

[8] *Legal Profession Act 2006* (NT) s 27.

[9] *Legal Profession Act 2006* (NT) s 28

[10] *Legal Profession Act 2006* (NT) s 83.

[11] *Legal Profession Act 2006* (NT) ss 18–19.

[12] *Legal Profession Act 2006* (NT) s 54.

[13] *Legal Profession Act 2006* (NT) s 57.

[14] *Legal Profession Act 2006* (NT) s 87.

[15] See *Legal Profession Act 2006* (NT) ss 464–466.

[16] Australian Bar Association, *Barristers Conduct Rules* (Australian Bar Association, 2010).

[17] Northern Territory Bar Association, *Schedule to the Constitution of the Northern Territory Bar*

Other jurisdictions have similar professional conduct rules. For example New South Wales and Victoria have adopted the *Australian Solicitors' Conduct Rules* formulated by the Law Council of Australia.[18]

Professional rules can serve as a standard of conduct in disciplinary proceedings, a guide for action in a specific case, and as a demonstration of the profession's commitment to integrity and public service.[19] They are a reliable and important indicator of the accepted opinion of the members of the profession.[20] However, as Dal Pont points out, professional 'rules' should not be viewed as exhaustive of lawyers' ethical responsibilities. The tendency to reduce professional ethics to precise rules should not prompt lawyers to approach ethical rules as if they were regulations to be skilfully evaded or discourage lawyers from exercising professional judgment.[21]

CONSEQUENCES OF BREACHING ETHICAL OBLIGATIONS

The main sanction for a lawyer is found in the power of the Supreme Court to remove the person's name from the local roll. Once that happens in one jurisdiction, there will likely be similar ramifications for the person in other jurisdictions where he or she wishes to practice.[22]

Courts also have the power to try, convict and punish a practitioner for contempt of court. A breach of ethical obligations can constitute a contempt of court, if it is conduct that would tend to prejudice a fair trial or undermine public faith and confidence in the administration of justice.

Courts have various other powers aimed at ensuring that justice is done, for example to stay a proceeding where a person accused of a serious offence does not have proper legal representation[23] or to grant a retrial where a trial has miscarried due to the incompetence of legal counsel.

Courts also have, and have exercised, powers to order a practitioner to personally pay costs where he or she has been guilty of some kind of misconduct in the course of conducting litigation. This includes failures to ensure compliance with relevant court rules and directions. In addition to the inherent jurisdiction of

Association Incorporated – Barristers Conduct Rules (adopted 14 March 2002) <http://ntba.asn.au/wp-content/uploads/NTBA-Barristers-Conduct- Rules.pdf>.

[18] Law Council of Australia, *Australian Solicitors Conduct Rules 2011* (LCA, 2011).

[19] G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 27.

[20] *Chamberlain v Law Society of the Australian Capital Territory* (1993) 43 FCR 148, 154 (Black CJ).

[21] See discussion in Dal Pont, n 19, 27–29.

[22] See eg, Arthur Sideris who was struck off the roll of practitioners in NSW after it was discovered he had used his brother's academic records to gain entry with advanced standing to study a law degree: *The Prothonotary of the Supreme Court of New South Wales v Sideris* (unreported, New South Wales Court of Appeal, Kirby P, Priestley and Powell JJA, CA 40442/94, 15 August 1994). Mr Sideris applied for admission to the NT Supreme Court in 2013 and was refused. Note that a practitioner can be re-admitted in the same jurisdiction after being struck off: see eg, Claire Morel, a criminal lawyer who was struck off the roll of practitioners in South Australia in 2004 but readmitted in 2015: *Legal Practitioners Conduct Board v Morel* (2004) 88 SASR 401; [2004] SASC 168; *Re Morel* [2015] SASCFC 20.

[23] *Dietrich v The Queen* (1992) 177 CLR 292.

a superior court to make such orders in relation to officers of that court,[24] such powers are expressly conferred in and under some statutes, for example s 43(3)(f) of the *Federal Court of Australia Act 1976* (Cth),[25] and rules and practice directions such as O 63.21 of the *Supreme Court Rules* (NT) and Northern Territory Supreme Court *Practice Direction 6 of 2009 – Trial Civil Procedure Reforms*.[26] See also cases following the application of ss 37M and 37N of the *Federal Court of Australia Act 1976* (Cth).[27]

Lawyers may also be liable under general negligence or contract law for breach of their duties of competence, care and skill, subject of course to advocates' immunity.

Complaints about the conduct of Northern Territory practitioners can be made to the Law Society.[28] The Law Society can institute proceedings in the Legal Practitioner's Disciplinary Tribunal, dismiss the complaint or impose a reprimand or a fine.[29] It can also take immediate action by suspending the person's practising certificate if it considers that necessary in the public interest.[30]

Should the Legal Practitioner's Disciplinary Tribunal consider that a breach of the ethical rules constitutes unsatisfactory professional conduct or professional misconduct, it may impose a range of disciplinary sanctions. These include a fine or reprimand, suspension or cancellation of one's practising certificate, an order to pay compensation to the client,[31] order to pay costs,[32] and a recommendation to the Supreme Court that the person be struck off the roll.[33]

Aside from formal sanctions, the risk to a lawyer of a loss of reputation is very serious, particularly in a small jurisdiction such as the Northern Territory. A lawyer's effectiveness for his or her client depends upon enjoying a reputation of

[24] See for example *Myers v Elman* [1940] AC 282; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178.

[25] *De Sousa v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 41 FCR 544; *Caboolture Park Shopping Centre Pty Ltd (in liq) v White Industries (Qld) Pty Ltd* (1993) 45 FCR 224; *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169, 236; *Kumar v MIMIA* (2004) 133 FCR 582; [2004] FCA 18, 22; *Lemoto v Able Technical Pty Ltd* (2005) 63 NSWLR 300; [2005] NSWCA 153; *Bagshaw v Scott* [2005] FCA 104; *Tran v Minister for Immigration Multicultural and Indigenous Affairs (No 2)* (2006) 228 ALR 727; [2006] FCA 199; *Gippreal Pty Ltd v Kurek Investments* [2009] VSC 344.

[26] See Northern Territory Supreme Court, *Practice Direction 6 of 2009 – Trial Civil Procedure Reforms*, 11 June 2009, [29] as amended by Northern Territory Supreme Court, *Practice Direction 10 of 2009 – Trial Civil Procedure Reform*, 5 November 2009.

[27] For example, *Modra v Victoria* [2013] FCA 779.

[28] *Legal Profession Act 2006* (NT) s 472 (unless initiated by the Law Society).

[29] *Legal Profession Act 2006* (NT) ss 496, 499.

[30] *Legal Profession Act 2006* (NT) s 502.

[31] *Legal Profession Act 2006* (NT) s 534.

[32] *Legal Profession Act 2006* (NT) s 529.

[33] *Legal Profession Act 2006* (NT) s 55. Other options available to the Tribunal include ordering that a practitioner's practice is managed in a certain way (s 525(5)(f)) and ordering that a practitioner take a specific course in further legal education (s 525(5)(b)). See eg *Law Society Northern Territory v Ian John Rowbottam*, (12 September 2008) (Disciplinary Tribunal: see http://lawsocietynt.asn.au/images/stories/documents/Reasons-for-decision.pdf).

appropriate behaviour. A lawyer who develops a reputation for a lack of honesty and courtesy may be disadvantaged by more careful scrutiny by judges of the court and will find it more difficult to secure the trust of colleagues when seeking to conclude agreements or resolve disputes.[34]

It is not just new practitioners who need to be reminded of their obligations to the court. Experienced Victorian defence barrister Colin Lovitt QC was found guilty of contempt of court in 2003 by the Supreme Court of Queensland following an incident in the Brisbane Magistrates Court where he had turned towards the media present in court and said that the Magistrate was a "complete cretin".[35]

HIERARCHY OF OBLIGATIONS

It is essential that there be public confidence in the court system and in the administration of justice. The integrity of the system relies particularly on the conduct of its practitioners, 'officers of the court'. All members of the legal profession have a paramount duty to the court.[36]

Judges are particularly reliant upon the advocates who appear before them. The practitioner is the intermediary between client and decision maker, simultaneously assisting both by putting forward the best case for the client's interest that is consistent with law.[37]

At times there might be tension between what a client wants and what the lawyer is obliged or permitted to do. Where there is a clear duty owed to the court that duty will override any duty owed to the client.

The NTPCR provides a guiding statement on each category or "level" of duty: to the court, to the client and to others including other practitioners. Each guiding statement will be addressed below and some specific examples provided.

Practitioners' duties to the court

The guiding statement in NTPCR about duties to the court states:

> Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents.[38]

Note that "court" is defined in the NTPCR to include any body described as such and all other tribunals exercising judicial, or quasi-judicial, functions, and

[34] The Hon Justice Pagone, "Divided Loyalties? The Lawyer's Simultaneous Duty to Client and the Courts" (Monash Guest Lecture in Ethics, 20 November 2009).

[35] *Attorney-General (Qld) v Lovitt* [2003] QSC 279.

[36] Legal Services Commission of South Australia, *Legal Professional Ethics* (10 November 2014) <http://www.lsc.sa.gov.au/dsh/ch02s01.php>.

[37] The Hon Justice Pagone, n 34.

[38] *Rules of Professional Conduct and Practice* (NT) (under heading "Practitioners' Duties to the Court").

includes professional disciplinary tribunals, industrial and administrative tribunals, statutory or Parliamentary investigations and inquiries, Royal Commissions, arbitrations and mediations.[39]

Particular duties include:

a) The duty to terminate a retainer with a client if a client insists on withholding information required by a court order with the intention of misleading the court, and will not allow the practitioner to make the relevant information available;[40]

b) The duty to do the work the practitioner is retained to do within sufficient time to comply with court directions;[41]

c) Advocacy Rules: rr 17.1–17.58 which apply to legal practitioners acting as advocates (but not to those practice solely as barristers) – eg, independence and responsible use of privilege;[42]

d) Prohibitions on practitioners:

   i. drawing any court document alleging criminality, fraud or serious misconduct unless the practitioner already has supporting factual material, the evidence would be admissible and their client wishes the allegation to be made,[43]

   ii. appearing as an advocate in a case where the practitioner will be required to give evidence material to the determination of contested issues;[44]

   iii. becoming the surety for their client's bail.[45]

Obligations to and relations with the client

The guiding statement in the NTPCR about relations with clients states:

> Practitioners should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Practitioners should maintain the confidentiality of their clients' affairs, but give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Practitioners should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.[46]

Specific examples of ethical duties include:

[39] *Rules of Professional Conduct and Practice* (NT) "Definitions".

[40] *Rules of Professional Conduct Rules and Practice* (NT) r 11.1.

[41] *Rules of Professional Conduct Rules and Practice* (NT) r 10A.2.

[42] This includes particular duties on prosecutors: see *Rules of Professional Conduct Rules and Practice* (NT) rr 17.46–17.57.

[43] *Rules of Professional Conduct and Practice* (NT) r 12. See also "Preparation of Affidavits", r 11.

[44] *Rules of Professional Conduct and Practice* (NT) r 13.

[45] *Rules of Professional Conduct and Practice* (NT) r 16.2.

[46] *Rules of Professional Conduct and Practice* (NT) (under the heading "Relations with Clients"). See also, *Connop v Law Society Northern Territory* [2016] NTSC 38, [42]–[46].

a) accepting a retainer from a client only when the practitioner has capacity to attend to the work with reasonable promptness;[47]

b) avoiding a conflict of interest;[48]

c) the duty to inform the client of alternative dispute resolution options;[49]

d) maintaining the confidentiality of a client's affairs even when not covered by legal professional privilege;[50] and

e) restraints on acting against a former client.[51]

Obligations to and relations with other practitioners

The guiding statement in the NTPCR about relations with other practitioners states:

> In all of their dealings with other practitioners, practitioners should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.[52]

These duties include:

a) Not misleading opponent about facts and evidence when negotiating a settlement;

b) Taking all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that communications are courteous and avoid provocative/offensive language;[53]

c) Not to giving undertaking that relies on a third party whose cooperation cannot be guaranteed, and not asking a fellow practitioner to make an undertaking that relies on a third party whose cooperation cannot be guaranteed;[54]

The NTPCR also contain rules about taking over a matter from another practitioner, transferring a practitioner's practice and communicating with another practitioner's client.

Obligations to and relations with third parties

The guiding statement in the NTPCR about relations with third parties states:

> Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of

[47] *Rules of Professional Conduct and Practice* (NT) r 1.1.

[48] *Rules of Professional Conduct and Practice* (NT) rr 8.1, 8.2.

[49] *Rules of Professional Conduct and Practice* (NT) r 10A.3.

[50] *Rules of Professional Conduct and Practice* (NT) rr 2.1, 2.2.

[51] *Rules of Professional Conduct and Practice* (NT) r 3.

[52] *Rules of Professional Conduct and Practice* (NT) (under the heading "Relations with other Practitioners").

[53] *Rules of Professional Conduct and Practice* (NT) r 18.

[54] *Rules of Professional Conduct and Practice* (NT) r 19A, 20. See also, *Connop v Law Society Northern Territory* [2016] NTSC 38, [42]–[46].

> others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.[55]

The same principles of honesty and fairness dictate that a practitioner must not lie on behalf of their client or make statements which grossly inflate their client's rights.

Potential for conflict between duties

Although practitioners must act in accordance with their client's instructions, they must also use a degree of forensic judgment in following those instructions in order to prevent submissions to the court which the practitioner knows will deceive the court.[56]

Ethical obligations on defence counsel whose client has confessed guilt to them are set out in NTPCR 14:

a) The role of counsel for the defence is still to endeavour to protect the accused from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence charged,[57] and the defence counsel can ensure that the prosecution is put to proof of its case.

b) Note that if a client does confess, the first thing to be determined is whether it is in fact a true confession of guilt. In some cases the law will be sufficiently subtle or complex that it will be difficult for a lay client to determine whether they are in fact guilty of an offence or not.[58]

c) The Rules provide that defence counsel must not put a defence case inconsistent with the client's confession, falsely claim that another person committed the offence or continue to act for that client if the client insists on misleading the court by giving evidence denying guilt.

The duty of confidentiality is most notorious for creating the public perception that "legal ethics" is an oxymoron. Notorious examples of lawyers whose duties of confidentiality to their clients overrode other public interests included:

a) A lawyer who hid knowledge of the whereabouts of the buried bodies of people that his client had previously murdered,[59]

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[55] *Rules of Professional Conduct and Practice* (NT) (under the heading "Relations with Third Parties").

[56] Legal Services Commission of South Australia, n 36.

[57] JE Singleton, *Conduct at the Bar and Some Problems of Advocacy* (Sweet & Maxwell, 1946).

[58] See Chief Justice Riley, "Ethics and the Criminal Defence Lawyer" (Paper presented at Criminal Lawyers Association Northern Territory Eighth Biennial Conference, Bali, 25 June 2001).

[59] The lawyer was later charged with violating a public health law that required notification to authorities by anyone knowing of the death of a person without medical attendance. The court held this statutory duty was overridden by the lawyer's duty of confidentiality. The New York State Bar Association's Committee on Professional Ethics ruled that the lawyer had an ethical duty to withhold the incriminating information about his client's previous murders. Disney et al, *Lawyers* (Law Book Co., 2nd ed, 1986) 679.

b) A lawyer who allowed other people to go to prison for conduct that the client had privately confessed to.[60]

A practitioner who is informed that his or her client intends to disobey a court order is obliged to advise the client in the strongest terms against such action and to warn of the dangers of so doing. However counsel is under no duty to inform the court or the legal representatives of his opponent of the intention of the client. An exception to this rule is where the intended conduct of the client constitutes a threat to the safety of any person.[61]

If counsel has to withdraw from acting in circumstances where the accused insists on misleading the court, counsel should withdraw without alerting the court to the problem arising from the proposed course of conduct to be adopted by the accused because to raise that matter with the court would be to act in breach of the obligation to maintain confidentiality.[62]

The obligation of candour in relation to the presentation of facts is different from that which applies in relation to the law.

a) Counsel have a positive obligation to inform the court of judicial decisions that are of a binding or persuasive authority or provisions of legislation which appear to be directly in point, irrespective of whether the decision or legislation supports the client's case.
b) On matters of fact, the duty imposed upon counsel is to not knowingly mislead the court.[63] That includes misleading the court by way of statements or conduct that may be regarded as "half -truths".

See for example *Meek v Fleming*[64] where, in a civil case, the defendant, a chief inspector of police, had been reduced in rank to station sergeant for disciplinary reasons relating to the deception of a court in another matter. Counsel for the defence disguised the reduction in rank by presenting the defendant in plain clothes and referring to him as "Mr". Counsel did not correct the plaintiff's counsel or the judge when they referred to the defendant as "Inspector". On appeal the court held that the conduct amounted to concealment as it enabled the defendant to "masquerade as a chief inspector of unblemished reputation enjoying such advantages as that status and character would give him at the trial" and that "the duty to the court here was unwarrantably subordinated to the duty to the client".

COMMUNICATION WITH CHAMBERS

Although the courts and the profession should be working together toward the goals of effective case management and efficient communication, these objectives

[60] The lawyer only revealed the information when the client died seven years later. He was subject to much criticism for failing to make an earlier disclosure but the Law Societies in England and Scotland asserted that the solicitor had been bound not to disclose the confession without the consent of his client. Disney et al, n 59, 677.

[61] *Rules of Professional Conduct and Practice* (NT) r 17.20

[62] D Napley, *The Technique of Persuasion* (Sweet & Maxwell, 4th ed, 2003) 57ff.

[63] See discussion of *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [51].

[64] *Meek v Fleming* [1961] 2 QB 366.

must be viewed in the context of the overarching need for impartiality on the part of judges and ethical conduct on the part of practitioners.

Much of the case law dealing with improper communications with chambers focuses on the courts' concern with ensuring procedural fairness and avoiding an apprehension of bias. However, practitioners should be aware that improper communications could also constitute a breach of their ethical obligations.[65]

The ease of email communication in this day and age makes it easy for parties to communicate directly with a judge's chambers but practitioners must ensure their communications adhere to r 17.40 of the NTPCR (echoed in r 56 of the Northern Territory Bar Association Barristers' Conduct Rules NT) which provides that:

> A practitioner must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:
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> (a) the court has first communicated with the practitioner in such a way as to require the practitioner to respond to the court; or
>
> (b) the opponent has consented beforehand to the practitioner dealing with the court in a specific manner notified to the opponent by the practitioner.

Rule 17.41 goes on to provide that a practitioner must promptly tell the opponent what passes between the practitioner and a court in such a communication.[66]

The Full Court of the Federal Court in *John Holland Rail Pty Ltd v Comcare*[67] endorsed the notion that, although there was nothing improper *per se* with ex parte communications on administrative or procedural matters, a sustained sequence of communications not circulated to other parties could become unprofessional or improper in the absence of some good reason.[68]

An advantage of email communication is that it allows a sender to copy in other recipients and creates a useful "paper trail". Practitioners would be well advised to make a habit of using the "cc" and "reply all" functions by copying in other parties to a matter into email correspondence with chambers as a matter of course.

R v Fisher

Some examples of "what not to do" by all parties are found in the Victorian case of *R v Fisher*:[69]

- The defendant's lawyer had made a sentencing plea which stressed that the defendant was the "sole carer" of his five-year-old daughter and that this role

[65] Richard Lilley SC and Justin Carter, "Communications with the Court" (2013) 87 ALJ 121.

[66] See the corresponding rule: *Barristers' Conduct Rules* (NT) r 57.

[67] *John Holland Rail Pty Ltd v Comcare* (2011) 276 ALR 221; [2011] FCAFC 34.

[68] In *John Holland Rail Pty Ltd v Comcare* (2011) 276 ALR 221; [2011] FCAFC 34, [22], the Full Court approved the observations made by Brereton J in *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 540.

[69] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100.

would make a sentence of imprisonment especially onerous. It was subsequently discovered that the daughter was in China and the plea was misleading.

- After the plea hearing but before the judge had delivered her sentence, the prosecution sent several emails to the judge's associate without copying in defence, revealing information about the daughter's whereabouts and enquiring whether the matter should be listed for a further mention.
- The associate raised the matter with the judge without first contacting the defence counsel[70] and continued to correspond with the Office of Public Prosecution without initially copying to defence counsel.
- A further hearing date was set, at which bail was contested. At that hearing the defence counsel took no objection to the course that had been followed and, on instructions, told the sentencing judge that the information that had come to light about the whereabouts of the daughter was correct. It transpired that the information was not only relevant to the question of bail but the question of sentence, yet the sentencing judge did not invite further material to be furnished prior to sentence.[71]
- The defendant appealed the sentence on the grounds that the receipt and use by the judge of communications with one party created a reasonable apprehension of bias, and that the failure to allow defence to make further submissions on matters affecting sentence constituted a denial of procedural fairness.
- On the topic of communications with the court, the Court of Appeal made clear statements to the effect that communications by one party to the court should not include information or allegations material to substantive issues in the litigation without the other party's express agreement (save in an exceptional case warranted for example by an ex parte application) and the other parties should be copied in on such correspondence.[72]
- The Court of Appeal found that the failure of the sentencing judge to afford the appellant an opportunity to deal with the adverse findings that she contemplated making did constitute a denial of procedural fairness. That was conceded by the respondent.[73] However the Court of Appeal did not find that a different sentence should be passed.[74]

Regarding the position of defence counsel during a plea: if it is clear to counsel that the accused intends to mislead the court then counsel can take no part in the presentation of that evidence and should decline to act further. However if the situation is not then clear counsel is under a duty to continue to act. It is not for him or her to judge the bona fides of the accused. In the event that the accused subsequently admits to counsel that he has deliberately misled the court then counsel must decline to act further in the matter unless the accused agrees to counsel revealing his misleading conduct to the court.

[70] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [11].

[71] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [62].

[72] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [38]–[39].

[73] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [68].

[74] *R v Fisher* (2009) 22 VR 343; [2009] VSCA 100, [82].

Rule 17.15 allows that a practitioner will *not* have made a misleading statement to a court simply by failing to disclose facts known to the practitioner concerning the client's character or past, when the practitioner makes other statements concerning such matters to the court, and those statements are not themselves misleading.

Regarding the irregular out of court communications: although an associate is entitled to rely on an undertaking by an officer of the court that the matter would immediately be raised with defence counsel, it is ill advised to continue with correspondence and to consult with the judge until having received confirmation that this has in fact occurred. There is no inflexible rule that any communication between the judge and a party will necessarily disqualify the judge from making a decision but a failure to strictly comply with such procedures risks threatening the integrity of the proceedings and gives rise to the risk of an allegation of at least a perception of bias.[75]

SPECIAL CATEGORIES

A few special rules for different categories are discussed below.

Barristers

The historical "cab rank rule": that is, the duty is to accept a brief in a court in which counsel professes to practice provided a professional fee is offered and there are not any special circumstances to justify refusal, is set out in Pt N of the *Barristers' Conduct Rules*. There are a number of mandatory and discretionary exceptions to the rule that nowadays mean in practice a barrister may be able to avoid taking a brief. Nevertheless the system as a whole requires barristers to uphold the spirit of the rule. Access to representation for all allows us to have confidence as a society that justice is administered properly.

There is another side to the rule that was expressed by the New South Wales Law Reform Commission as follows:

> In our view the main practical effect of the rule … is not that it forces reluctant barristers into accepting unpopular cases, but rather that it reduces criticism of barristers who take such cases.[76]

Parts P and Q of the *Barristers' Conduct Rules* provide for situations where briefs may be refused or returned. The brief in a serious criminal matter can only be returned for good cause and with reasonable notice.

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[75] See the two-step test in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

[76] New South Wales Law Reform Commission, *First Report on the Legal Profession: General Regulation and Structure*, Report No 31 (1982) [6.78]. A famous instance arose out of the decision by Dr HV Evatt KC to accept a brief on behalf of a group of industrial unions to dispute the validity of the *Communist Party Dissolution Act 1950* (NSW). The controversy was sufficiently real for a Committee of the New South Wales Bar Association to issue a statement to the press supporting Dr Evatt's right to accept the brief and explaining the duty imposed upon him by his calling as a barrister. Disney et al, n 59, 605.

Barristers must confine their professional work to matters set out in r 74 of the *Barristers' Conduct Rules*.

Prosecutors

Special obligations on prosecutors are found in rr 17.46–17.58 of NTPCR and Pt J of *Barristers' Conduct Rules*. It has been said that the proper role of the prosecutor is that of a "Minister of Justice" whose function is to seek justice and ensure fairness.[77] Obligations relate to ensuring that all material evidence is brought to the attention of the court and/or the accused through calling material witnesses and disclosing all material evidence. Prosecutors must assist the court fairly with submissions of law, avoid attempts to bias the court and ensure that the defendant is accorded procedural justice.

Counsel assisting inquisitorial bodies

Counsel who are assisting inquisitorial bodies are also under some of the same duties as those applicable to prosecutors, such as not arguing any proposition of fact or law which counsel does not believe on reasonable grounds to be capable of contributing to a finding of guilt.[78]

Clients with limited capacity

A person is presumed to have capacity,[79] but practitioners should be alive to the possibility that a client may have a cognitive disability (eg, Foetal Alcohol Spectrum Disorder), acquired brain injury or mental illness. There is no single legal definition of capacity as the capacity required will depend on the type of decision or transaction.[80]

Part IIA of the Northern Territory *Criminal Code*[81] provides for mental impairment and unfitness for trial. In proceedings under Pt IIA, legal counsel may exercise an independent discretion to act "as he or she reasonably believes to be in the person's best interests" where an accused or supervised person is unable to provide adequate instructions on questions relevant to an investigation or proceedings.[82]

In 2011, Jonathon Hunyor and Michelle Swift identified some ethical issues confronting practitioners acting for mentally impaired clients in criminal proceedings given that a client's best interests may well not be served by having

[77] David Plater, "The Development of the Prosecutor's Role in England and Australia with Respect to its Duty of Disclosure: Partisan Advocate or Minister of Justice?" (2006) 25 *University of Tasmania Law Review* 111. In *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68, [82] the High Court stated that the prosecutor represents "not an ordinary party but the organised community committed to the fair trial of criminal accusations and the avoidance of miscarriages of justice".

[78] *Barristers' Conduct Rules* (NT) r 72; *Rules of Professional Conduct and Practice* (NT) r 17.58.

[79] There is a presumption of capacity at common law: *Masterman-Lister v Jewell* [2003] 1 WLR 1511; [2002] EWCA Civ 1889 – such presumption must be displaced on the balance of probabilities by those seeking to assert otherwise.

[80] Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Lawyers* (2009); Client Capacity Committee, Office of the Public Defender, Law Society of South Australia, *Statement of Principles with Guidelines* (2012).

[81] Found in *Northern Territory Criminal Code Act* (NT) Sch.

[82] *Criminal Code* (NT) s 43ZO.

issues of their fitness or mental impairment raised.[83] Given the indefinite nature of supervision orders, it is arguably in an offender's interests to be tried or plead guilty so they have the certainty of a release date.

Counsel are obliged to inform the court if they form the opinion that their client is not fit to be tried. However, Hunyor and Swift suggest that a distinction should more readily be drawn between fitness to plead and fitness to be tried. The minimum standards of capacity required to plead guilty and take part in the sentencing process are said to be "vastly less onerous" than the capacity required to stand trial.[84] Making this distinction may form an important step in protecting a client's best interests.

Issues of mental and legal capacity may arise in many other areas of practice (eg, will preparation, contracts, guardianship orders) which are beyond the scope of this article. The starting point must be that lawyers are under an ethical duty as fiduciary agents to act on their client's instructions, and, if necessary, find a way to ensure their client can maximise his or her autonomy and make an informed choice.[85] Resources published by the law societies in various jurisdictions may provide practical assistance.[86]

In-house counsel

Rule 4 of the NTPCR 4 applies the NTPCR to lawyers who are employed otherwise than by practitioners. In-house counsel must be careful to avoid certain ethical issues; for instance, they must make sure they and their employer understand who the client is when advising different entities within organisational groups. Arrangements about which legal entity is being advised and on what basis the advice is given should be carefully documented. In-house counsel should exercise caution before accepting confidential communications from other sources given their overriding obligation to the organisation and duty to avoid conflict of interest.[87]

Model litigants

The model litigant policy has been adopted by the Australian Government as a guide to the manner in which it and its agencies should conduct themselves in litigation. The development of this obligation can be traced to *Melbourne*

[83] Jonathan Hunyor and Michelle Swift "A Judge Short of a Full Bench: Mental Impairment and Fitness to Plead in the Northern Territory Criminal Legal System" (Paper presented at the Criminal Lawyers Association Northern Territory 13th Biennial Conference, Bali, 30 June 2011).

[84] Chris Bruce QC, "Ethics and the Mentally Impaired" (Paper presented at the Public Defenders Criminal Law Conference, Sydney, 27 February 2011) and discussed in Hunyor and Swift, n 83, 21-22.

[85] The Australian Law Reform Commission recently recommended a shift away from an objective "best interests" approach towards an approach requiring decision makers to act on the "will, preferences and rights" of the person. Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (2014); Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014). See Fleur Beaupert and Linda Steele, "Questioning Law's Capacity" (2014) 40 *Alternative Law Journal* 161.

[86] Law Society of New South Wales, n 80.

[87] Australian Corporate Lawyers Association, "Guidance for In-house Counsel on Ethical Decision Making" (November 2013).

Steamship Co Ltd v Moorehead where Griffith CJ explained it as "[t]he old fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects".[88] The guidelines issued by each state and territory are largely consistent with the Commonwealth guidelines.

It has been suggested that the model litigant obligation is an ethical, rather than a legal, standard,[89] albeit a standard that courts "can and do exhort the Crown to meet".[90]

Self-represented litigants

Lawyers should be particularly careful when communicating with self-represented litigants and should ensure any statements do not convey a misleading impression.[91]

The Northern Territory Supreme Court publishes guidelines to assist self-represented persons in criminal and civil matters to understand the processes of the Court system.[92] Section 5 of the *Sexual Offences (Evidence and Procedure Act) 1983* (NT) prohibits an unrepresented defendant from directly cross examining a complainant in a sexual assault case.

From time to time the Northern Territory Bar Association has provided counsel to appear pro bono for an unrepresented party in criminal appeals.

ETIQUETTE

Ethics can be understood as professional duties that, if breached, might result in discipline for misconduct. Conversely the topic of etiquette covers the customary behaviour, good manners, and courtesies extended between lawyers appearing in court, and between those lawyers and the Bench.[93] Court etiquette is said to have developed around the time of the enactment of the *Magna Carta* and with the evolution of the legal profession in the 13th century.[94]

One shouldn't necessarily expect to be disciplined for displaying poor etiquette but there are some very good reasons to observe proper etiquette:

a) it marks you as a person to whom the court is a familiar environment,
b) it preserves the dignified and orderly conduct of litigation; and
c) it helps you avoid the possibility of offending your opponent or the judge.

[88] *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342.

[89] See eg the Hon Justice Pagone, "The Model Litigant and Law Clarification" (Speech delivered at the Aggressive Tax Planning Workshop, 17 September 2008).

[90] Christopher Peadon, "What Cost to the Crown A Failure to Act as a Model Litigant?" (2010) 33 *Aust Bar Rev* 239.

[91] The Hon Justice Emilios Kyrou, "A Lawyer's Duty" (2015) 89 *Law Institute Journal* 34.

[92] Supreme Court of the Northern Territory, *Self Represented Parties* (2008) <http://www.supremecourt.nt. gov.au/going2court/selfrep.htm>.

[93] R Annesley, *Good Conduct Guide: Professional Standards for Victorian Barristers* (Victorian Bar, 2006) 121.

[94] For more in depth discussion of the history and development of court etiquette see Thomas Gaffney, "Borrowed Manners: Court Etiquette and the Modern Lawyer" (2012) 86 ALJ 842.

In some respects good etiquette overlaps with good advocacy technique. Advocacy is the art of persuasion, and politeness is often the way to persuasion.[95] The two pillars of consideration and respect should uphold every aspect of an advocate's conduct,[96] from punctuality to presentation. Some guidance on appropriate etiquette is as follows.

Courtroom conduct

a) Be on time. Counsel should be ready to go a few minutes before the hour. Most judges are yet to master the art of teleportation and time must to be allowed for the court officer to confirm appearances of counsel and escort the judge from his or her chambers.
b) Avoid speaking while someone else is speaking. If the judge or your opponent starts speaking, counsel should cease speaking immediately.
c) Counsel should also keep silent while a witness is being sworn. This is a solemn occasion.
d) Make sure your mobile phone is switched off or to silent.
e) In some cases, courtesy in the court room looks different from courtesy in a social setting. You should refrain from greeting the judge with "Good morning" when you announce your appearance – though it is a nice sentiment, announcing an appearance is a state occasion and the judge should not feel obliged to wish everybody good morning.
f) When an objection is made, it should be stated concisely so that a judge understands its purpose is other than to interrupt a witness or put counsel off their stride. A seemingly terse, "Objection – irrelevant" is preferable to "Your Honour, I must object to this question. Frankly I just don't see the relevance". Opposing counsel should immediately sit and stop talking if an objection is made.
g) Respect the court reporters and those who may rely on the transcript (which may turn out to be you). Provide a list of witness's names ahead of time, spell out any unusual terms and try to avoid speaking too quickly. Where a witness makes a physical gesture, it helps to provide a narration: "the witness is indicating to a point around five metres away," "the witness has pointed to a spot on the Exhibit A map which I have pencilled a star next to".
h) Do not leave the bar table empty.

Preparation

a) Try to agree early on with your opponent about projected timeframes, uncontested facts and which issues are in dispute.
b) Know what orders you want. Have the orders which you seek prepared ahead of time so they can be provided to your opponent and handed up to the judge.
c) Estimate time accurately – the convenience of other lawyers, court staff and those preparing the court calendar depend upon it. Always advise the court as soon as a case is settled or where there is some change of

[95] PW Young, "Court Etiquette" 76 ALJ 303.

[96] V Coomaraswamy et al, *A Civil Practice: Good Counsel for Learned Friends* (Academic Publishing, Singapore Academy of Law, 2011).

circumstances that will prevent a listing going forth as planned. Early notification assists the court to manage the busy court calendar effectively and helps judges to schedule their in-chambers time productively.

d) Anticipate the judge's reasonable request. Judges often appreciate receiving aides such as chronologies and outlines of submissions. If parties can reach agreement about a document such as a timeline (going back to my point about preparing with opposing counsel) there is no reason why such a document cannot be provided ahead of time. Not only does it save the judge from scribbling madly away in court, it allows a matter to hit the ground running.

Addressing and referring to others

a) A High Court, Supreme Court or Federal Court judge should be addressed as "Your Honour" and referred to as His / Her Honour Justice / Chief Justice X.
b) After the commencement of the *Local Court Act 2015* (NT)[97] a Local Court judge should be addressed as "Your Honour" and referred to as His / Her Honour Judge / Chief Judge X.
c) Outside court a judge should be addressed as "Judge" unless you know that person on first name terms.
d) Inside court a fellow practitioner should be referred to as Mr / Ms X and where the practitioner is a barrister he or she should be referred to as "my friend" or "my learned friend". The term "learned" indicates only that your opponent is qualified to appear as a legal practitioner.[98]

CONCLUSION

The effective advocate will at all times maintain a high standard of conduct including unfailing courtesy to both the court and his or her opponent.[99]

The advice that US Federal Judge and Cornell University Dean, Frank Irvine, had for lawyers is useful advice to end on: "The lawyer should bring his manners into the court room. If he possesses none, he should borrow a set for court room use".[100]

[97] The *Local Court Act 2015* (NT) commenced on 1 May 2016.

[98] Trevor Riley, *The Little Red Book of Advocacy* (Law Society of the Northern Territory, 2nd ed, 2016) 148.

[99] Riley, n 98, 80.

[100] Frank Irvine, *Ethics of the Trial Court* (Cornell University, 1913).