Advocacy – Observing the Customs

"As laws are necessary that good manners may be preserved, so good manners are necessary that laws may be maintained."

Machiavelli

The Hon. Justice Riley

I have always been intrigued by counsel announcing his or her appearance to the court by saying, "If it please the court my name is Smith and I appear for the plaintiff". It seems to me that counsel's name will be Smith whether it please the court or not. Counsel would be better to reorder the statement as follows: "My name is Smith. If it please the court I appear on behalf of the plaintiff".

There are innumerable conventions, rules of conduct and rules of etiquette that govern the conduct of counsel when appearing before courts in the Northern Territory. It is not possible to visit all of those rules and conventions in an article such as this but I would like to mention a few that are commonly breached.

Moments of Silence

There are times in the course of a trial when it is necessary for counsel and all others present in court to remain silent and still. There should always be silence when a witness takes the oath or affirmation at the commencement of his or her evidence. The same applies whenever an oath or affirmation is taken in the course of a hearing, for example by members of the jury and by the jury guards.

Likewise the court should be silent and still on such solemn occasions as when a verdict is delivered by a jury or a judgment is given by a judge or magistrate. The same will apply when a judge is summing up to a jury or when a judge or magistrate imposes sentence.

Citing Authority

In referring to authorities you should always endeavour to refer to the authorised reports. If the matter is reported in the Commonwealth Law Reports then that is the report to which you refer. You should avoid the temptation to cite every authority on the point you wish to address. Wherever possible you should limit yourself to the leading authority and only refer to others if there is some compelling reason to do so.

When citing authority to a court the written citation Jones v Smith becomes Jones and Smith or Jones against Smith. It is not Jones versus Smith.

When identifying a case by reference to any of the law reports it is not appropriate to refer to the report by an abbreviation such as 149 CLR 51 or 140 FLR 62. Rather the reference should be to (1981-1982) 149 Commonwealth Law Reports at 51 and (1997) 140 Federal Law Reports at 62.

When referring to judges, although the print records Martin CJ or Mildren J, your reference should be to "the Chief Justice" or to "Justice Mildren". If the reference be to a former Chief Justice then you should identify that person by name eg Chief Justice Asche.

Addressing the Bench

As is well known judges are referred to as "Your Honour" and magistrates are referred to as "Your Worship". Other judicial officers should be referred to by their title, for example "Master", "Registrar", "Acting Registrar".

As a matter of common courtesy you should never talk over a judicial officer. If you have a desperate need to interrupt the judicial officer then you should await a convenient interval in what is being said before doing so. When you do address a judicial officer you should always rise to your feet prior to doing so. If your opponent rises to his or her feet whilst you are addressing the court then you should immediately sit down. There should not be two counsel on their feet addressing the court, or seeking to address the court, at the same time. This latter is not only a rule of courtesy but one which ensures a structured debate and avoids the deterioration of the presentation of the argument into one counsel over-talking another with both striving to be heard.

Your Learned Friend

No matter how strained relations may be you should refer to your opponent as "my friend" or "my learned friend". The use of the term "learned" indicates no more than that your opponent is qualified to appear as a legal practitioner. It is no greater endorsement of the qualities of your opponent than that.

Whatever the provocation you should avoid bickering with your opponent. When egos clash in that way the judge or the jury assumes the role of a frustrated bystander. Such conduct is unseemly and does not advance the case of your client.

If your opponent is interrupting you or sniping at you in a way which is distracting you from your task then you may wish to do one or more of the following:
(1) Quietly and privately invite your opponent to refrain from distracting you.
(2) In a louder and more public way invite your opponent to refrain from distracting you.
(3) If the conduct amounts to what cricketers term "sledging" and continues on you may wish to indicate to the court that it appears that your opponent has

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ADVERTISEMENT

Toyota Launches New Echo Mini-car

Bridge Autos Toyota offers Law Society members special discount deals. It now has in stock an all-new European-designed mini-car with advanced package efficiency and class-leading engine technology.

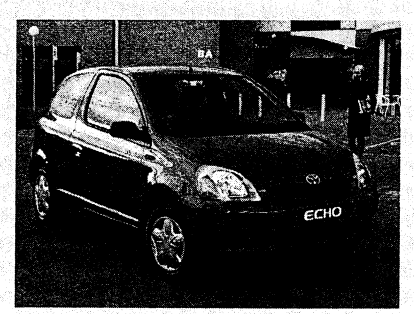
Toyota Echo is the first Toyota styled in Europe. It goes on sale in Australia on October 8, from $14,990.

Echo offers outstanding space, safety, fuel and environmental efficiency in a challenging styling package. It can accommodate four 190cm-tall adults. Australian buyers have the choice of three model variants - 3-Door and 5-Door Hatch, with a 1.3 litre engine, and a four-door sedan with a 1.5 litre engine.

Both Echo twin cam multi-valve engines have intelligent variable valve timing - a first in class and a first in Australia for a Toyota-badged vehicle. VVT-I improves torque, power and fuel economy, and reduces emissions. The 1.5 litre engine is the first mini-car engine to break the 100hp barrier. It delivers 80kW (107hp) at 6000rpm and 142Nm of torque at 4200rpm.

These engines can be matched to the five-speed manual or state-of-the-art electronically controlled four-speed automatic transmissions. Echo Hatch was designed to a "short but tall" concept, for increased interior space and better aerodynamics. At 3615mm overall length it is the shortest vehicle in the Toyota range.

Echo Hatch has a drag co-efficient of 0.30 and sedan has a coefficient of 0.29. Toyota designed Echo under its GOA (Global Outstanding Assessment) program to meet the world's toughest safety standards, including a 40 percent offset deformable barrier test at an impact speed of 64km/h - well in excess of the world test standard of 56km/h. Passive safety features include driver's airbag SRS with force-limiting seatbelt pretensioner, whiplash injury lessening (WIL) front seats, head impact protection for the pillars and roof rails and a four-way collapsible steering column.



Echo has a refined interior package which includes digital centre-mounted instruments, and tri-tone interior colours with Jacquard cloth seat trim. Echo's hip point is 580mm above the ground, for greater ease of entry and exit, and a relaxed driving position. The rear seat in Hatchback is a 60/40 split fold design which tumbles forward to create additional luggage space. Toyota Echo has more than a dozen cabin storage locations. There are various option packs, including Safety Pack, for all models.

"Suspicion or mere idle wondering"

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the Full Court allowed a period of 3 weeks to check the figures, assess the company's position, and seek expert advice.

We doubt that the three week period stated in that case is of much comfort for directors in most insolvency situations. We suggest that, in practice, the change from "mere idle wondering" to "reasonable grounds for suspecting" will not take place on receipt of a particular set of financial statements. Usually, by then, the "commercial reality" will have become all too apparent.

1. Queensland Bacon v Rees (1966) 115CLR 266.
2. Kong v Pilkington (Australia) Ltd (1997) ACLC 1561.
3. Metal Manufacturers Limited v Lewis (1988) 13 NSWLR 315.
4. Statewide Tobacco Services Ltd v Morley (1990) 8ACLC 827.
5. Pegulan Floor Coverings v Carter (1997) 15 ACLC 1293.
6. Standard Chartered Bank of Aust Ltd v Antico (1995) 13ACLC 1381.

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something to say and sit down to give him or her the opportunity to address the court. (4) If the conduct persists invite the court to intervene to ensure that you are able to present your case free from interruption.

You will find that if misconduct of this kind by your opponent is distracting you it will also be distracting the Bench and the jury. The Bench will not need much persuasion before it interferes.

Submissions

It is important to remember that you appear as the representative of your client and you are there to put submissions on behalf of your client. The court is not concerned with your personal views and, indeed, should not be made aware of those views. The case is not about you. It follows that when you address the court you should not be using expressions such as "I think" or "I believe". Your role is to make submissions on behalf of your client and you do this by using expressions such as "I submit" or "I contend" or "Our case is".

The Bar Table

Often you will appear before a court when a series of matters is being dealt with. This regularly occurs in Magistrates' Courts and also in the Supreme Court when interlocutory matters are being dealt with or arraignments conducted. When you are at the bar table and come to the completion of your matter you should not leave the bar table unless other counsel is taking your place. If yours is the last matter in the list or if other counsel are not assuming positions at the bar table you should remain in place. If it is necessary for you to leave then you should seek the permission of the court to do so. In the absence of permission it is a discourtesy to the Bench to leave the court facing an empty bar table.

This is a grab bag of random and incomplete observations regarding this topic. You should refer to any of the many texts on advocacy to find out more regarding matters of etiquette and appropriate conduct in court.