Guidance Statement No. 22 – Dealing with inappropriate judicial conduct in the courtroom (Published 4 May 2021)

1. Introduction

1.1. Who should read this Guidance Statement?

This Guidance Statement is for solicitors.

1.2. What are the issues?

Solicitors appearing in court or tribunals may from time to time encounter inappropriate judicial conduct in the courtroom by judicial officers.

This Guidance Statement seeks to provide some strategies for properly identifying and dealing with this type of behaviour in a manner consistent with a solicitor's ethical obligations.

1.3. Status of this Guidance Statement

This Guidance Statement is issued by the Queensland Law Society (QLS) Ethics and Practice Centre for the use and benefit of solicitors.

This Guidance Statement does not have any legislative or statutory effect. By having regard to the content of the Guidance Statement and following the guidance it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This Guidance Statement is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This Guidance Statement represents a standard of good practice and is endorsed by the Ethics Committee with input from numerous policy committees of QLS.

2. Ethical principles

ASCR

Rules 3 and 4 provide:

3.	**Paramount duty to the court and the administration of justice**
3.1	A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.
4.	**Other fundamental ethical duties**
4.1	A solicitor must also:
…	
4.1.2	be honest and courteous in all dealings in the course of legal practice;
…	
4.1.5	comply with these Rules and the law.

The above principles reflect the common law.

2.1. Discussion

What is not inappropriate judicial conduct in a courtroom?

A court or tribunal is a special environment. The subject matter of proceedings before courts of law and other tribunals or bodies is invariably serious, often gravely so, for the parties concerned and must be approached with this in mind.

The judicial officers who preside over those proceedings have significant responsibility, as well as power, not only to ensure that justice is served, but also to see that proceedings are conducted efficiently. Judicial officers also experience a high degree of stress and pressure, something not assisted by the urgency with which their work may need to be conducted or by insufficient court or tribunal resources. The prospect of an appeal and the ensuing public attention, including both in the mainstream media and social media, only add to the pressure.

In exercising these functions, it is the obligation of a judicial officer constituting a court or other body to test evidence and submissions and to call out deficiencies, including any lack of preparation by those appearing before it:

> Judges need to ensure that lawyers, especially advocates, in the testing circumstance of litigation, master their briefs, familiarise themselves with the applicable law, command the detail of the facts, reflect seriously on the structure and content of their arguments, obey the practice rules and help the court to reach a lawful and just conclusion. They need to test the propositions advanced by the advocates and to ask them tough questions. The judges themselves are often under considerable pressure. The circumstances are often dramatic and emotional.[1]

Lawyers, including solicitors involved in litigation, therefore have a corresponding obligation of professionalism. Against that backdrop:

> Occasional evidence of judicial ill-temper may simply indicate that the judge, under much provocation, has exhibited human emotions of impatience, anger at time-wasting, and distaste for poor professional performance.[2]

[1] Michael Kirby, 'Judicial Stress and Bullying' (2014) 14(1) *QUT Law Review* 1, 10.
[2] Ibid 11.

For example, it may be appropriate for a judge or tribunal member in appropriate circumstances to:

- engage in stern questioning;
- exhibit impatience with an irrelevant submission;
- be abrupt or direct in their manner,

provided that the behaviour does not rise to the level of 'inappropriate judicial conduct', as described below.

It is nonetheless desirable that to the greatest extent possible the business of the court or tribunal be carried out with, 'courtesy, restraint and appropriate mutual respect'.[3]

What is inappropriate judicial conduct in the courtroom?

Inappropriate judicial conduct in the courtroom can be difficult to define, as the way it arises varies but it can involve behaviour / conduct directed to a solicitor advocate that is an abuse of power of some kind.

Such conduct may include:

- abusive or inappropriate language including personal attacks, insults, demeaning or humiliating comments;
- shouting, aggressive and intimidating behaviour;
- persistent, unwarranted criticisms;
- baseless accusations (such as dishonesty);
- threats that have no basis at law (such as threats to fine or imprison for contempt, where there is clearly no basis for doing so, proper processes have not been followed or the court or tribunal does not possess such powers);
- comments about an advocate's physical appearance or attire (where the person is otherwise dressed in accordance with generally accepted standards for court dress);
- comments which would in any other setting amount to sexual harassment;
- comments which are discriminatory, such as remarks about race, gender, sexual preference, a disability or religion; or
- other behaviours which amount to an abuse of the judicial officer's power.

Inappropriate judicial conduct in the courtroom may be directed at counsel, solicitors, parties, witnesses, court staff or members of the public watching the proceedings from the gallery. This behaviour may also be found in other quasi-judicial bodies, such as commissions of inquiry or disciplinary or appeal boards.

The impact of such conduct can lead to stress and impact the mental or physical health of those concerned. Solicitors and other lawyers regularly appearing in such a setting are likely to be particularly affected.

As discussed above, the conduct of proceedings often involves formal and robust dialogue with the bench. In contrast, inappropriate judicial conduct is not acceptable, in that it ceases to be professional or acceptable and goes beyond what a reasonable practitioner of an average level of sensitivity and resilience ought to be expected to endure.

[3] Ibid 6.

Apart from its impact on practitioners and others before the court, the behaviour is also objectionable as it lessens the dignity of the court and in doing so impacts the administration of justice.

An example of such conduct directed at a legal practitioner can be seen in *Adacot & Sowle* ('*Adacot*'),[4] which also contains extracts from the transcript of hearing in the Federal Circuit Court of Australia considered by the Full Court of the Family Court of Australia. *Adacot* referenced *Ellis v The Queen* where it was noted that '[A] miscarriage of justice will occur in circumstances where the conduct of the judge prevents a party from properly presenting his or her case'.[5] This case also outlines some of the ways a judge's intervention may be excessive and lead to this miscarriage.

3. Strategies

A solicitor appearing before a court, tribunal or similar body must always be courteous and respectful and should always be prepared.

Practitioners should ensure that they:

- know their matter thoroughly – ensure that summaries of argument are concise and valid and do not include anything in the 'hopeless or pointless' category;
- know the procedure thoroughly – ensure all relevant rules and practice directions have been complied with;
- know what to expect when appearing before a specific judicial officer. However, 'judge shopping' is not appropriate;
- consider having counsel if you anticipate the matter could be contentious and you consider it to be in the best interest of the client;
- have a short summary of the miscarriage and bias principles as a ready reference;
- know whether a transcript will be available and if not, ensure appropriate notes are taken. If the matter has been difficult to argue, it may be useful to obtain instructions to order a transcript or ensure that the audio is preserved if the tone and manner of the interaction is of concern.

Being well prepared enables the advocate to manage the inappropriate judicial conduct knowing that they are in a position of strength regarding their submissions. Judicial officers reiterate on numerous occasions that a constant source of frustration and unhappiness at their end (which may manifest itself in difficult behaviour) is an ill prepared advocate.

When faced with inappropriate judicial conduct, a solicitor may feel constrained in taking action by concerns for the clients, their case or their own reputations. However, there are some things that can (and in some cases should) be done in the face of such conduct.

Adopting the strategies outlined below in a respectful manner is not inappropriate and will not amount to a breach of the practitioner's ethical obligations.

These strategies may include:

- ***Remain*** calm - while unpleasant and difficult, remind yourself that this is a temporary situation. Retaining composure by slowing down to a measured speaking pace may enable you to buy precious thinking time and could reduce the emotional atmosphere. Take opportunities for calm by standing down to take instructions, resolve an issue with your opponent etc.

[4] [2020] FamCAFC 215 ('*Adacot*').
[5] *Ellis v The Queen* [2015] NSWCCA 262, [65], cited in *Adacot* (n 4), [18].

- ***Remember*** that behaviour of this nature is not a reflection on you, your abilities or your worth as a solicitor, but on the person exhibiting inappropriate conduct. Others present will likely also be well aware of the dynamic that it is occurring. Knowing it is not your behaviour that is inappropriate comes with experience, but conflict is much easier to cope with when you can be confident in your own position.

- ***Manage*** the behaviour as best as you can in the moment by:

    - Taking the 'high ground' by remaining as **courteous and respectful** as possible, recalling that such courtesy is due to the court / office held by the judicial officer. It is the particular court or office that we acknowledge by the expression 'Your Honour', not the individual. Courtesy is a powerful tool. It also provides a contrast to inappropriate behaviour that is being exhibited from the bench.

    - Reverting to / maintaining strict formality – this can assist you to continue to be respectful. Be concise and specific – less opportunity for criticism.

    - Avoid inflaming the situation – when the judicial officer interrupts, allow them to speak, answer any questions then return to your application / submission prior to the interruption.

    - Accepting responsibility for any of your own conduct which may have been lacking – this leads back to being prepared though there will be situations where the matter has been given to you at the last minute through no fault of your own. Be aware that the court may **not** take this into account. For example: '*I apologise for the 2 pages upside down in Your Honour's copy of the affidavit. It was an unfortunate oversight. Appropriate measures will be taken to prevent a repetition. Turning to the next point in our outline ...'*.

    - Attempting to steer the dialogue back to the relevant issues in the matter. Ensure that the essential points you want to make are put on the record. For example: '*I am grateful for Your Honour's indication. There are three points which I seek to put on the record in brief terms before Your Honour rules …'*. It is helpful to have a written outline, and ask that it be marked for identification.

    - Asking for clarification or confirmation of inappropriate statements or observations, but be aware that it does take some skill to go down this path without inflaming the situation. When applications / submissions are being obviously and unreasonably refused, respectfully request a reason for such refusal or denial. Any such comments should be prefaced by 'with respect' and it is better to limit anything said to a necessary response to factual enquiries. If you are being pressed to make a response that you assess as amounting to a trap, simply say (with respect) you do not wish to make any response.[6]

    - If possible, think ahead about how there may be a possible appeal due to a miscarriage of justice as a result of judicial conduct and press with all reasonable applications and submissions even if they are being unreasonably and repeatedly refused or denied (it is important to make the application / submission lest it be said on appeal that the application/submission was not made which weakens success / prospects on appeal) – don't be thwarted – complete the job.

    - If possible, propose an adjournment, even a brief adjournment to allow tempers to cool and to reflect on whether the conduct is reasonable or has become inappropriate. This may also give you an opportunity to consult with a senior

[6] *Gambaro v Mobycom Mobile Pty Ltd* (2019) 271 FCR 530, 541-2 [37].

colleague to ascertain whether there is something you have missed or misinterpreted.

- If the behaviour is relentless, you may need to consider making an application for recusal for apprehended bias and / or consider withdrawing from the case if such behaviour begins to impact on the client's best interests. Discussions with senior colleagues and the client would be part of this decision-making process.

- If an appeal[7] becomes necessary, consider:
  - whether leave is needed;
  - whether a stay is needed;
  - ensuring that any draft order for rehearing includes a provision expressly requiring that the rehearing is before a judge other than the primary judge.

- ***Debrief with:***

  - A senior practitioner / colleague – some members of the bench will conduct the matter in a different manner when a senior partner or QC appear for the second round or are aware that a senior colleague is present.

  - The client - bear in mind that you are there to protect your client's interests, and it may be necessary to subordinate your own. Putting on a show of defiance may impress your client, but it is unlikely to serve their interests. Resist the temptation to 'go down swinging'. If you are aware that a judicial officer may be difficult, it is important to brief the client in advance – this offsets the need to be performative in front of the client and ensures that the client understands the dynamics that may be taking place in the courtroom.

- ***Record*** what has occurred. Where appropriate:

  - ask for a ruling or order and reasons for the ruling;

  - ensure that the behaviour will be recorded in the transcript;

  - if there is no transcript, ruling or order, make a detailed file note of what was said as soon as practicable after the hearing.

- ***Intervene***, if you are a senior practitioner, to support a more junior colleague (even if they are your opponent), including assisting and attempting to diffuse the situation. This requires courage and collegiality (see below). A senior colleague could suggest in such difficult circumstances, *'Your Honour, perhaps it would be of assistance if my friend were permitted to make his / her submissions.'* Or, *'Your Honour, I do not think my friend has finished his / her submission.*'

  When it is your turn, you could indicate, '*Your Honour taxed my friend forcefully about x, y, and z. We do not take any point about that.'* Or, *'In fairness to my friend, as we understand his / her submission, it is that …'*. By stepping in, the power imbalance changes and enables the practitioner to regain some control and promotes necessary collegiality amongst the profession. It is a powerful sign of support which you, in turn, may need at another time.

- ***Collegiality -*** Do **not** take advantage of a judge's unwarranted criticism or inappropriate conduct towards your opponent. Acknowledging obvious wrongdoing against another is appropriate and promotes collegiality. Simple words privately such as 'That was not called for' or 'You handled it very well' or even a sympathetic glance is incredibly

[7] *Ellis v The Queen* [2015] NSWCCA 262 discusses judicial conduct which prevents a party from properly presenting their case resulting in a miscarriage of justice. See *Gambaro v Mobycom Mobile Pty Ltd* (2019) 271 FCR 530.

important. Remember that next time, it could be you who is on the receiving end of such conduct.

Resist any temptation to associate yourself with the misconduct – it will backfire in the event of an appeal and will damage your reputation.

- ***Seek advice*** afterwards, including about whether the behaviour was unusual or would be regarded as inappropriate judicial conduct and how it might be managed in the future, especially if the hearing has not yet concluded. Senior practitioners should be open to providing this advice and can reassure a less experienced colleague in a way that enables them to process the experience and learn and improve their advocacy.

  Consideration should be given to whether junior staff or any practitioner consistently singled out for such conduct ought to attend a hearing before that judge in future. Workplace health and safety considerations will be relevant to the firm in making such decisions.

- ***Seek support*** including informally from peers, senior colleagues, family and any mental health resources available through your firm or the QLS such as LawCare, QLS Senior Counsellors or QLS Solicitor Support Pty Ltd (QLS Ethics and Practice Centre).

- ***Inform*** the QLS* or where appropriate using the relevant jurisdiction's complaints mechanism.

  *QLS has no regulatory power with regard to the conduct of a judicial officer but may be in a position to informally and confidentially discuss.

4. QLS

To record any concerns arising from instances of judicial conduct referred to in this Guidance Statement, members can contact the QLS Ethics and Practice Centre or they may email / write to the QLS President who can informally raise such concerns with the respective Heads of Jurisdiction in accordance with the agreed *Protocol for the Queensland Law Society to Raise Concerns about Judicial Conduct.*

5. More Information

Solicitors are referred to the Queensland Law Society, *The Australian Solicitors Conduct Rules 2012 in Practice: A Commentary for Australian Legal Practitioners, Queensland Law Society* (2014).

For further assistance please contact an Ethics Solicitor in the QLS Ethics and Practice Centre on **07 3842 5843** or email at **ethics@qls.com.au** .