

PODCAST

ROLES AND RESPONSIBILITIES FOR

- **CLIENTS**
- **SOLICITORS**
- **BARRISTERS AND**
- **JUDGES**

AT FAMILY LAW FINAL HEARINGS

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Family Law litigation is often expensive, time consuming and stressful. Not all matters can resolve and do then proceed to a final hearing, often because one or both parties seek that occur.

What is very important is that each party, their solicitor and barrister are clear on their respective roles and responsibilities as the matter quickly jettisons to a final hearing. What one needs to do is ensure that 'each moving part', works as it should, to do what it is meant to do, to the best of its ability, to allow the whole to work as it should. Judges too have their roles and responsibilities in the process. What is often most helpful is for all concerned to *lead by example* and perform their role and responsibilities, in a timely, ordered and professional manner. That way, solicitors can be *of service* to barristers, who can be *of service* to judges who in turn can be *of service* to the parties, the Law and the community at large. When all parties perform their roles and responsibilities, there's generally job satisfaction on account of a job well done by all. You doing your job properly allows others to do theirs properly. What usually ensues is good product delivery and a better *experience* for everyone. What is also very important is for everyone to attend to their roles and responsibilities in an orderly fashion, on time, to keep stress levels down. Imposing tight timelines for ordinary, ordered tasks along the litigation pathway to a final hearing simply increases stress levels unnecessarily. Generally, it is expected that those involved in preparing and presenting a final hearing will be able to do their preparatory work during business hours. That can and often does happen if materials are filed and delivered on time. The advent of e-brief, the Court Book and Tender Bundle as well as developments in AI are helping a lot in this regard. Most professionals, no matter their level, are very keen to achieve a work/life balance in modern practice.

You and those in your firm may like to consider the concepts in this paper, discuss them at your next meetings, exploring if and how they might apply to your firm, its ethos, culture and your own practice approach to preparation for final hearings.

I have always suggested that roles and responsibilities should be perceived and understood well prior to final hearing. In particular, they need to be considered and discussed prior to and at the Mediation and the Compliance and Readiness Hearings, if not from the beginning of a matter.

For example, is a matter really ready to be set down for trial at a Compliance and Readiness Hearing, if the client is not clear on what the real costs of the trial are likely to be and/or if those funds are not in trust or secured?

Should counsel be briefed for a trial date which is known but fees are not yet in trust for the trial or secured, or where affidavit material is not filed and served?

Many briefs are cancelled on late notice on account of 'no funds' or 'the firm is no longer acting in the final hearing' on account of a client not being able to secure funds for a trial and/or a client not being able to file material on time and pay for that work. Cancellation fees may apply. Disruption ensues for everyone. Event management responsibilities for final hearings require that funds be secured for the final hearing, in the writer's view, at the Compliance and Readiness Hearing and be discussed in full with clients at the mediation with an accurate fee estimate for the final hearing to avoid 'Bill Shock', embarrassment or disappointment.

A family law final hearing in Division 1 or Division 2 is a very serious and important matter. Trial preparation orders need to be understood, diarised and honoured by all concerned to ensure that the matter proceeds to final hearing in an ordered, calm manner so the focus is on substance, not basic matters of procedure or a last minute scramble trying to get documents settled and filed late, with the attendant risk that provisions in a notation in the usual orders may be enlivened such that the other party who has filed on time may make application to proceed on an undefended basis.

On time filing of material projects a strong, sharp, ordered and cohesive team ready to prosecute their client's case and meet the other party's case in the same manner.

Funding, administrative or personal matters arising should be kept to a minimum and not distract from the actual preparation for trial for clients, solicitors and barristers.

Once counsel has taken delivery of the completed e-brief, then all negotiations should proceed via the parties' counsel (with instructions) in line with common practice. If solicitors are aiming still to negotiate an overall settlement of the matter, counsel should be informed of that in writing and clients should be advised that with the e-brief delivered to Counsel, they may have to factor in counsel's hourly fees for work being done on their matter by counsel as well as any late cancellation fee.

It is often the case that with say 14 days' notice, most instructors will write to the other party to advise that on date Y the e-brief will be delivered to Counsel Z and thereafter negotiations need to proceed via both parties' counsel. Counsel with instructions, if there is time, will endeavour to resolve the matter or narrow issues. That work is to be done such that it does not interfere with the time tabling of actual trial preparation work in relation to cross examination and the considering of what documents to tender, when. Thus, ideally the e-brief needs to be delivered about I suggest say 10 days prior to Day 1.

Should a matter resolve prior to or at Day 1 of trial, clients should expect to be billed for Day 1 of trial by counsel (likewise for conference and preparation) with Counsel usually attending to

make submissions before the Court in support of the orders being pronounced, unless counsel is released by his or her instructor. If counsel is released, he or she would likely bill for Day 1 of trial if an alternate brief cannot be found for that day. The client is expected to attend Day 1 of trial even if the matter is resolved and final consent orders are to be pronounced by the Court, unless the client is excused by the Court prior.

ROLES AND RESPONSIBILITIES AT FINAL HEARINGS FOR CLIENTS

- Well prior to Final Hearing, at Mediation and Compliance and Readiness Hearings, clients should:-
 - Have clarity on their capacity to fund a trial at say \$11 000 per day for each party (plus ancillary preparation at that same cost per day again so it is probably \$22 000 per day per party, if not more or slightly less depending upon the seniority of counsel engaged). The suggested \$11 000 per day is \$5500 per day for counsel and an instructor being present. An instructor is generally expected to attend court to instruct during a final hearing for obvious reasons
 - Have clarity on their capacity to discharge and refinance any loans in the joint names of the parties into their own name, pay any outstanding legal fees and trial costs if they seek to retain the family home
 - Have clarity on their capacity to attend at and participate in the final hearing which includes
 - Taking time off work
 - Making arrangements for the children from 8.30am – 5.30pm
 - Making arrangements for support people (who are not witnesses or adult children of the parties) to be in attendance on a roster
 - Making arrangements for physical and emotional self-care before, during and after a trial
 - Being available after hours to assist in on-the-go preparation including the weekend prior to trial and days after in case it runs over time
- Be prepared to do detailed work with the solicitor to check instructions against subpoenaed material and other witness evidence when drafting material by due dates with the solicitor
- Have the time and capacity to attend to trial preparation so affidavit material is prepared, filed and served on time
- Have the time and capacity to attend to reply material and provide typed, dated brief factual instructions for that process for the consideration of the solicitor who will decide if there will be a reply affidavit and what its contents will be
- Be able to provide typed, written instructions to ancillary documents from the other side such as the other party's Financial Statement, Outline of Case and/or the Family Report as those instructions subject to the instructor's review may be passed on to counsel for his or her consideration in preparing cross examination
- Be prepared to attend to the preparation of ordered discoverable documents in support of the affidavit/annexures
- Be prepared to attend conferences in person not just online

- Be prepared to listen to advice as evidence comes to light – advice changes along the way with important developments in a case. There is no issue with asking questions or putting forward concerns but clients should not ‘argue’ with advice
This is where preparing and having documents filed on time, comes into play. A barrister who has been given time to read, consider and analyse a brief will be much better prepared for a client/counsel conference with an instructor and will be able to form a good rapport with the client and project preparation, accuracy and confidence which makes for a client being more readily able to accept considered advice
- Avoid being on holidays overseas or interstate for weeks allocated to trial preparation or on the week after trial as written submissions may be called for by a trial Judge or a case may go longer than expected
- Before trial, consider attending a final hearing with the allocated trial Judge with an instructor to observe the Court process at Final Hearing, what works well and what does not work well – for say 30 minute and/or visit other cases in other Court rooms
- Before trial get accountancy advice
 - on CGT on sale of family home if the client has not been in it since separation for over 12 months – the SRO is very active on raking in as much tax as it can for our Victorian State coffers
 - the minute of proposed property orders
- At Mediation and at the Compliance and Readiness Hearing appreciate that:-
 - A trial listing is usually in competition with say 2 or 3 other matters, so your client’s case may or may not get reached or it may be the only case listed, so may well proceed.
If it proceeds the material and preparation will be tested in open Court for all solicitors, barristers, clients and members of the public as well as the Judge, to see so it must be right
 - a party will not get ‘the answer’ from the Judge at the end of the hearing and judgment will likely be reserved. There will likely be a wait of 3, 6, 9 or 12 months or anything in between or longer for judgment
 - solicitors and barristers cannot and do not guarantee outcomes
 - solicitors and barristers generally advise on *a settlement range* in property matters and a likely outcome in parenting matters
 - appeals are possible where parties can afford them and where an appeal is warranted
 - costs orders can and are made after judgment in the Family Court in Division 1 and Division 2
 - for cost to be paid by the other side, unless agreed to, requires a separate Application in a Proceeding supported by an Affidavit issued within 28 days of judgment where the Trial Judge will then make orders and directions for the filing of the Application, a Reply and a return date or for the matter to be considered in chambers with additional written submissions all of which costs more money
 - an order may say that costs are to be paid at X % or at scale and may require a taxation process by the Costs Registrar of the Registry so that takes time too
 - All in, a client may achieve say, one quarter of the costs arising, and one needs to also seek costs of the Costs Application

- All this is somewhat labour intensive, costly, involves delay and comes off the bat of a contested hearing where litigation fatigue has usually set in, well and truly. So, everyone needs to steel themselves with a new boost of energy for such applications where the outcome is not guaranteed and is discretionary. Then there is the matter of payment and enforcement of any non-payment of a costs order.
- At the Conference in Chambers with Counsel
 - Make arrangements for children and transport
 - Know the venue address (there's a difference between ODC East and West!)
 - Be on time
 - No recording without consent
 - Please avoid bringing children or adult children or witnesses in proceedings
 - Know what the agenda is for the conference which is normally set by the instructor with instructions
 - A Conference with Counsel Agenda would normally be
 - Confirm any safety/risk issues and how to accommodate them
 - Confirm dates and the Judge allocated to the hearing
 - Confirm that there are no conflicts arising
 - Confirm that the matter is proceeding
 - Confirm who is appearing for the other party
 - Confirm that no s.102NA aspects arise
 - Confirm the purpose of the trial and procedure at trial
 - Confirm who is needed for cross examination and their availability in writing - 14 days' notice is required for that notice (so check that compliance and readiness orders allow for that!)
 - Are all witnesses to be cross examined in person or video and is there a need for an application for any video cross examination
 - Confirm hearing requirements
 - Poppy the dog requirements
 - Interpreters
 - Amplification for parties with hearing issues
 - Comfort breaks etc for any parties with any medical issues
 - Confirm that the trial material has been filed on time and re-read by the client including expert reports
 - Confirm whether there are any important developments or news arising as a matter of fact from the date of swearing or affirming the trial material and if so, consider the preparation and service of a Proof of Evidence to be adopted in Evidence in Chief with notice to the other side so they can get instructions on this new evidence if it's allowed in via a leave to adduce further evidence oral application
 - Settlement ranges
 - Purpose, process and procedure of the final hearing - including the order of witnesses and what to do when there is an objection and/or when a Judge asks a question

- Confirm that all trial directions at Compliance and Readiness (or as updated by the Trial Judge) have been complied with and note the likely consequences on legal process for any failures to comply
- Roles and responsibilities at trial re:
 - the Judge
 - counsel
 - opposing counsel
 - solicitors
 - parties
 - witnesses and
 - members of the public
- Settlement options
- Waiting for judgment
- Cost estimates being correct
- Instructions to resolve matter or narrow issues
- Any further written offers to be made
- Homework/Tasks
- Any important developments or things counsel should know
- Know Counsel's name and background
- Listen to advice
- Avoid *arguing* with advice
- Challenge advice with important and reasonable questions, considerations, observations or facts
- Avoid focussing on matters which are not relevant to the legal process and legal decision making
- Consider life without the problem
- Consider the benefit of a resolution of the matter which secures
 - Finality
 - Certainty
 - Control over the outcome
 - The avoidance of any further delay
 - Cessation of any future legal costs
 - The avoidance of an Appeal process
 - No order as to Costs (where such an order should be included in consent orders if need be)
- Consider providing instructions to counsel to reach out to the other barrister to see if issues can be narrowed or the matter resolved in line with instructions
- Make time to attend to tasks as required (do not take leave OS or interstate before or just after a trial) as trials go for longer sometimes and sometimes written submissions are called for after a trial listing

- At the hearing
 - Appreciate that 95% of cases do resolve at Court or during a case so imagine life without the problem and appreciate the reasons for this – finality, control, avoidance of delay and avoidance of further costs
 - Plan the trip in and arrange parking/public transportation
 - Arrive on time for a 10am start – settled and composed say 9.30am
 - Any questions or feedback needs to go to solicitor who will raise them with counsel
 - Be clear on communication loop – questions or comments are usually directed to the instructor who will bring them to the attention of Counsel if warranted at the appropriate time
 - Follow the settlement discussions if they occur
 - Ask questions as needed
 - Listen to advice from Counsel
 - Appreciate Court etiquette including that no one is to move and there is to be silence whilst the oath or affirmation is being administered
 - Listen to views/comments and observations from the Judge
 - Remain as composed as possible
 - Have stress management techniques thought out and use them
 - Sit politely with appropriate posture
 - Avoid gestures or theatrical body language
 - Do not shout out instructions or feedback on evidence or a comment
- * Do not interrupt counsel in the running
- * Catch the instructor's eye
- Make discrete notes as required
- When giving evidence
 - Be clear on what the purpose of given evidence is
 - Be clear on why we are all here and what your general purpose is
 - Be clear on whether one is taking an oath or an affirmation and know the difference (there should be consistency between what is done in the witness box and what has been done in affidavits per the front sheet, jurat and annexure pages)
 - Listen to the question
 - Answer just the question
 - Be honest
 - Project the impression and image you have chosen which is in line with your personality, values and purpose
 - Assist the Judge in receiving evidence which is true to assist the Judge in his/her decision-making regarding findings of fact and the decision overall
- Understand the process of a hearing, what happens when generally – it's about the applicant having a turn to put his or her case and the respondent putting his or her case with the applicant having the right of reply
- Be clear on the purpose of cross examination – it's to challenge or correct or confirm the evidence, not to 'give them hell' or promote some other agenda

around accountability, punishment, pay back, embarrassment, therapy, forgiveness or change

- The evidence will simply be relevant to all the facts the Judge needs to find to make his or her decision, on the balance of probabilities, considering the relevant evidence under the umbrella of the relevant legislative provisions
- Outside of Court Hours and in Court precincts be very clear that it is expected that parties behave politely and respectfully to all including the other side, so there should be no stalling or listening in to conversations or making comments which will be reported to counsel and then raised in open Court
- If there is a call for a document in Court that call needs to be answered in Court
- Clients should
 - know that one bows as one enters and exists the Court Room if Court in session and why that is so
 - know that no one in the Court Room is to move whilst an Oath or Affirmation is being administered as it is a serious juncture in the process
 - be clear on whether they are giving an oath or affirmation
 - be clear on the difference
 - be clear on their material having re-read their affidavit
 - have ready access to a clean copy of their affidavit in the witness box
 - bring their medication to Court if any
 - bring what they need for their comfort breaks
 - wear comfortable clothing
 - remember that the bar table is for counsel and only things to do with the case go on the bar table
 - remember that counsel's brief is counsel's brief and is not to be taken or read or leafed through by the client
 - note that all conversations in the Court are being recorded even during break times for transcript purposes, so private conversations need to be had in private
 - not discuss the case or legal advice with others and not do so in the Court room or in front of Associates
 - understand the role of and respect the Court Associate
 - provide lawyers with privacy when lawyers are discussing the case or having private conversations
 - be ready to resolve the matter, even during a final hearing, as lots of matters do resolve during a final hearing
 - appreciate that the Judge does not give the answer or make final orders at the end of the case, as judgment is often reserved
 - understand that where there are funds to do so, a party may appeal final orders if the judgment warrants that and sometimes there is an appeal even if it is not warranted

- they need to come back for Day 2 etc of their trial even if they have finished giving their own evidence
- they need to remain in the court room during the trial and if they need to excuse themselves, they should catch the instructor's eye. There are comfort breaks at lunch time, and some Judges take a morning break
- only bring their bag and bottled water into the Court room (no coffee and drinks/food)
- consider who they bring to court as support people and how many people attend at the one time in line with impression management and the physical amenity at Court to accommodate support people, a roster may be more appropriate rather than a group en masse

SOLICITORS INCLUDING SOLICITORS AS ICLS AND s.102NA SOLICITORS

- Avoid matters from family members or from friends
- Develop your skills in event management and case management
- Know that your work is the foundation for much of what occurs next – devoting enough time to that planning and reflection is an imperative – the client, counsel and the Court is relying on you and they appreciate your work very much
- Have a professional, good working rapport with the other solicitor and all counsel involved in the matter as well as professional witnesses
- Be willing to cut to the chase and contact the other solicitor practitioner by telephone as it's often quicker to get the nub of things when time is of the essence or be willing to discuss a matter or aspects of it by telephone one; repeat the take away to confirm common understandings as to next steps or agreements; if disagreements arise, keep them in perspective and work through them to reach a resolution and maintain a cordial relationship with the other practitioner. It is an example to the parties as to how trained, experienced and well paid professionals communicate and collaborate on things. That way, parties can focus on what they need to focus on regarding more substantive aspects of their case
- Ensure that clients understand that both parties usually have more in common than what they have differences and that solicitors generally aim to resolve matters as quickly, efficiently, accurately and in an informed manner, focussing on solutions reached in line with instructions guided by advice which is given in line with the legislation and case law developments, referable to the client's situation. Client's should also appreciate that solicitors are officers of the Court and must conduct themselves in line with their duties to the Court which come first and foremost after their duties to the client. Solicitors are not the client's friend, or counsellor. They are their professional advocate, advocating for the resolution of the client matter in line with a likely range of outcomes which is informed by the evidence and that range can and does change in line with new evidence which comes into play as the case unfolds, particularly if instructions are not particularised or backup with documents and fact checking
- Avoid inflaming a case, the rapport between solicitors or the parties – elements in respect of risk and/or contentions as to the building blocks of a case need to be put factually, sensitively, accurately, with examples or requisite details to make the point as to risk or contribution or circumstances and no more; avoid exaggerations or irrelevant matters
- Explain to the client what your duties and obligations are to a self-represented litigant and likewise the Court's approach to self-represented litigants
- Be clear on what the client can expect from counsel
- Be clear on what the client as a party can expect from the Court – it's judicial officers, its processes and its expectations of a client as a party to proceedings – it is absolutely imperative that clients as a party follow orders of the Court (for many reasons) and that documents are filed on time. If you are late in one round of proceedings with documents being filed late, assess why and avoid those pitfalls in the next round of due dates for documents

- Have the client appreciate that the Court and profession are resolution focussed not final hearing focussed; if a final hearing is necessary one will be had and paid for expenses and it will be done properly but a final hearing is not usual given most of the issues in contention between separated parents/ parties
- Being resolution focussed still requires documents to be filed on time and for instructions to be sought, checked and all evidence to had to be considered in an intellectually honest and rigorous manner
- Have the client appreciate that many of the matters in dispute which require decision making would require decision making whether they were still together or separated – what makes it unnecessarily harder is time pressure or emotional pressure; what makes it easier is documents filed on time, timely discovery per the rules, an good rapport between solicitors and an overall solutions focussed approach
- Ensure clients get the emotional assistance they need from professional psychiatrists or psychologists
- Be clear on what you need counsel to do by when and why
- Seek supervision from your in-house senior not counsel
- Ensure that fees are paid as they are due to avoid any conflict of interest regarding fees and settlement of a matter and/or having to file a notice of ceasing to act before a trial (noting the rules do not allow such a notice within 2 weeks of final hearing)
- Avoid taking on matters unless you have the time and resources to devote to the matter in line with orders and directions for the due date for filing material
- Be clear with the client on the costs provisions on the Family Law Act, the general rule in relation to costs, the impact of accepting or failing to accept an offer; proportionality between what is being sought and what is being spent and the likelihood of achieving the result
- Take good file notes of advice, instructions and the client's demeanour and indicators of having listened to and accepted or not accepted advice noting when the advice was given in what context
- Be willing to review and update advice as new evidence comes to light throughout the matter and as subpoenaed documents are inspected and analysed
- Exercise good judgment in a wholistic manner; be calm, professional and objective; lead by example in this regard;
- Remind clients that the trial is about evidence and the Judge will make findings of fact based on that evidence and if necessary, on credit
- Appreciate that solicitors (and barristers) are not the mere mouthpiece of a client and ensure that clients appreciate this point and the solicitor's duty to the Court and legal process

- Be aware that the Court can and does make costs orders against practitioners (where their conduct fails to meet an obvious requisite standard) or make orders disallowing charging for work which does not warrant a fee
- Be patient, courteous and respectful of other practitioners, counsel and opposing counsel – remember counsel may have work to refer to you and/or your firm
- File relevant, cogent, tested material on time (tested material is material which has been checked against subpoenaed documents and/or other witnesses). Material would also be prepared considering any professional reports and orders of the Court.
- Material will also need to keep abreast of developments in legislation and case law, such as for example, developments in the definition of family violence see s.4 FLA and Pickford [2024] FedCFamC1A 249 (20 December 2024) and Shinohara & Shinohara [2025] FedCFamC1A 126 (23 July 2025) on addbacks and consideration of the parties' current and future circumstances
- Remember the Discovery obligation is ongoing throughout a matter and applies even during a hearing. Be conscious of how and when you deliver documents to the other side for discovery. They should be delivered in a decipherable, categorised manner where everyone can discern what has been sent, when. It is often important to be able to show when a document was discovered and to scotch arguments about non-disclosure. Consider the E-Brief discovery facilities (E Brief Ready ph. 03 9020 4456 or 03 9956 1026).
- If your client is seeking a determination on any interim order as to Costs Reserved on a matter, or on any enforcement action then make sure there is evidence in chief material in the affidavit in support of any order sought with the head of power identified
- Be clear on Privilege – what it is, if it applies to documents and when it is purportedly waived
- Read Updated Orders and directions as to filing of trial documents and outlines of case, as these may change from Compliance and Readiness orders by Boymal J., and/or the Chief Justice, to those refreshed orders made by the allocated Trial Judge
- Deliver the e-brief, hard copy brief and paginated Court Book in one job lot, on time for counsel to
 - Read the material and be able to reference it per the page numbers in the Court Book if a Court Book has been ordered
 - Understand the scope of the brief – for example, a s.102NA brief is not at all likely to be just to cross examine and take on other briefs during the listed Court days (ICL counsel and s.102NA counsel are reading, preparing, conferring and negotiating at no cost to the party or the interests they represent. It is work which is done gratis and should be respected. To do that work properly, and on an even footing with other counsel, they need their brief in good time to do that work. It is

suggested by the writer, usually 10 days prior to Day 1 of trial). That reading and preparatory work simply must be done for that counsel to be effective and be of service to their client, to participate in pre Court Day 1 discussions and to be of service to the Court and the parties. You want a good return on the investment of the work you and your client have put into the case so far

- Understand the facts and what arises therefrom in terms of the big picture and detail
 - Confer with instructor
 - Confer with instructor and client to get instructions to
 - Narrow issues
 - Resolve the matter in full
 - Allow enough time for counsel to reach out to the other counsel to see if issues can be narrowed or resolved in full and if not, to do objections if ordered and a trial plan if ordered
 - Allow enough time for counsel to prepare the opening address, examination in chief/reply if any, cross examination and closing address as appropriate during business days and business hours (the closing address is usually prepared by summarising the relevant evidence pertaining to the closing address at the end of each court day. Hence, Court finishing at 4.30pm to allow for that process. Judges will also summarise the day's evidence germane to a judgment usually as the days proceed
 - All counsel in a matter really do need to be ready to confer well prior to Day 1 to narrow issues or resolve the matter. There needs to be time for drafting orders and/or heads of agreement to be tendered into court. A Minute of Proposed Final order signed is preferred; a Heads of Agreement Document will usually contain a provision that the agreement set out therein is admissible in court to prove the agreement reached between the parties on date X (to avoid a party resiling from an agreement set out in a Heads of Agreement document). If there is time for a minute of final order to be signed before Day 1 rather than at Day 1 all the better
 - Solicitors and clients need to be available after hours to assist counsel or provide updated instructions. This includes ICL solicitors and s.102NA solicitors.
 - If a minute of order has been signed or a Heads of Agreement document signed, then it is usual for a joint email to be sent to chambers of the trial judge to inform the trial Judge of the matter resolving in principle. All three parties need to agree to this email being sent.
- Ensure clarity around fees for preparatory work, conference, negotiation work billed at an hourly rate and the daily fee to avoid Bill Shock.

If a matter is resolved before Day 1 you can assume that all preparatory and ancillary work plus Day 1 will be billed, in full, unless advised otherwise and the client should know this.

The solicitor should also advise the client that the daily fee is for any part of the day, not just a full day as counsel has set that day aside for the client and declined other briefs to appear on that day or been marked as 'not available' on account of the diary final hearing commitment.

- Be very clear on counsel's cancellation fees policy – remember a cancelled brief constitutes that barrister's whole day's income for that day or 20% of their income for the week
- Prepare an agenda for the conference with counsel and the Costs Notice
- Deliver the Costs Notice in advance of any conference with counsel and in advance of Day 1 of the trial so the obvious purpose of the Cost Notice can be achieved for the benefit of your client
- Have funds in trust before the delivery of the brief and Court Book (if one is ordered) to cover
 - The allocated days for hearing
 - Preparation
 - Conference
 - Discussions

The firm is liable for counsel's fees and disbursements

- Ensure that the client has re-read their trial affidavit, the other side's trial material and the expert reports prior to the conference with counsel and prior to Court. It's not a memory test but they should be familiar with the documents
- If there are changes or developments please advise Counsel prior to and at conference; please check regularly with the client if there are any changes or developments
- Remember that counsel will likely decline a brief and Court Book if it is not delivered in full by the day agreed to allow enough timely preparation during business hours
- Allow for possible (but not expected) after hour attendances and week-end attendances (to be kept to a minimum) for trial work by the solicitor and counsel
- Prior to taking on a new matter right before trial, be very clear on whether the solicitor can undertake their role and responsibilities properly and can reasonably afford counsel an opportunity to do the same.
- Know and understand why a client has changed solicitors before and be very clear on the capacity of a new late comer client to fund a trial and preparation and be able to prepare on time as well as accept advice
- Appreciate that an Adjournment on account of having a new solicitor on the record is not generally favoured by the Court. The time spent on asking for an adjournment can often be spent doing the requisite work under pressure, if the solicitor is properly resourced and if not, perhaps the matter should not be accepted by the solicitor's firm

- *** Be very clear on the Rules regarding when a matter listed for final hearing is to be relinquished and a Notice of Ceasing to Act filed
 - NB Rule 3.10 1A – A firm may not file a Notice of Ceasing to Act within 14 days of a final hearing without leave of the Court in writing
- Have the e-brief ready and delivered at least 10 business days prior to Day 1
- Have the Court Book ready and delivered at least 10 business days prior to Day 1 – which should be done and paginated within 24 hours of the last trial document being filed, with the outlines to be added at the end only, so the pagination is not disordered. If someone is late with their filing of material, that material should be added to the end of the Court book to not disrupt the pagination (and preparation work already done by counsel). The pagination is crucial for the preparation of cross examination referencing by counsel
- Have the Tender Book Ready, separately paginated, as again, counsel will cross reference those page numbers with his or her cross-examination questions particularly if appearing in a paperless Court.
- Have a hard copy Tender Book for the witness box
- Have experience in quickly calling up the relevant page of the Tender Book and/or emailing it to the Associate so it can be referenced easily in Court
- Have the annexures of the affidavits ready to tender separately as counsel will do this in Evidence in Chief or if an annexure is put to a witness or as agreed between counsel.

Remember, if an annexure is not tendered formally and accepted into evidence, the Judge cannot read it per Rule 8.13. Annexures which are not in issue or not relevant need not be tendered. There is no need to put an annexure to the affidavit to prove each paragraph of the affidavit. Annexures are relevant for matters likely to be in contention. Most solicitors draft affidavits saying that the discovery pertinent to a point is available for inspection, if it is. This rules as to the tendering of Annexures also stands for interim hearings

- Have a hard, clean copy of the Court Book if one is ordered for each Counsel, the Judge or at least the witness box, so each person can access the hard copy page easily, unless the Judge runs a paperless Court
- The same may be said for a parties' Tender Book (which does not go to the other party until they have started their cross examination)
- Have a shell of the Exhibits List Book (this is a book of documents tendered in the running of a case) ready to be completed at the end of each Court Day, unless the Associate is doing this, so everyone can have an electronic Exhibits List Book with an

index and the actual document behind it. The Associate may do this or the Applicant's solicitor can do this for everyone, but it is an important resource so be clear on who is doing it quickly at the end of each Court Day.

- Ensure the applicant has paid the daily hearing fee for Day 1 and on going
- Ensure that if interpreters are required for the parties that they have been arranged by the Court (confirm this via the Associate cc: the other side)
- Ensure that if any party or person involved in the Court requires for the proceedings to be amplified that this is relayed to the Court via the Associate (cc the other side)
- Ensure that if your client would benefit from having Court Dog Poppy attend proceedings that arrangements are made via Melb.CourtDog@fcfcoa.gov.au
- At trial the solicitor would generally
 - Ensure the client is in attendance and settled with or without appropriate support people
 - Ensure the client is following what is going on
 - Vet questions
 - Assist in communication between counsel and the client as the solicitor usually has a very good understanding of the client's communication style and how they think. The solicitor can generally sense if the client is not understanding something or can help discern the point the client is trying to make with counsel in discussions
 - Remind the client that counsel is focussed on their role and that when asked a question by their own counsel outside of court in its precincts in general discussion or during negotiations, that the client needs to provide their direct answer quickly, as counsel is running on a clock
 - Remind the client to ask for a break if they need one (noting the lunch break)
 - Ensure the client is reminded of and fulfilling their role and responsibilities, likewise their support people
 - Have the easy-to-read Costs letter done per Rule 12.06 in good time for the trial
 - Have the documents to be tendered ready to go in line with the order of cross examination (so this means the Tender Book is prepared very well in advance of trial and before Counsel is preparing cross examination)

- Ensure that the client and others conduct themselves appropriately inside and out of Court and in the precincts of Court re: verbal and non-verbal communications
- Let counsel know of any issues
- Attend set up with 5 minutes to spare
- Note adjournment times during the day
- Note the last question counsel asked before a short adjournment
- Lead by example in all things
- In Court remember
 - There is to be no personal recording by anyone of the Court proceedings and clients should be told this
 - Mobile phones are to be turned off and clients should be reminded of this
 - Witnesses should be out of court once the case begins (after administrative matters are attend to but it's often easier to simply have them out of Court from the beginning to avoid embarrassment or confusion)
 - Only things pertinent to the trial go on the Bar Table
 - No one moves whilst the Oath or Affirmation is being given and clients should also be told this and reminded
 - If you must provide documents to anyone, they are to be clean copies if they are hard copies
 - The order of proceedings is generally
 - Administrative matters
 - Opening address if counsel wishes to do one
 - Examination in chief of the applicant
 - Leave application to lead any additional evidence arising from after the date of affirming or swearing their affidavit (with notice of such application to all other counsel and the content of the evidence via a proof of evidence or otherwise)
 - Cross examination of the applicant
 - Re-examination of the applicant
 - Per the above for the next witness in support of the applicant's case, if any [the other counsel does not have to advise which order they will be calling their client's witnesses, but they will generally tell your counsel when they know!]
 - When the applicant's witnesses are finished that may be the end of the Applicant's case subject to hearing from the expert single experts/family report writers
 - Opening address if any for the Respondent
 - Examination in chief of the respondent

- As above should there need to be an application for leave to call further evidence arising from a date after the affirming or swearing of their trial affidavit
 - Cross examination of the respondent
 - Re-examination, if any of the respondent
 - As above for any other lay or professional witness in support of the Respondent's case
 - Cross examination of the single expert
 - In a parenting matter the ICL may cross examine first, then the applicant and then the respondent
 - In a property matter the applicant would cross examine first and then the respondent
 - Short break at the conclusion of the evidence if sought to rally thoughts prior to closing addresses
 - Closing addresses
 - The ICL may go first in a parenting matter
 - Then the respondent
 - Then the applicant or
 - In a property matter the respondent would normally go first and then the applicant or the applicant, then the respondent and then the applicant having the right of reply only as to what the respondent has addressed the Court
-
- Make sure that your affidavit has noted on the face of it including annexure pages and the jurat whether it is sworn or affirmed and that the witness knows what he or she is doing in this regard before they step in to the witness box
 - Rally witnesses at the right time – have their mobile numbers in your phone
 - Know the Court records everything that is said when Court is in session and even when it is not
 - You may like to ask for a Court link if you want to observe Court as the ICL whilst in the office or if you are too unwell or too far away to attend
 - Remember that those on the link can see and hear you in Court even whilst Court is stood down and even if you cannot see or hear them
 - Take good notes of all the evidence – the answer is the evidence not the question
 - Provide your notes and summary points to counsel at the end of every day – typed up, colour coded or highlighted so there is some analysis of salient matters in the evidence for closing address or for re-examination by Counsel from the instructor's point of view
 - Make sure you keep a hawk's eye on the client in the body of the Court, likewise everyone else in the Court and relay any salient matters to counsel
 - Allow some time at the end of each Court Day for a short de brief with counsel as to how the evidence is going and if anything else needs doing
 - Allow some time at the end of each Court Day for client care
 - Allow some time at the end of each Court Day for self-care
 - Make sure you do not relay to professional or other witnesses what the evidence has been or generally even how the evidence is going – professional witnesses

will be given a summary of the evidence by the Judge or by the ICL or an agreed counsel with that counsel having conferred with the other counsel as to what the summary will be

- Remember that you cannot confer with the client whilst he or she is under cross examination – you may at the end of cross examination or to discuss offers with the permission of the Judge and other counsel (this is generally done by Counsel with an instructor present) or Counsel may do so to get instructions for re-examination
- Appreciate that re-examination does not often occur and occurs where Counsel wants to expand upon or explain or contextualise evidence given in cross examination. Re-examination is not an opportunity to introduce evidence in respect of new topic somehow related to the evidence
- If you have suggestions or feedback for counsel at the Bar Table, then please make sure the note is legible and/or the oral suggestion made just so counsel can hear it clearly or send a text or email as appropriate; agree on how you are going to communicate
- Make sure you let the client know when they are next due in Court – ie. the next day at 9.30am for a 10am start – one client thought he did not have to come back as he had completed his evidence. Another client visibly annoyed, thinking he had to come back the next day, even after his case was finished, as the Associate said the Court was adjourned to ‘tomorrow at 10am’
- Make sure nothing personal or controversial is discussed in the Court Room as it is constantly recording and Associates do not want to be privy to such discussions as they may cause embarrassment

The Closing Address

- Usually, the ICL will go first in a parenting matter, then the respondent and then the applicant. In a property matter, the usually goes first and then the applicant or sometimes the applicant goes first and then the respondent with the applicant having a right of reply.
- Make sure you, the client and professional witnesses are available to assist counsel with the closing address. Particularly if the case has gone for several days and there are developments in the evidence.

This applies very much to ICL instructors. Counsel for the ICL is not the ICL as Counsel did not file the Notice of Address for Service. The ICL solicitor did so.

The ICL instructor as a party needs to provide informed instructions to Counsel with the assistance of the professional witness (usually the family report writer). The other Counsel have the benefit of their instructors' input. Counsel for the ICL should also have this benefit, along with the input of the family report writer.

Counsel for the ICL usually makes submissions on behalf of ICL first in closing, with the respondent and applicant then replying to those in their final address to the Court. Parties have often spent many thousands of dollars in the Court proceedings and at trial, so they are entitled to have all counsel being able to provide considered, cogent closing addresses and a minute of proposed order, with the assistance of those professionals who are there to support them.

- After Trial
 - Do not book a holiday for the day after the last day of trial as the case may go longer and/or written submissions may be required
 - Ensure that the client complies with extant interim orders pending judgment
 - Make arrangements via consent orders for any narrow issues which can be agreed in the interim for example, what is to happen this Christmas or on some special occasion but appreciate that there's not necessarily going to be an order other than by consent for say, increasing time even if an increase in time is agreed by all parties ... there has to be a consent order for that
 - Consider what further orders may need to be made if an interim order expires on a set date
 - Appreciate that the Bench may have some comments or observations which the Bench wants discussed with the parties to see if the matter can be resolved. Solicitors and barristers are expected to have direct and meaningful conversations with their clients about any possible resolution of the matter considering such comments which would avoid the necessity for a judgment – which means no delay in actioning consent orders (it is not unusual for one party to not mind the delay at all of course – a parent may not want the extension of any time or a party may wish to stay in the house just that bit longer etc). The point is that a client should be open to resolving a matter if the outcome is reasonably clear on the evidence. That said, a client cannot be and should not be forced into anything.
 - Ensure that the client appreciates that the judgment can take anywhere from 60, 90 to 120 days or more and in between they are not to prejudice their case by acting out, interfering with the process or taking matters into their own hands
 - If one needs to check on the progress of a judgment, then the process is to write to the CJ's chambers. Do not contact chambers directly.
 - Ensure that all extant accounts are paid for by the due date; making sure that accounts are paid often reduces the likelihood of any costs dispute upon judgment being delivered if the result is not to the client's liking

COUNSEL FOR A PARTY OR COUNSEL FOR THE ICL AND s.102NA COUNSEL

Counsel are expected to

- Lead by example
- Have a patient and courteous relationship with the Bench and all professionals involved in the matter as well as the with the client and support people
- Have read the brief
- Know the facts and details of names and background of children, parties and witnesses
- Assess risk and likely outcomes with advice being tailored as new matters come to light
- Check if any special arrangements for trial need to be made regarding a client's risk
- Provide guidance to instructors regarding the preparation of the case, outlines and minutes or orders if there is time to do so
- Have conferred meaningfully with the other parties' counsel with instructions to narrow issues or resolve the matter before Day 1
- If ordered, done objections to evidence and/or a trial plan in consultation with the other counsel
- Enter discussions with opposing counsel, with notice to the instructor, and keep within the parameters of evolving instructions. Counsel will keep the instructor and client advised of important developments regarding discussions
- Not enter discussions directly with the client, as that usually causes confusion or embarrassment; discussions should be three way as between counsel, instructor and client, to keep everyone in the loop and the team working as one
- Enter settlement discussions outside of Court hours as appropriate
- Remain calm, polite and professional always and be able to answer questions from the Bench and others; facilitate orderly and clear communication and decision making by the client
- Prepare and present effective, relevant cogent cross examination such that in the process the Bench and parties learn new things, have matters confirmed, corrected or clarified relevant to the issues in the case
- Present cross examination in an effective and respectful manner and not in a manner which is designed to or does bully or embarrass or prolong the case unnecessarily – the Bench expects counsel to run the case with a mind to the issues in dispute. Relevance and proportionality is key and clients should appreciate this. Counsel will not denigrate anyone involved in the case or join in that behaviour
- Counsel will generally work 10-hour days during a trial and the client should expect to be billed for that necessary and important work. Counsel should provide a fee disclosure agreement and the instructor should call for one, if one is not provided to ensure clarity as to the fee structure and fee estimate to avoid Bill Shock; please assume counsel will

bill for work which you have asked be done and/or work which you can see is being done – do not assume counsel will be attending to tasks free of charge. Counsel will likely bill for work which is necessary and reasonable to comply with the obligations of their retainer

JUDGES AT FINAL HEARING

At a final hearing, parties, solicitors and barristers may reasonably expect trial Judges to

- lead by example
- have read the material (remembering that annexures are not filed)
- bring an open mind and good ear to the case
- start on time and finish on time
- make up any lost Court time at the end of beginning of the next day or in part of a lunch break (where Court time has been lost on account of the Judge's commitment or need to start late or leave early). Settlement discussions are expected to take place outside of Court hours and your client may expect to be billed for that attendance by counsel.
- run an efficient, fair and respectful Court such that everyone is treated with respect
- curb any behaviour which is inflammatory or performative – there is no jury
- express views or observations fairly and calmly including feedback to a party or their practitioner on the content of affidavit material or preparation
- avoid behaviour which is perceived to be biased (to avoid any application for actual or apprehended bias and otherwise)
- if the Judge is not available to hear the case, once it has started, offer a Costs Certificate pursuant to the Federal Proceedings (Costs) Act 1981 (the provisions do not apply where a counsel is not available on account of poor health or a personal/family emergency for example)
- apply the relevant legislation and case law to the case, guided by counsel
- release a considered judgment in a timely manner which is written in a way which affords the reader the ability to understand what findings were made why, and how those findings lead to conclusions which lead to the result. It does usually help parties to know that the judge has understood their case as prepared by their solicitor and advocated by their counsel. It does usually assist parties to accept the result if they can understand the reasons for it. Inferences may be properly made and judicial notice of facts can be relied upon if notice of that is provided to the parties and their counsel.

WHAT HAPPENS WHEN THE JUDGMENT IS DELIVERED

Solicitors will have the judgment and orders pop up in their email in-box usually with notice from the Associate.

Counsel appreciates receiving the Court's decision. It should be emailed to Counsel with the bottom line and a short form synopsis. The instructor should have read the decision before sending it to Counsel and be ready to make time for a professional courtesy de-brief.

Likewise, before the solicitor sends it to the client. The client should be provided with a general synopsis of the decision and invited to attend a meeting to discuss the decision as a debrief or if the solicitor thinks it more appropriate, a meeting can be rallied for the solicitor to present and discuss the Reasons for Judgment and Orders in person with the client.

The client will be told that either party has 28 days to lodge an appeal if there exist appealable grounds to do so and an appeal is warranted.

In property matters, you probably need to consider

- the court outcome
- compare that in table format to your client's offer by line item
- compare the % splits
- compare the overall outcomes
- consider variables and the reasons for that
- consider legislative costs considerations and the exercise of discretion
- consider delay and cost/benefit analysis of any costs application
- ensure any costs application is made within 28 days of the decision

If counsel is briefed to advise on whether the decision should be appealed, that brief needs to be delivered quickly as any appeal needs to be lodged within 28 days of the decision. Often whilst counsel in the matter may be asked to consider the merits of any appeal, it is usual practice to brief different counsel to advise on whether there are grounds for an appeal based on an error or law or miscarriage of discretion.

Solicitors will

- diarise all due dates and obligations to be complied with pursuant to final orders
- ensure strict compliance with same and check compliance, including as to superannuation split orders which must be actioned
- ensure subpoenaed documents are returned or destroyed
- provide copies of the orders to whomever is entitled to copies
- thank relevant professionals/witnesses in the matter
- check in with their clients to ensure they are travelling OK after the delivery of judgment and final orders
- have a de brief with their supervisor and/or counsel

COMPLIANCE AND READINESS

- Those appearing should ensure there is enough time in the trial preparation orders between the last day of filing an affidavit and delivery of the e-brief (and court book) to allow counsel to
 - Read and understand the brief
 - Confer with the instructor
 - Confer with the instructor and client
 - Confer with opposing counsel to
 - narrow issues or
 - resolve the matter (avoiding the need for actual trial preparation and the attendant costs of that) and/or
 - attend to a trial plan and/or
 - attend to objections to evidence if they are part of the trial preparation orders
 - Attend to preparation of the matter if it does not resolve so that if it's a three-day matter, there is three clear business days to prepare.

This means that the brief and Court book would need to be delivered a good 10 business days prior to the hearing.

Please check that the compliance and readiness orders allow for that. Otherwise, what will happen is that the settlement discussions will not happen and the client will be billed for preparation days and then then the matter will simply proceed to Day 1 where that preparatory work will be used or if the matter resolves, it will be paid for but not used. The preparation bill could have been avoided, if there was enough time allowed for informed discussions with instructions. The alternative is that counsel for your client will accommodate last minute settlement discussions which will eat into preparation time and your counsel will likely be compressed in his or her preparation or be very tired before he or she begins the case. There's no need for that with timely, diarised preparation mechanics as to the filing, preparation and delivery of the ebrief and Court Book, if ordered.

JUDICIAL SETTLEMENT CONFERENCES ON OFFER

If at any time in the litigation process a Judicial Settlement Conference is offered to the parties, please be very clear on

- who the proposed allocated SJR or judicial officer will be and get instructions if that suits your client and their needs
Some parties like the idea of having the same SJR or judicial officer involved in their matter as before and others much prefer to have a fresh SJR or judicial officer, for a Judicial Settlement Conference – it may be that the parties do not get a choice. If that is the case, let the parties know and either or both parties may opt to take up or decline the offer;
- the proposed date, time and venue offered for the Judicial Settlement Conference and the context.
Will it be conducted in open Court in a SJR daily list or will the parties have an allocated day and privacy. The writer has had a private mediation with a retiring Judge via zoom and another conference by a SRJ in open Court during the SJR's busy Court List with no privacy and not much SJR time or attention allocated to the matter. Clients need to know what's on offer exactly and what they are purportedly paying for exactly.
- What are the Court fees, if any for such a conference
- What time is allocated to the Judicial Settlement Conference by the SJR or Judge or Justice
- What happens if the matter resolved
- What happens if it does not resolve
- What material needs to be done
- Is counsel to be briefed?
- Are the report writers or experts to be 'on call' on the allocated date for the Judicial Settlement Conference

WHAT HAPPENS IF A SPEEDY TRIAL IS OFFERED

If one is offered a trial *quick sticks* rather than in three months which sometimes occurs for different reasons, then the solicitor's office needs to be resourced to attend to the filing and service of material on time for Day 1 of trial and to ensure that counsel is briefed properly in good time to perform at his or her best for the client. Professional witnesses and their reports also need to be able to be done. This all needs to be checked. If necessary, ask for the matter to be stood down for say 15 minutes to explore the rallying of resources. The client also needs to be able to raise funds for a quick trial and disbursements.

Solicitors can consider briefing counsel to attend to drafting work or settling material, if the firm is not resourced with senior and junior practitioners with diary time to attend to same. When counsel is briefed to settle material, that usually simply involves checking the material for any objectionable material, not drafting it from scratch, reading the background material, family reports, checking compliance with orders and back checking any interim/historical material and checking subpoenaed documents of the content of the draft affidavit. Be very clear on what you need counsel to do and check their actual capacity to do that work as well as their fee estimate. Your client must be able to fund that those attendances ahead of Day 1 of trial in most instances.

WHAT HAPPENS IF A TRIAL NEEDS TO BE ADJOURNED

If a case needs to be adjourned remember the principles set out in Reed and Reed; Draper (intervener) (1995) FLC 92 – 649

An application in a proceeding needs to be filed together with an affidavit in support. The respondent will get a right of reply if the adjournment is contested and the application will be allocated a hearing date before the trial Judge.

If the application is not successful, a costs order may be made or costs may be reserved on the basis that findings of fact need to be made at trial to be able to fully discern whether the application for the adjournment was properly brought or not.

It is difficult to adjourn a final hearing given the principles set out in Reed and Reed. It is a matter for the Court's discretion and that discretion will be exercised in line with relevant considerations. The Court will consider if the refusal to grant the adjournment will result in serious injustice to one party. Should it be granted? Will there be serious injustice visited upon the other party if an adjournment is granted? The Court is balancing potential injustice to each of the parties should an adjournment be granted or refused.

Remember too that parties wait a long time for a hearing, they are on three months' notice of that date where they agreed to the matter being set down and should the matter be adjourned, then there may be further costs arising in respect of updating valuations or reports.

Also, the matter, if it were to be adjourned, would be added to a Court date which may already be full, inconveniencing other matters/families in need where they are then in competition with an extra matter, to be heard.

The Court expects parties to comply with trial orders and directions upon the matter being set down and it is not for a party to misbehave and then expect an application for an adjournment to be successful on the basis that the applicant may simply pay the other party's costs thrown away. Litigants are entitled to bring litigation to an orderly and timely conclusion. There are public policy considerations at play. The Court also wants to ensure there is public confidence in the listing system and that cases will not languish via an adjournment process.

An application for an adjournment of a final hearing then is a very serious and important matter and is not to be made lightly and may not be successful. If such an application is to be brought, it should be brought sooner rather than later, with the other side on notice.

One can appreciate that the Compliance and Readiness appearance and preparation for it is very important. Submissions made and information relayed to the Court (written and oral) as to readiness or not needs to be accurate.

Be very wary of taking on a new matter which is listed for final hearing if you do not have the background of the case, the file, knowledge of its nuances (why did the solicitor reject the client or the client change lawyers, why did the matter not resolve at mediation etc) and resources to take it on in a manner which allows you to fulfill your duties and responsibilities to the client, counsel and to the court.

WHAT HAPPENS IF A JUDGE CANNOT HEAR A CASE AS A WHOLE OR ON AN ALLOCATED COURT DAY DUE TO ILLNESS OR CIRCUMSTANCES BEYOND THEIR CONTROL

The Federal Proceedings (Costs) Act 1981 s.10 probably does not cover such an instance

It does cover in respect of the Judge – death, resignation, removal from office, dismissal, protracted illness or if the Judge otherwise becomes unavailable to continue with or to give judgment in the proceedings. A costs certificate may issue - up to \$2000. The proceeding needs to be discontinued, and a new proceeding ordered (one needs to make sure that the reasons for the discontinuation or new hearing is not attributable to the neglect, default, or improper act of any party to the proceeding). The Court needs to be able, on the application of a party, to say that in its opinion, it would be appropriate for the Attorney General to authorize a payment under this Act.

WHAT HAPPENS WHERE COUNSEL IS ILL OR CALLED AWAY ON AN EMERGENCY AND THE CASE CANNOT PROCEED ON THAT DAY

That might simply be a matter of bad luck, with the parties and their counsel coming back on an adjourned date, part heard if the case has started. There is not usually a costs order made against counsel who is ill or called away on an emergency. Remaining counsel may or may not charge a fee for that day, at their discretion.

WHEN MUST COUNSEL RETURN A BRIEF AND WHEN MAY COUNSEL RETURN A BRIEF AND WHAT ARE THE RULES AROUND RELEASING COUNSEL FROM A BRIEF OR THE TRANSFER OF A BRIEF?

It is very important to be aware of the Rules around this issue and know how they impact you choosing and retaining counsel as well as timely delivery of the brief, conferences prior to hearing and conduct at the final hearing itself.

I encourage you to read the relevant rules set out below carefully and know them.

Legal Profession Uniform Conduct (Barristers) Rules 2015 [NSW which apply in Victoria]

101 Briefs which must be refused or must be returned

A barrister must refuse to accept or retain a brief or instructions to appear before a court if:

(a) the barrister has information which is confidential to any other person in the case other than the prospective client, and:

- (i) the information may, as a real possibility, be material to the prospective client's case, and
- (ii) (ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case,

(b) the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate,

- (c) the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer,
- (d) the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case,
- (e) the brief is to appear on an appeal and the barrister was a witness in the case at first instance,
- (f) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case,
- (g) the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee,
- (h) the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client,
- (i) the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or appeared for the arbitrator in connection with the arbitration,
- (j) the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member, unless the hearing is before the High Court of Australia sitting all available judges,
- (k) NB there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules,
- (l) the barrister has already advised or drawn pleadings for another party to the matter, or
- (m) NB. the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises.

104 NB. A barrister must not accept a brief to appear on a day when the barrister is already committed to appear or is reasonably likely to be required to appear on another brief if by appearing on one of the briefs the barrister would not in the normal course of events be able to appear on the other brief or briefs.

105 Briefs which may be refused or returned

A barrister may refuse or return a brief to appear before a court:

- (a) NB if the brief is not offered by a solicitor,
- (b) NB if the barrister considers on reasonable grounds that the time or effort required for the brief threatens to prejudice the barrister's practice or other professional or personal engagements,
- (c) NB if the instructing solicitor does not agree to be responsible for the payment of the barrister's fee,
- (d) NB if the barrister has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with the costs agreement,
- (e) if the brief may, as a real possibility, require the barrister to cross-examine or criticise a friend or relative,
- (f) NB if the solicitor does not comply with a request by the barrister for appropriate attendances by the instructing solicitor, solicitor's clerk or client representative for the purposes of
 - (i) ensuring that the barrister is provided with adequate instructions to permit the barrister properly to carry out the work or appearance required by the brief,
 - (ii) ensuring that the client adequately understands the barrister's advice,
 - (iii) avoiding any delay in the conduct of any hearing, and
 - (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused,
- (g) NB if the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be,
- (h) if the prospective client is also the prospective instructing solicitor, or a partner, employer or employee of the prospective instructing solicitor, and has refused the barrister's request to be instructed by a solicitor independent of the prospective client and the prospective client's firm,
- (i) NB if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief does not require the services of a Senior Counsel,
- (j) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief also requires the services of a junior counsel and none has been briefed,
- (k) where there is a personal or business relationship between the barrister and the client or another party, a witness, or another legal practitioner representing a party,
- (l) where the brief is to appear before a judge whose personal or business relationship with the barrister is such as to give rise to the apprehension that there may not be a fair hearing, or
- (m) in accordance with the terms of a costs agreement which provide for return of a brief.

106 A barrister may return a brief accepted under a conditional costs agreement if the barrister considers on reasonable grounds that the client has unreasonably rejected a reasonable offer to compromise contrary to the barrister's advice.

WHEN MUST A BARRISTER NOT RETURN A BRIEF

107 A barrister must not return under rule 105 a brief to defend a charge of a serious criminal offence unless: (a) the barrister believes on reasonable grounds that: (i) the circumstances are exceptional and compelling, and (ii) there is enough time for another legal practitioner to take over the case properly before the hearing, or (b) the client has consented after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and of the terms of this rule.

108 NB A barrister must not return a brief to appear in order to accept another brief to appear unless the instructing solicitor or the client in the first brief has permitted the barrister to do so beforehand, after the barrister has clearly informed the instructing solicitor or the client of the circumstances in which the barrister wishes to return the brief and of the terms of this rule and rule.

109 NB A barrister must not return a brief to appear on a particular date in order to attend a social occasion unless the instructing solicitor or the client has expressly permitted the barrister to do so.

110 NB. A barrister who wishes to return a brief which the barrister is permitted to return must do so in enough time to give another legal practitioner a proper opportunity to take over the case.

111 NB. A barrister must promptly inform the instructing solicitor or the client as soon as the barrister has reasonable grounds to believe that there is a real possibility that the barrister will be unable to appear or to do the work required by the brief in the time stipulated by the brief or within a reasonable time if no time has been stipulated.

112 NB. A barrister must not hand over a brief to another barrister to conduct the case, or any court appearance within the case, unless the instructing solicitor has consented to that course.

FEEDBACK FOR JUDGES

Feedback regarding Judges and the way they have executed their roles and responsibilities during a final hearing may be made via the chambers of the CJ via private and confidential email setting out

- What the problem is
- How it arose and when
- Why it is a problem
- What you would like done about it

One would not issue any feedback to a trial Judge during the period in which one is waiting for a judgment for obvious reasons.

During the trial if there are issues with the Judge's conduct an application for actual or apprehended bias may be considered and if made, made sooner rather than later so the issue is scotched, moving forward during the trial.

If there is general feedback on improving aspects for the preparation for and the running of a trial or generally, then that constructive feedback may be provided via the chambers of the Chief Justice.

FEEDBACK FOR COUNSEL

Feedback from a client to counsel is usually made via the instructing solicitor.

If a solicitor has any feedback about counsel that is usually made directly, or it can be raised via a private email to the Head Clerk or the Ethics Committee or counsel's mentor named on their Vic Bar profile. Any issues which are serious and cannot be resolved may be referred to the Legal Services Commissioner.

FEEDBACK FOR SOLICITORS and SIGNING THE HIGH COURT ROLL

Most solicitors' firms have an avenue for feedback from clients. Solicitors should ensure clients know what it is, so clients can relay that to solicitors.

Most counsel will relay any feedback directly to their instructor along the way.

If as a solicitor, you are seeking feedback then please ask Counsel for it along the way, or you might like to have a de-brief lunch or coffee a few days or weeks after the trial once you have both de-compressed. Most counsel are very happy to have a de-brief if required.

If there are any serious matters to be raised, counsel may relay them to the instructor and/or their supervisor.

All solicitors doing any appearance work in the Federal Circuit and Family Court of Australia should ensure that they have signed the High Court Roll and that they have a current practising certificate. There have been instances where solicitors have entered appearances at interim hearings and even final hearings without these fundamental epaulettes.

Clients, barristers and solicitors work as a team where communication is key. Communication about roles, responsibilities and expectations is important as is functional (not dysfunctional) communication with the other side. The issues practitioners deal with are usually very important to clients.

Most parties have more in common than not. Most want to resolve their matter sooner rather than later, keeping legal costs to a reasonable minimum. They are usually cost sensitive and want good value for money in the services they receive from their legal advisors. They usually want a reasonable court experience where they have clarity on roles and responsibilities, process and likely outcomes.

Most practitioners can see their clients' pain, anguish and stoicism as they adjust to new circumstances whilst still running a separated family, a household, work commitments and more. Most practitioners do not want the system they work in, and are a fundamental part of, to do harm to their clients and their family. That creates professional embarrassment. Most practitioners want the family law system and its mechanics to penetrate only as deeply as needed into a separated family. Solicitors and counsel need to be very clear on what they are doing when, why, how, to what effect in this regard in line with their roles and responsibilities, as well as ethical considerations in play.

It is important to consider every step along the way and its impact. In this regard the filing and service of properly prepared, relevant material filed on time is crucial to creating an experience which is respectful of the parties' and practitioners' needs in practice.

Properly prepared material, filed on time allows parties and their practitioners to focus on what matters in a timely and ordered way. It allows everyone to perform their duties, obligations and responsibilities for the benefit of those we are privileged to serve in our chosen profession. A job well done, for a good cause, has to be what sustains practitioners over a long, rewarding career.

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