

# The Furies

**D**ear Furies, while most of my experiences appearing in court before judges are positive, on occasion some judges seem irritated by relatively minor matters, for example, a missing page of a document or a document handed up by my solicitors not being hole punched. Rather than giving me the benefit of the doubt, these grumpy judges seem to take it out on me. Of course, I do my best to ensure that everything is in order, but there are times when mistakes outside my control happen. What's the best way I can deal with this judicial irritation (or worse, anger) when it occurs, other than to apologise and try to avoid it happening again?

Firstly, let us congratulate you. Secondly, let us ask: how have you done it? Seriously, how have 'most' of your appearances been 'positive experiences'?

When we approach the court, we are much like a fearful supplicant not knowing whether we shall be saved or whether, instead, we shall be served up as a ritual sacrifice (think the heart removal scene from *Indiana Jones and the Temple of Doom*, and you are getting close to understanding the level of trepidation we feel before each appearance). It really could go either way.

If the courtroom is a temple to the administration of justice, then the judge is the high priest. There are practices that must be observed and the solemnity of the occasion must be maintained. Above all, you must show deference to the judge's authority. All of these things are necessary to instil in the wider public the idea that this 'rando' sitting behind a plank of wood wearing a wig has the rightful power to take away their freedom or their property. As with most organised religions, the power of our judicial institutions is only as strong as the mass belief in the validity of their existence and the social good they dispense. In this regard, we all have our part to play.

A barrister's paramount duty is to the administration of justice, which, in our view, requires the barrister to assist the judge



to the extent possible, while honestly and diligently advancing the client's interests. We must smooth the way for the judge, whether it be ensuring that copies of alphabetised authorities are in an indexed folder or that the annexures of an affidavit are complete, signed and bound. We have a lot of sympathy for judges becoming a little stern when, while trying to manage a busy docket efficiently, counsel waste their time because, for example, they failed to consult the practice note.

As always, there is context to consider. If you are racing to court on an extremely urgent injunction, the duty judge should understand that the documents may not be perfect. We have observed, to excellent effect, very experienced and respected senior counsel deftly alerting the judge to an 'unfortunate oversight' in the documents given 'the exigencies' and 'which will be remedied as soon as practicable'. We do not ever recall an apology being expressed, but the effect on the judge was no less potent for that where the deficiency was, instead, pre-emptively acknowledged and the undertaking to remedy it was volunteered. Of course, it also helps to be a very experienced and respected senior counsel in these circumstances. We highly recommend you be that.

Judges also have their part to play. It is a very tough role. Not only do they face, each day, the Sisyphean task of judgment writing, but they must also brace themselves for the near certainty that a judgment they have dispensed, possibly in difficult or trying circumstances, will be the subject of careful dissection by appellate judges with more time and assisted to do so by more able

counsel. Also, instead of getting, say, a bonus for getting through their cases efficiently, they get – you guessed it – more cases and more judgment writing. It must be galling to be so 'rewarded' when you sense your less efficient brethren having an easier time of it. Add to that the prospect of academic or extrajudicial criticism, and you would be forgiven for thinking judges are always under attack and under-appreciated.

And this leads us to the next point. It is possible, just barely possible, that some of the irritation you have experienced has not been caused by you at all, but by the demands of a difficult job on someone who is, after all, only human. It helps to bear this in mind and to be a little forgiving, of both yourself and the judge.

But I hear you talk of anger. We can think of no way that the administration of justice is advanced by a judicial officer exhibiting anger at anyone. Signs of bullying, vindictiveness or cruelty also diminish the office. Similarly, allegations of professional misconduct directed against a barrister ought not be made lightly and, for the same reason that the rules proscribe such conduct in solicitors and barristers, should never be made without a proper basis.<sup>1</sup> Each time a judge gives in to intemperance or indulges in behaviour more befitting of a toddler, the public esteem of our judicial institutions is eroded just that little bit more. Back in the good old days, when our democratic institutions were unquestioned, perhaps such liberties could be taken. But that is no longer the case.

We hope that you continue your excellent record of appearances. We hope that you thrive. And because you are so good at what you do, we have no doubt that you will, one day, be made a judge. And when you are, and we appear before you and we hand up a document with a missing page, we trust that you will know what to do. Won't you? **BN**

## ENDNOTES

<sup>1</sup> *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW)* r 32; *Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)* r 61.