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Representing unpopular clients and interacting with the media
The Ten Commandments
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Introduction

1. Most criminal lawyers have likely been confronted with dinner party or barbecue inquiries from otherwise intelligent acquaintances such as: '*How could you act for someone like that?',* or '*… someone who's done that?*' Oddly, it is not something that is asked of health or other professionals who are involved in providing essential services. They point to the Hippocratic oath and little is judged of them for doing so. For lawyers, it is assumed that they exercise a choice, yet that assumption is only partly true.

2. There has always been media interest in crime. Mostly it is tabloid, but there is also a legitimate societal interest in how criminal justice systems process allegations of criminal conduct.

3. The idea that there are popular and unpopular clients is of course a fallacy. At best it is a simplistic characterisation and the notion of it bearing any value as a filter for any criminal lawyer committed to the rule of law should be resisted. It is nevertheless a premise that pervades populist thinking, including in the mainstream media, so negotiating retainers by those demonised or glorified in it involves careful consideration.

4. This paper seeks to examine and suggests some tips for this interaction.

The regulatory framework and related considerations

5. The cab rank principle[1] in Rule 7 of the NSW Bar Rule does not technically apply to solicitors in this State. And, I doubt that it actually is at the forefront of many

[1] **7 Cab-rank principle**

A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:
(a) the brief is within the barrister's capacity, skill and experience,
(b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence,

barristers when considering taking a brief; I have yet to see any regulatory action taken against any barrister, anywhere, for not being willing to take a brief in respect of a client.

6. The latter point may well be because of the nature of the relationships between most barristers and the solicitors who brief them, or because there is more than one way to reject a brief; especially if they are publicly funded. Moreover, Rule 101 provides some loose exceptions for refusing to take a brief including:

> *(f) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case.*

7. As to the first point, I recall that when One Nation's Pauline Hanson and David Ettridge were convicted of fraud by a Queensland court, I was asked by the solicitor who had appeared at the trial for Hanson to consider taking on the appeal for Ettridge (I was then also a solicitor). He mentioned that his partners (at a first tier commercial firm) were putting pressure on him not to continue acting for her. He decided to leave that firm and opened up his own firm and continued to act for Hanson. I myself did not hesitate in acting for Ettridge; I had never heard of him before and as the matter was amply funded saw no reason not to act for him. I did this even knowing that Hanson had reiterated in Federal Parliament, in her maiden speech a few years earlier, a racist paragraph from former Labor Opposition Leader, Arthur Calwell, a staunch advocate of the White Australia Policy. One quote of *his* rhetoric was:

> *"I am sure we don't want half-castes running over our country" and "if we let in any U.S. citizen, we will have to admit U.S. Negroes [...] I don't think mothers and fathers would want to see that"*[2]
>
> And the now infamous: *Two Wongs don't make a White'*

8. Hanson had '*no hesitation in echoing the words of Calwell*':

> *"Japan, India, Burma, Ceylon and every new African nation are fiercely anti-white and anti one another. Do we want or need any of these people here? I am one red-blooded Australian who says no and who speaks for 90 per cent of Australians."*

9. Some of you may know that I was born in Burma to Burmese parents who brought me here as 4 year old. But, for me, it was not a matter of being offended by this vitriol or applying any rule; rather a mixture of a far simpler approach with commercial considerations.

10. If you are involved in criminal defence work, it is inevitable that you will be retained to act for some abhorrent people or for ordinary people who are

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(c) the fee offered on the brief is acceptable to the barrister, and
(d) the barrister is not obliged or permitted to refuse the brief under rule 101, 103, 104 or 105.

[2] Sullivan, Rodney (1993). "'It had to happen': the Gamboas and Australian–Philippine interactions". In Reynaldo C Ileto & Rodney Sullivan (eds.). *Discovering Australasia: Essays on Philippine-Australian Interactions*. James Cook University.

alleged to have done abhorrent things: infanticide, child sex offences, callous murders, serial killings, violent sex offences, domestic violence, and the like. So, if you think that you will not be able to fearlessly represent such people in the face of a criminal allegation, then the simple choice is not to practice in that area of law. Perhaps just stick to acting for company directors and corporations who engage in widespread fraud or discreditable conduct.

11. So, once you make that choice, it becomes illogical to pick and choose what you might find sufficiently distasteful. That said, I confess however that as a solicitor I have sometimes made those choices. I found many child sex offenders difficult to relate to or even tolerate as clients. Even when they were cashed up and disputed the allegations. I had the luxury in those days of having several employees, and as a general rule let them conduct these cases at the trial stage. I was less choosy when it came to appeals as client contact was lessened in those retainers and I remained curious about the legal principles concerning the reviled are treated by the system.

12. I use this experience to illustrate that the notion of 'unpopularity' is a subjective one. Especially when it comes to political figures as we have seen in the recent US elections, And the more important point is that taking on an 'unpopular' client cannot mean, to any intelligent commentator, that you take on their cause or identity. Defending a racist politician cannot mean that you embrace their racist or political agendas nor should representing a sex offender do the same. Yet, to this day, more people show me disdain for having acted for the likes of Pauline Hanson and Clive Palmer than they have for the most heinous violent child sex offenders or serial killers like Ivan Milat.

13. That said, there are bounds to the retainer. Again, turning to the US for the last time, media depictions of Rudy Giuliani, who is said to be a lawyer although I doubt he actually appears in courts as such, illustrate how lawyers should not behave or interact with the media. He makes no distinction with his client's cause and his own views in public statements, even if they are made in a parking lot outside a landscaping business alongside a sex toy shop and crematorium. It may not be a bright line, but whatever latitude one might give to him he crossed over it. He made his client's cause one which he declared to be fact and true and was willing to speak publicly even while cases were already before courts.

14. This brings me back to the NSW Bar Rules that fall for discussion in this conversation:

> **76 Media comment**
> A barrister must not publish or take any step towards the publication of any material concerning any proceeding which:
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> (a) is known to the barrister to be inaccurate,
> (b) discloses any confidential information, or
> (c) appears to or does express the opinion of the barrister on the merits of a current or potential proceeding or on any issue arising in such a proceeding, other than in the course of genuine educational or academic discussion on matters of law.

77 A barrister must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, other than:

(a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of the parties or of any witness already called, the nature of the issues in the case, the nature of the orders made or judgment given including any reasons given by the court and the client's intentions as to any further steps in the case, or
(b) a barrister may, where it is not contrary to legislation or court practice and at the request of the client or instructing solicitor or in response to unsolicited questions supply for publication:
  (i) copies of pleadings in their current form which have been filed and served in accordance with the court's requirements,
  (ii) copies of affidavits or witness statements, which have been read, tendered or verified in open court, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection,
  (iii) copies of transcript of evidence given in open court, if permitted by copyright and clearly marked so as to show any corrections agreed by the other parties or directed by the court, or
  (iv) copies of exhibits admitted in open court and without restriction on access.

78 A barrister:

(a) may if requested advise a client about dealings with the media but not in a manner which is calculated to interfere with the proper administration of justice, and
(b) does not breach rule 76 or 77 simply by advising the client about whom there has been published a report relating to the case, and who has sought the barrister's advice in relation to that report, that the client may take appropriate steps to present the client's own position for publication.

15. These rules seem sensible enough; but they have been the subject of fair and trenchant criticism.[3] And, notwithstanding Rule 77, take some caution about providing any documents to the media. Stephen Keim SC, a Queensland barrister was the subject of a complaint to the Legal Services Commissioner, by the AFP Commissioner Michael Keelty and solicitor Russell Biddle for breaching the equivalent of Rule 77, after Keim disclosed a transcript of an ERISP between his client Dr Mohamed Haneef and the AFP after he was arrested but before he was charged of a terrorist offence. Keim went on to be awarded Australian of the Year, together with his solicitor Peter Russo, now a State MP for their defence of Haneef, however he endured many months of investigation, and much heartache, for this alleged breach of the rule.

16. Professor Mortenson wrote:

> *The Queensland bar's Rule 60[4] is therefore just as problematic. The Bar Association never gave a rationale for the muzzle rule when adopting it; but then it was never forced into the position that the Law Society was. However, the difference leaves Rule 60 exposed to precisely the same criticisms. A barrister has no greater duties to the court, and no fewer duties to a client, than a solicitor has. Traditionally, barristers may have regarded themselves as being in a more ministerial, removed and even –*

[3] See for example a detailed examination by Professor Reid Mortensen in the Queensland Law Journal 2009 (Volume 28(2)) at 329: *Keim on the muzzle rule: A reply and joinder*.
[4] The equivalent of NSW Bar Rule 77

perhaps – impartial position in relation to clients than solicitors were, but the modern expression of barristers' and solicitors' roles has emphatically denied that there could be any functional difference between them. Resting within the same web of ethical responsibilities as the Solicitors Rule, Rule 60 therefore has little to commend it.[5]

The media

17. In the era of fake news, there is now a very wide landscape within which to engage for this discussion. From the traditional forms of reporting in newspapers, television and radio in news format, we now have discussion forums conducted by current affairs shows, talk back radio as well as social media platforms such as Facebook, Twitter, YouTube, Instagram, LinkedIn and many more.

18. It now takes less than fifteen seconds to be famous right across the world. And, a single post can endure for a lifetime.

19. So, the first consideration in any interaction with 'the media' is the purpose of the interaction.

20. First, if the purpose of the interaction is to promote the interests of the client, great care must be taken as to whether that is permissible within the regulatory framework set out above in addition to the prospect of you being in contempt of any proceedings before a court.

21. This is a technical task that in some cases takes a great degree of care.

22. There may be a justifiable cause for this; including the circumstances where the opposing side, usually the police will routinely conduct a press conference when someone has been charged. The non-naming of the offender in these public statements is often seen as an acceptable way of dodging complaints of contempt, but it is not in cases of particularly high profile conduct. Your client may well wish to protest their innocence or put out a narrative from the outset.

23. Some lawyers, especially when confronted with a camera as they leave court, may feel that there is some value in making a 'doorstep' comment. In fact I know that some prepare themselves especially for that opportunity (perhaps for other reasons discussed below).

24. If the charge faced by your client is ultimately to be heard by a jury several years later, it seems unlikely that a juror will remember any comment that their lawyer made and most judges and magistrates will be in the same position and even less likely, if they were to recall it, to be affected by such commentary. But, if the comment is republished and printed on the internet, as most are these days, then it may be an enduring remark that a judge or juror will come across at the time of any trial or sentence hearing. Despite dire warnings given by judges to jurors not to Google the matter they are sitting in judgement on, there are many cases where jurors have been found to have done so.

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[5] Ibid at 335

25. That said, even the most well-motivated juror is unlikely to be impressed by a defence lawyer's doorstep comment about their client's protestations of innocence or excuse for the alleged offending, at the time of their arrest.

26. So, although, as a solicitor, I have done doorstep comments,[6] upon reflection, they seem to have been a waste of energy. Moreover, there is a real danger that any protestation of innocence, if imputed to your client, may be used to found submissions that they lacked remorse, in the event that they ultimately are found guilty on their own confession.

27. Second, it is important that you hold instructions to make any comment on behalf of your client or even about your client. This should be recorded in writing. One of the successful complaints against Keim was that he held no such instructions at the time he did what he did.

28. Third, if one accepts that anything you say is unlikely to be effective in promoting your client's interest, why do it at all? I suppose there is some commercial value for yourself in having your picture in the media, especially for an 'important' or even just well-known client. How often have we seen lawyers strut out of court at high profile cases alongside their precious clients? And to later post any picture or article on their social media feeds. I have done so myself. But is it necessary for there to be any associated comment attributed to you in this public relations exercise. I would have thought that, in commercial terms, your 'impressiveness' or identitication as a lawyer retained by an important client is achieved by the image, and only likely to be diminished by anything said by you, or for that matter, them.

29. So, I would recommend, that if you propose to do the strut, work on how you look, and, limit anything you say to an intelligent looking 'no comment'.

30. Fourth, there will of course be occasions where you can greatly benefit from having your client's narrative 'out there' from the outset. As an aside, I would have thought that the best way to achieve that is to carefully provide an explanation in an ERISP, before being charged, if that opportunity is availed. However as to dealing with the media, this can sometimes be achieved by having sensible 'off the record' or 'embargoed' conversations with respected or key journalists before your client's day in court.

31. To illustrate this, I'll use a non-criminal law example that I was involved in more than 20 years ago. In 1999, I acted for my then estranged wife. She is the first indigenous person appointed to the Queensland judiciary as a magistrate. This event attracted polemic commentary including some with some racist overtones with the usual palaver about merit since she was one of several women appointed to the judiciary around that time by a progressive Labor Attorney-General. Within a week of her appointment, the Chief Magistrate directed that she relocate to Townsville in North Queensland within three weeks, from her Brisbane home where she had five children under ten. Having a personal stake in the outcome I agreed to act for her in the judicial review of

[6] In fact there is one of me following Ivan Milat's committal for trial which has endured, has been rightly pilloried for me having a bad hair day, which did little other than attract ridicule.

that decision and she was ultimately successful in setting aside the transfer edict.[7] The Chief Magistrate resigned in protest.

32. The direction became public knowledge, as did her resistance to it.[8] It also sparked considerable discussion of the issue of the relevance of parental responsibilities in this context as the system of regional transfers, which still exists in many tiers of the public service such as for police officers, teachers, nurses and doctors, was a sore point in the magistracy, many of whom did not fully appreciate the notion of judicial independence.

33. Three years later, the new Chief Magistrate, the first woman to be appointed to that position became involved in conflict with several magistrates about her transfer decisions and related matters. Given my involvement for my ex-wife, three of these magistrates retained me to act for them in these disputes. Again, judicial review and other proceedings were fore-shadowed. One of the magistrates was not well thought of in some quarters within the legal profession because of the manner in which she sometimes addressed lawyers in court. Some thought, she, having bullied them, was rightly being bullied by the Chief.

34. I thought that very important issues concerning judicial independence, first raised in my ex-wife's case, needed to be embraced by the legislative framework around magistrates. This was a nuanced issue and one I knew could not easily be communicated within the 24 hour news media cycle.

35. I felt it necessary to gain the support of the Murdoch newspapers which largely monopolised the local media. I sought out a trusted journalist and discussed 'off the record' what the issues were over several long hours and then kept him in the loop as the correspondence war erupted between the three magistrates and the Chief Magistrate. After preparing extensive affidavit material containing my clients' responses and obtaining the written submissions of the senior counsel they had retained in the judicial review proceedings, after obtaining instructions, I provided all of this material to the journalist with an embargo on publication until he was able to lawfully access them in the registry. The purpose of this course was to give him time towrite articles, carefully and accurately, about the real issues at stake in the litigation and to publish articles in a timely fashion to get in front of the commentariat.

36. After the affidavits and submissions were filed close to 4.00pm, the journalist who had already drafted his stories and opinion pieces then went to the registry to verify that that which I had provided was in fact what had been filed. The articles were published the following day before any other journalist knew what had happened. Several pages including the front of the *Courier-Mail* and the *Australian* were devoted to the story in fine accurate detail. These articles later earned the journalist a Gold Walkley. More importantly it changed the whole public, legislative and judicial discussion which was later reflected in the judgements of the Supreme Court, including one line that was

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[7] *Payne v Deer* [2000] 1 Qd R 535

[8] Once headline read: 'Indigenous Magistrate fails to appear in Townsville Court.'

particularly important to me: '*Judicial independence is one of the cornerstones of a free society*'.[9]

37. Finally on this aspect of this discussion, I can point to a political example. In 2004 an indigenous man was killed by a police officer on Palm Island. I ended up acting for the family of this man and the Palm Island Council. In the wake of this death the then premier, Peter Beattie, flew on to the island with several of his key ministers with a declared 'Five Point Plan' that they had devised to appear to address the injustices and social inequities on the island. By coincidence I, and another lawyer in my firm, happened to be there when they arrived unannounced in a government jet, at a council meeting which was separately discussing the death in custody.

38. In speaking to the community leaders, Beattie promised to waive a $200,000 debt apparently owed by the council to the state government if they were willing to walk with him as part of a publicity stunt to open a newly built PCYC basketball court that very day. Unknown to everyone, including me, the white CEO of the Council recorded the conversation on a cassette tape. He said he recorded all council meetings so that resolutions and the like could be accurately understood. Nevertheless, the conversation with the premier was being noted by all who were present which included the lawyer in my employ who used to work for Beattie as his most senior cabinet legal adviser, and a celebrated and respected writer who later wrote a book about this death.[10]

39. The Chair of the Council made a complaint to the Crime and Misconduct Commission alleging that a bribe had been offered. However, the recording was later found to have been faulty.

40. Upon realizing this, I had the lawyer and the writer write verbatim statements of their recollections and provided them to the CMC as well as the same respected, and now trusted by me, journalist. The Murdoch newspapers published the recollections and the fact of a complaint having been made alleging the bribe. It also suggested that the alleged bribe had been recorded and that the CMC was investigating it. Beattie was questioned about this in parliament and accepted that what had been reported was accurate as he assumed, wrongly, that a recording still existed. He repeated this in the Courier-Mail whilst referring to me in defamatory terms.[11] This meant that the fact that the recording was faulty became otiose.

41. For reasons that are still not clear to me, despite the CMC commissioning an independent advice from an independent Queens Counsel who recommended that hearings be conducted, the Chair decided not to, and cleared the premier. Both the silk and the Chair went on to be appointed to the judiciary, by the LNP and the Labor party, respectively.

42. Nevertheless my interactions with the media were productive in protecting the interests of my clients.

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[9] *Cornack v Fingleton* [2003] 1 Qd R 667 at [28]
[10] Chloe Hooper: *The Tall Man.*
[11] I was referred to as a 'white leech' upon indigenous communities.

Practical thoughts – The Ten Commandments

43. First, there is much to be commended for rules like the cab rank rule as they form part of the importance of the rule of law in this country. If lawyers generally did not adhere to the presumption of innocence or everyone's right to be legal represented in court then our democracy and public confidence in the justice system is diminished. Despite the fact that you may attract unwanted attention in some instances I would encourage all legal practitioners to respect this obligation as much as possible.

44. Second, taking on unpopular clients should not be seen, or felt, to be embracing their conduct or public perspectives of the offences they face nor their general position in society. You should be careful in not making any public statements which suggest the contrary.

45. Third, before you interact with the media make sure you have clear written instructions to do so.

46. Fourth, be across the regulatory framework which governs your professional and ethical obligations. If in doubt, seek advice from the President of the Bar Association and Law Society or if they do not make themselves available to meaningfully advise, seek advice from senior partitioners in either branch.

47. Fifth, be clear as to your objective in any interaction. It should, first and foremost, if not only be, to protect or advance your client's interests.

48. Sixth, in a competitive commercial environment, self-promotion has specious appeal. However, this may be achieved with careful planning, and without saying a word.

49. Seventh, if there is to be engagement, be strategic and comprehensive in how that is done. There are respected journalists in NSW and respected media platforms. Seek them out and do the hard work of getting your point/s across, properly using 'off the record' and 'embargoed' communications.

50. Eighth, being a public identity has multiple facets, not all of which are helpful to your brand as a lawyer. Being a 'media tart' for a lawyer conveys mixed messages. There are easier ways to promote a commercially fertile persona or brand than speaking with the media about clients: Invest in, financially if necessary, in all of the self-promotion platforms such as *Doyles* and the raft of *Lawyers Weekly* awards which seem to proliferate on some of the professional social media platforms such as LinkedIn. Popularity in this arena may well not bear any relation to your capacity, but I am reliably informed that mantles such as "Partner of the Year' have increased the number of clients being referred to them.

51. Ninth, if you are nevertheless going to interact with news and TV platforms get some media training as to how they all work and take a holistic approach to how you come off on the screen. The optics are important and by definition can be very revealing in a way you do not fully wish.

52. Tenth, once you make a digital comment, it may take off, and is enduring. So, be judicious about anything you write or say. If in doubt, shut the …. up!

Andrew Boe