

TIPS FOR JUNIOR BARRISTERS

WHEN WORKING WITH A SILK FOR THE FIRST TIME

Whilst it is true that good news about a junior barrister spreads fast, it is also true that bad news probably travels even faster – depending on luck and the nature of the Silk you have ‘let down’.

It is common for Silks to ask other Silks to recommend a junior or to comment on juniors who the Silk has been asked to work with. So, obviously, if the opinions they express are favourable to you then this can help the growth of your practice enormously. The converse is also true.

In this context, I am sure that I am not Robinson Crusoe in saying that I have (albeit rarely) resolved not to work with particular juniors again, if at all possible (“obtuse”, “lazy”, “struggle to get to the pitch of the ball”, “not candid”) and that I have advised other Silks of my negative views about those juniors, if asked direct questions about them. P.S Fortunately, none of them are on our Floor!

Sometimes it is not possible (or prudent) to decline (‘dodge’) a brief because of misgivings about whether the junior is already briefed is capable of providing the assistance that you expect and require. e.g big, interesting case; important solicitor; second junior possible.

The consequence of the above is that all barristers, but especially new barristers who are seeking to build or expand their practices by working with Silk, should take the following steps:

- (a) Whether directly (i.e. ask the Silk) or indirectly (i.e. ask the solicitor and/or colleagues at the Bar who have worked with that Silk), get the “goss” on the particular Silk in terms of how they like to work e.g. at one end of the spectrum, are they prone to do everything themselves and see the junior as providing only ancillary services on a needs basis or, at the other end of the spectrum, expect the junior to do the lion’s share of the work including drafting written submissions and perhaps (gulp) even preparing questions for cross-examination.
- (b) In effect, this involves ascertaining why the Silk wants a junior in the first place. In an ideal world, the Silk should be self-aware and hence volunteer this information hence making the ‘new’ junior’s ‘assimilation’ into the team easier and quicker. Furthermore, if not volunteered, find out preferably by direct means and/or indirectly (as indicated above) about any particular things ‘to do’ or ‘not to do’ when working with the Silk in question.

Dos & Don'ts when Working with a Silk

It is because all Silks are different, that the exercise contemplated in (a) and (b) above, needs to be undertaken with each and every Silk that you are asked to work with for the first time.

From my experience (see Schedule), things that juniors should do are as follows:

- (1) When offered a brief to work with me, then before you accept it, be realistic when assessing whether you are confident and realistic that you have the time necessary to do what is likely to be required to work it up and run it to conclusion. If you are not confident that you are truly “available”, then say so and decline the brief. Such candour will help you, not hurt you.
- (2) Once briefed, pull out all stops to understand the facts of the case and to commence working on your own very detailed chronology of those facts (ie. do not rely on chronologies prepared by others) with cross references to the evidence, such that I can ask questions about the facts and sequence of events with confidence that I will get reliable answers – and hence save myself a significant amount of my own time in ascertaining the

answers to those questions. The key to most cases is found in the chronology.

- (3) To be candid with me at the outset if any unavoidable time or other constraints exist/have arisen that will interfere with your ability to work on the case. This will enable me to make or revise decisions about when the preparation can be done (either jointly or separately) and the extent to which I can afford to delegate particular areas of preparation to you.
- (4) If you agree to perform any task, then complete what you have agreed to do on time and to the best of your ability (i.e. not once-over lightly to get it off your table). This is particularly important in the context of the preparation of draft submissions.
- (5) In the days prior to any trial (especially in a complex matter where many documents may need to be shown to a witness and/or otherwise tendered), if I do not volunteer it, invite me to tell you the likely sequence in which I will deal with particular topics (especially during cross-examination) and the documents that I intend to use/tender. Then work closely with the solicitors

to ensure that sufficient copies of those documents are in Court and readily accessible. ie. not buried in a huge suitcase in the back of the Court.

- (6) At the trial, be on top of all the proposed evidentiary material such that you can anticipate what is coming next and you have the materials at hand to give to me as and when I need them (without the need for me to stop and ask for them).

Whilst the above list of 'dos' clearly reveal many of the things that I do not want juniors to do, nevertheless, let me state them separately because they are probably more important than the "dos" (in terms of the junior's future work with me and perhaps other Silks).

- (1) do not mislead with me – for example, do not tell me that you have set aside the next 3 days to work on the matter (a representation that I am likely to place great reliance on when planning my own preparation). It is highly likely that I will find out that you already had other work on that you needed to do in that period (but did not reveal this) or, worse still, took a new matter in those preparation days (without seeking my ok to do so). I regard such behaviour as unprofessional, not only because

it is dishonest but also because it will inevitably put greater pressure on me and I will be disappointed (if not angry) about being put under more pressure than I usually face as the lead counsel in the matter. It is also a slight to my intelligence for a junior to think that they can “get away with” this conduct as, in my experience, in 9 out of 10 cases where it occurs, it will be discovered e.g. by simple enquiry to the Clerk: “Where is X? S/he said that s/he would be here to work on our case today?” Clerk: “He/she took a matter in the District Court – back at 4.30pm”, or by clear deduction when work due from you, does not materialise.

- (2) More generally, do not make “promises” that you either know or at least suspect you will not be able to keep e.g. agree to prepare detailed draft written submissions by X for me to settle, then fail to do so or, worse still, provide me with “rubbish” a day or two before the submissions are due to be filed and served, leaving me with the daunting task of completing now urgent submissions, essentially from scratch.
- (3) Do not be “backward in coming forward” with your own views on particular legal questions or issues in the case and especially

so if you disagree with or doubt the correctness or wisdom of the views that I have expressed either in a proposed pleading or in preparing the matter for trial or even during the course of the trial (but only at appropriate times).

- (4) Once a trial is underway, do not assume that “your work is done”, or principally done, so that you have the luxury of “tuning out” (thinking about or working on something other than the particular subject or issue being dealt with at the particular time). The opposite is the truth. ie. you must be 150% attentive and vigilant ie. as if you were running the case eg. aspire to be attuned enough to say things like: “Ask him X again – I think he can will crack this time”. If you are NOT, then you may crash and burn. For instance, (preferably) during the trial, prepare a detailed index to the transcript and avoid being in a position when asked by me: “What is the Exhibit number for document Y?”, “What was it that the judge/witness just said?” or “Did our opponent just concede proposition X – did I hear him right?” where you answer by saying “Sorry, I wasn’t paying attention” or “I was looking at something else” or “I don’t know”.

- (5) At the other end of the spectrum, be cautious about interrupting me when I am on my feet (especially in cross-examination), unless you are confident that I need to hear what you have to say, right then and there (rather than during the next formal or informal break in proceedings) eg. “What you just said is wrong or misleading” versus “Do you want a drink of water?” Do not provide a barrage of post-it notes stuck to the lecturn in front of me, containing your latest thoughts that I cannot read or otherwise make sense of.

Whilst Bret Walker SC suggests this should occur in the real world, in an ideal world, the junior should aspire to be in a position to stand up and carry on with the case should the Silk be unable to attend or to continue, for any reason (eg. like Steele QC once told Kenzie and me). This highlights the need for juniors to know the case and the issues at least as well as the Silk does, have a good sense of what is sought to be proved (or rebutted) and an even better sense of the risks to which the client is exposed and the pitfalls that must be avoided, if at all possible.

Silks can help with this education and preparation for you to take over eg. “If you were cross examining Y, what would you focus on”? “In closing, what would you emphasise?”; “What are their best points against us –

how do we overcome them?"; "Would you like to cross-examine X or Y?"
(if the client is happy).

In reflecting on why the above dos and don'ts matter to me, it has become apparent that what I want and need, is a junior(s) to take the pressure off me, who is my trusted backup/backstop, especially with respect to the facts and the relevant law. eg. if I say: "Your Honour, our research suggests there are no cases on this point" – you better be right!!

I want to be able to focus on those aspects of the matter that I regard as critical (and non-delegable).

I want someone who can make an active contribution as part of a team (not just seek to ride on my coat tails), to deliver the best outcome that we can for the client consistent with professional ethics whilst, at the same time, providing maximum assistance to the Court, given that we are Officers of the Court. If there appears to be any tension in this context – the choice is clear (we do not need the answer to this – do we?)

Whilst there are many exceptions, in my view, when 'two counsel' are engaged, the norm should be that the junior is to do as much of the preparation work as possible. This is cost effective for the client as it

(hopefully) means that the Silk need only spend a short(er) time 'settling' their work and the junior fees useful and valued.

However, this division of labour can only come about once the Silk has developed sufficient trust in the Junior's work ethic and work quality to trust them to undertake the bulk of that work. So move quickly to develop that trust by volunteering to do X and Y and do it well.

As I indicated above, all Silks are different and the nature of their practices can vary greatly, such that what is needed from or desired of juniors may also vary wildly. Accordingly, what follows below is a summary of the "dos and don'ts" for juniors that other Silks and some juniors on this Floor have identified.

It is to be noted that, having seen my list, no-one has taken umbrage with my views (except re the stickers) but they have provided some helpful restatements or 'variants on the theme' and some important additional 'dos and/or don'ts', from their perspective, namely:

1. Be reliable, "be there in body and spirit" at all times;
2. Work on the case as if it was your own ie. as if you are presenting it.

3. Be candid – do not agree with your leader out of fear or to be polite (vomit) or to get along.
4. Be clear – even if the Silk is not – as to who is doing what, to ensure you have valuable things to do, to avoid duplication and to minimise later criticism eg. “You were to do X by today” or frustration: “I feel like a third nostril.”
5. Be confident, if not courageous, in your dealings and discussions with the Silk. eg. “I don’t think I understand that point – help me”; “I am not sure what it is that you want me to do – can you tell me again?”; “I am troubled about this/your point – I am unsure/uncertain that it is correct”; “I think I made some significant mistakes in the trial below, namely....”
6. Do not say you have “researched the law” and the position is X or Y or unclear – unless you have conducted fulsome research of the best available internet search engines, and you are confident in your view (do not ‘fudge’).
7. Be proactive at all times eg. once briefed, do not wait for the Silk to call you, call him/her to get the ball rolling: “Hey – I am interested in this – and keen to get started”. Do not ask: “When do you want

me here”, ask “What time will you be in?” (as I will be here well before then.) ie. display full commitment.

Conclusion

Think earnestly about why this Silk wants a junior in this matter and how I can best serve his/her wants/needs and add value.

Ask the questions, both general and specific about the Silk’s needs and expectations and then listen closely to the answers and:

- accept and follow the answers that you understand and agree with;
and
- query those you do not understand or disagree with.

In the end, this all comes down to self-awareness, the capacity to listen and confidence in your ability to be candid. Develop these capacities and the world of working with Silk is “your oyster” or if things go really well – your oyster farm (or two).

M J Kimber SC

Chambers

20 February 2019

SCHEDULE

1. As a junior I was led by Kenzie QC on a regular basis (almost exclusive basis for 15 years), Burbidge QC, Lawrey QC, McInerney QC, Coombes QC, Cassidy QC, Capelin QC and Walker SC.
2. On this Floor (as presently constituted) I have led Prince SC, Flett, Dixon, Meehan, Easton, Rauf and Fredericks.
3. On this Floor (as previously constituted) I led: Taylor SC, Casselden SC, Scott, Mahendra and Fagir.
4. Off the old/current Floor I have led: Nomchong SC, Collins SC, Moses SC, Gotting, Seck, Raper, Chin, Reitano, Britt, McIntosh, Kaur-Bains, Gerard, Nolan, Warren and (Commissioner) Murphy.