INFORMAL COMMUNICATIONS WITH JUDGES' CHAMBERS: A PROFESSIONAL AND RISK MANAGEMENT ISSUE

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Snapshot

- There are well established and clear protocols for communications with judges and judges' chambers. However, recent judgments demonstrate that breaches of the protocols are not uncommon.
- Exceptions apply, but generally there should be no communication with a judge's chambers without the prior knowledge and consent of all active parties to the proceedings.
- Given the consequences of failure to comply with the protocols, it is important that litigation lawyers be familiar with the requirements.

In many aspects of litigation practice, the old, cumbersome, and more formal court rules and practices have been replaced with streamlined, efficient and less formal procedures. In the area of communications (particularly emails) sent to a judge's chambers, it is necessary however to observe strict formalities and protocols.

These requirements have been clearly fixed for some time, but the various recent judgments, and our own experience, demonstrate that non-compliance/breach of these protocols is disturbingly frequent.

These requirements were summarised by Justice Kunc in *Ken Tugrul v Tarrents Financial Consultants Pty Ltd (in liquidation)* [2013] NSWSC 1971. They were also adopted and summarised by Justice Robb in *Stanizzo v Badarne* [2014] NSWSC 689, as follows below.

Key protocols to be followed

- There should be no communication with a judge's chambers (written or oral) without the prior knowledge *and* consent of all active parties to the proceedings;
- The precise terms of a proposed written communication with a Judge's chambers should first be provided to the other active parties for their consent;
- All written communications with a judge's chambers must be copied to the other active parties;
- A statement should be included in the communication that it is sent with the consent of the other active parties;
- The only exceptions to the above rules are where the communication:
  - relates to trivial matters of practice, procedure or administration (for example, the start time or location of a matter, or whether the judge is robing);
  - relates to an ex parte matter;
  - responds to a communication from the judge's chambers or is authorised by an existing order or direction of the Court (for example, the filing of material with a judge's associate);
  - exceptional circumstances.
- Communications which fall within the above exceptions must be copied to all other active parties and state why the communications have been sent without their consent (except for communications of trivial matters of practice).

Justice Robb added that if consent to the communication cannot be obtained from the other active parties, then consideration should be given to relisting the matter.

The difficulty with emails

As a matter of practice, Justice Robb noted that it can often be very difficult for a judge's associate to ascertain which parties have been copied into email correspondence (based on email addresses alone) and that practitioners should make it clear in the body of the communication who is entitled to receive a copy of the communication and who in fact has received the communication.

These requirements are also found in rule 22.5 of the *Legal Profession Conduct Rules* under the *Legal Profession Uniform Law*.

Clearly, the courts take these issues very seriously.

In a postscipt to his Honour's judgment in *Hans Ekblad v Lorraine Ekblad* [2015] NSWSC 507, Justice Wilson said:
'Since orders were made in this matter the Plaintiff has sent a number of, usually very lengthy, emails to my chambers ... I regard it as entirely inappropriate for litigants in proceedings before the court to communicate with my chambers in this way ... Copies of all emails have been placed with the Court's file and have been provided to the defendant.' (at [98]-[99])

In the proceedings before Justice Robb, the underlying facts were that in the week prior to a trial, one of the parties – in breach of the protocol requirements – sent Justice Robb emails attaching various correspondence. Justice Robb was obliged to consider whether he should disqualify himself in view of the irregular dispatch of this communication. In the result, Justice Robb concluded that he was not, in fact, obliged to disqualify himself in the circumstances.

Consequences of inappropriate communication

Where a judicial officer is required to disqualify himself or herself from hearing a case because of the conduct of a lawyer or one of the parties to the litigation, the likely consequences will include adjournment and a delayed outcome for the client. There is also the possibility of costs orders against the party or the solicitor responsible.

In addition to the possibility of monetary and costs consequences, a breach of these protocols may also ground a professional conduct complaint to the Legal Services Commissioner. The net result is that litigation lawyers should be well familiar with these requirements. LSJ