The dangers of communicating directly with the court

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Snapshot

- Solicitors must not communicate with the court about any matter of substance in the absence of the other party.
- Consent should be sought from all active parties in proceedings before any communications are sent.
- All communications with the court must be copied to the other parties.

Email has changed the way litigation is conducted in the past 20 years and online court has changed the way hearings are conducted, particularly in the last two years. Despite these changes, litigation solicitors need to retain a thorough understanding of the protocols around communicating with judges' chambers, as there can be serious consequences for both solicitors and clients if those protocols are breached.

The most serious consequence arises where a private communication with a judge is for the purpose of influencing the judge's decision on a matter before him or her - 'it is to be treated as, what it really is, a high contempt of court' (*Re Dyce Sombre* (1849) 41 ER 1207). In such circumstances, solicitors risk being found to have been in contempt of court, as well as in breach of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015* (***Australian Solicitors' Conduct Rules***').

Even a private communication with judge's chambers that is *not* intended to influence the judicial process could still lead to disqualification of the judge or a decision being set aside, which could have adverse consequences for clients and lawyers (see, for example, Deane J's comments in *Webb v The Queen*; *Hay v The Queen* (1994) 181 CLR 41 at 74). Whilst it is not decisive, the fact of an ex parte communication with a judge is an 'important consideration' in determining whether a disqualifying bias or apprehension of bias exists (*Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 540). If a trial has to be abandoned because of a lawyer's imprudent communication with the judge, this could lead to applications for wasted costs or damages claims against the lawyer by their own client, the other party or both.

Open communication

Open communication is taken seriously by the courts as the common law system of adversarial trial requires that its processes be conducted by an independent and impartial tribunal. It also requires that judges' decisions be made on the basis of the evidence and arguments in the case, not on the basis of information acquired out of court (*The Queen v Fisher* [2009] VSCA 100).

These 'twin pillars' of natural justice have important practical implications for solicitors wishing to communicate with judicial officers outside of court and are reflected in Rule 22 of the *Australian Solicitors' Conduct Rules*. Rule 22 provides that a solicitor must not, outside an *ex parte* application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance. Rule 22.5 contains two exceptions: (i) where the court first communicates with the solicitor in such a way as to require a response (rule 22.5.1); and (ii) where the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor (rule 22.5.2)

His Honour Justice Kunc in *Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation) [No 2]* [2013] NSWSC 1971 ('***Tugrul***') considered a situation where one party emailed information to the judge during the hearing of a notice of motion. The hearing had been adjourned and a conclave of experts took place during the adjournment. Immediately prior to the resumption of the hearing, one party emailed an expert report to the judge, annexing material which was the subject of objection. While the email to the judge was copied to the other parties, there was no notice provided to the opponents about the proposed content of the email before it was sent.

His Honour acknowledged the benefits of direct communication with the Court in facilitating the parties and the courts achieving a just, cheap and quick resolution of proceedings, consistently with the obligation in section 56 of the *Civil Procedure Act 2005* (NSW). The courts have accepted as commonplace, for example, the advance provision to the judge of material proposed to be relied on in court, such as bundles of materials, documents for tender, affidavits, and emails.

However, Kunc J went on to say that even 'well-intentioned' communications with the judge's chambers sent with the