Communication with a judge's chambers

Lachlan Edwards writes on practitioners' and out of court contact with the courts.

Get away from my associate. This isn't a shop counter.[1]

If you read no further than this first paragraph – and take nothing else away from this note than a reminder – the rule is this: you may contact a judicial officer's chambers only with the knowledge and consent of all other parties in the proceedings that are before that judicial officer. The precise terms of any proposed written communication with a judge's chambers should be provided to the other parties for their consent. You must copy those parties in on the communication.

The rule arises from the proscription against barristers communicating in their opponents' absence with the court concerning any matter of substance in connection with current proceedings. The exceptions to this rule are few and relatively rigid. They are:

- the court has first communicated with the barrister in such a way as to require the barrister to respond to the court;
- the opponent has consented beforehand to the barrister dealing with the court in a specific manner notified to the opponent by the barrister; or
- in ex parte matters (but, the author suggests, take the same stringent view about your obligations of disclosure in those communications[2]).

The rule was discussed in Justice Kunc's recent judgment in *Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation)*[3]. In that case his Honour dealt with an unauthorised communication with his chambers in which a party, purportedly acting upon an order of the court, forwarded a joint expert report but annexed to it documents that were objected to by the other parties, making clear that the offending documents were the subject of objection. His Honour returned the offending material and instructed his staff to delete the communication from the court's email system.

His Honour provided further clarification of the exception to the rules prohibiting unilateral communication with the court, so as to include: trivial matters of practice, procedure or administration (e.g., the start time or location of a matter, or whether the judge is robing), and where the communication responds to one from the judge's chambers or is authorised by an existing order or direction (e.g., for the filing of material physically or electronically with a judge's associate).[4] In such circumstances, the communication with the court should:

- expressly bring to the addressee associate's or tipstaff's attention the reason for the communication being sent without another parties' knowledge or consent;
- where consent has been obtained, expressly state that fact;
- always be copied to the other parties.[5]

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It does not appear in that case that any party made an application for his Honour to recuse himself. There is no rule that any unauthorised communication between a judge and a party will necessarily require a judge to disqualify her or himself.[6]

His Honour's reasons in *Tugrul* and the other decided cases raise other interesting issues. Why should the rule persist as long as parties are copied in? We live in modern times and courts at all levels have acknowledged that there may be some advantages to less formal communication between courts and litigants, not the least of which is the tendency of communications in relation to matters of no controversy, or to permit efficient conduct of proceedings, promoting the just, quick and cheap disposal of the proceedings.[7]

Communications breaching the above rule are sent reasonably frequently in this email age. Anecdotally, that the infraction is most often committed by solicitors, probably unwittingly. In the author's experience, it rose no higher than the commission of a professional discourtesy.

We should of course all guard against discourtesy, but if that isn't reason enough, we know an offended opponent can be a dangerous opponent; an offended bench is of a different order altogether. Happily, in NSW at least, all new barristers are told, very early in the Bar Practice Course, about the existence of these rules.

The rules, as expressed, guard against practical infringements of the principle of natural justice. In *Carbotech Australia Pty Ltd v Yates*[8] (a case in which improper communication had been made with a court-appointed referee, rather than the bench), Brereton J stated:

> The 'twin pillars' of the rules of natural justice are the hearing rule … and the bias rule … However … they may overlap: a persistent failure to hear one party might establish an apparent lack of impartiality as well as a breach of the hearing rule.

In *R v Fisher*[9] Redlich and Dodds-Streeton JJA said that the rule was founded upon:

> … [the] undoubted principle that a judge's decision should be made on the basis of the evidence and arguments in the case, and not on the basis of information or knowledge that is acquired out of court.

In *R v Magistrates' Court at Lilydale, ex parte Ciccone*[10] McInerney J put the rule, and its foundational basis, in the following terms:

> The sound instinct of the legal profession - judges and practitioners alike - has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.

The danger being protected against is that the judicial mind might be coloured by information that has not been subject to open debate with another party (or at the very least, consideration by the other party). The rule, strictly applied, of course goes further than that. It also, for example, guards against familiarity, and the apprehension of bias that accompanies it.

Three further questions arise. First, why should communications with chambers (rather than with the judicial officer directly) attract the same prohibition? Secondly, what of the obligations attaching to a judge's staff? Thirdly, what of communications with a court's registry?

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One former judge reportedly counselled his associate to be careful of what he communicated by email because it was proper for the parties to regard the associate 'as my amanuensis'. Elsewhere it has been said that in Australia the judge's staff (principally the associate and/or tipstaff) are the judge's public face while the judge presides and decides.[11] Indeed one author suggests that the role of the associate cannot really be divorced from the role of the judge at all. In his view, associates should be afforded a kind of proxy protection as a consequence of the strict separation of powers doctrine. That author said:[12]

> … it must be accepted that if judicial independence is to have any real meaning, the principle [of independence] must extend to the associate, to give them some protection from external interference and control.

If those various formulations are accepted, it follows that a communication with the associate is akin to a communication with the court and so is impermissible other than under one of the exceptions to the rule.

It follows that if there is an obligation upon a judge to accept only evidence properly put before the court, and submissions made to the court, there is an obligation also upon judicial staff.[13]

Communications with registry staff are a different matter. They should, of course, ordinarily be conducted by solicitors. That said, communication with the registry is often encouraged from the

bench. Ordinary matters of practice unrelated to the outcome of proceedings are dealt with, daily, efficiently, by those staff, and fall comfortably within the second exception to the rule.

However, no matter of substance that should properly be brought before the court in ordinary session should be raised with the registry. An appropriate test is, if what you are seeking can only be granted by way of an order of a registrar, even if they have the power to deal with it in chambers, then the matter, absent agreement, needs to be relisted. That is because, as some have been reminded, the courts aren't shop counters.

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Endnotes

1. Anecdotal record of an exclamation by a senior New South Wales judicial officer.
2. See: *NSW Barristers' Rules 2014*, r 53. Identical provisions are to be found in the solicitors' *Revised Professional Conduct and Practice Rules 1995*.
3. [2013] NSWSC 1971 esp at [21].
4. *Tugrul* [2013] NSWSC 1971 at [21].
5. *Tugrul* [2013] NSWSC 1971 at [22].
6. *R v Fisher* [2009] VSCA 100 at [37].
7. Explicitly so in *R v Fisher* [2009] VSCA 100 at [39]; less explicitly in *Concrete Pty Limited v Parramatta Design and Development Pty Limited* (2006) 229 CLR 577, per Kirby and Crennan JJ, see *Tugrul v Tarrants Financial Consultants Pty Ltd (in liq) (No 2)* [2013] NSWSC 1971 at [19].
8. [2008] NSWSC 540, at [46].
9. [2009] VSCA 100 at [20].
10. [1973] VR 122.
11. *Re Altman and the Family Court of Australia* (1992) 27 ALD 369 at 374 (AAT per President O'Connor J).
12. Horton, J, 'Justices' Associates: Some Observations', (2002) 22(1) *University of Queensland Law Journal* 114 at 118.
13. *Fisher* [2009] VSCA 100 at [39].