Ethical issues arising when communicating with the court and opponents online

By Simon Philips

The changes necessitated by practising remotely may have led some barristers to (inadvertantly) breach the rules against unilateral or ex parte communications with a judicial officer. These important and well established prohibitions continue to apply and have relevance, despite the increasing prevalence of less formal, electronic communications between bench and bar.

Rule 54 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015 NSW* (Barristers Rules) provides that:

> A barrister 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 in connection with current proceedings unless:
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> (a) the court has first communicated with the barrister in such a way as to require the barrister to respond to the court, or
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> (b) the opponent has consented beforehand to the barrister dealing with the court in a specific manner notified to the opponent by the barrister.

This rule is complemented by Rules 55 and 56 of the Barristers Rules which provide that a barrister must promptly tell an opponent what passes in a communication referred to in Rule 54 and must not raise any matter with a court on any occasion to which an opponent has consented other than the matters specifically subject to the opponent's consent.

These rules codify the longstanding prohibition against barristers communicating with a judge in relation to any matter of substance in connection with extant proceedings in the absence of an opponent. They are unqualified, absolute and apply at all times and in all circumstances, even (or especially) in the context of online communications with the court.

The importance of these prohibitions to the administration of justice was recently highlighted by the High Court in its decision in *Charisteas v Charisteas* [2021] HCA 29; 95

ALJR 824 where (at [13]) the court referred to and adopted what was said by McInerney J in *R v Magistrate's Court at Lilydale* [1973] VR 122 at 127, namely:

> 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 underway, or about to get underway, 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.

These concepts were described by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 346 as being 'a fundamental principle that a judge must not .....receive representations from one side behind the back of the other....'.

Such principles were analysed by the NSW Court of Appeal in *Wollongong City Council v Papadopoulos* [2019] NSWCA 178. In this case, counsel at first instance had responded to an ex parte communication from the court asking for an indication as to counsel's availability for a further listing by providing, without leave, written submissions contending against there being any further hearing. In finding that such unsolicited communication with the court was improper, Leeming JA (with whom Basten and McCallum JJA agreed) observed (at [49]) that providing supplementary written material after the conclusion of oral argument without leave (or an invitation or direction from the court) is unsatisfactory and impermissible. Leeming JA also noted (at [49]–[51]) that the Court of Appeal had repeatedly stated that doing so is 'misconceived' and should not occur, and the unsolicited submissions should not have been drafted or sent.

Adherence to the rules prohibiting unilateral parte communication with a judicial officer led to the well-established practice, where an unsolicited communication with the court may be necessary, of counsel composing a draft communication to the judicial officer and seeking consent from the opponent(s) before such communication is sent. However, the writer's recent experience and anecdotal evidence suggests that, with informal email communication between advocates and judicial officers (and their staff) now routine in the context of remote and online hearings, appearances and practice generally, this well established convention is often ignored, and unsolicited emails are routinely sent to judicial officers without consent first being sought from the opponent. Simply copying an opponent in on an unsolicited email to the court at the time the email is sent does not mean that compliance with Rule 54 has been achieved.

Counsel for an 'innocent' party who becomes aware of unsolicited communication by their opponent with the court without prior consent which has not yet been acted on by the court typically faces a dilemma – namely whether to ignore the communication (in the hope that the court takes a similar attitude) or

to engage with and respond to it (and thereby incur time and costs which may prove to be wasted). If possible, counsel could in such circumstances draw the court's attention to the fact that the communication was made without their consent, and ask the court to ignore it. However, in some circumstances, such a communication (without prior consent from the opponent) may itself be caught by the prohibition. Conversely, if nothing is done, the court may not ignore and instead may act on the ex parte communication, leaving the 'innocent' counsel to decide whether to make an application for the court to revoke any steps taken in reliance on the (prohibited) ex parte communication.

The distinction should be drawn between unilateral, non-consensual communications which are unsolicited and those which are required by the court. The latter are of course permitted (and required), although wherever possible, an opponent should be copied in on any communication with the court. Even in circumstances where emails between counsel and judge's associates and tipstaff are now routine (and ubiquitous), communications with the court about any matter of any substance without the opponent's prior consent which are not required or requested by the court remain prohibited. The relatively informal nature, convenience, and speed of email communication may have led some practitioners to overlook the distinction between unsolicited and requested communications with the court and therefore to (inadvertantly) breach Rule 54.

Given the fundamental changes which have occurred in the modes of litigation practice in response to the pandemic, especially the ubiquity of email communication between legal representatives and judicial officers (and their staff), it is tempting to speculate that the conduct of counsel which drew judicial opprobrium in *Papadopoulos* in 2019 may not be the subject of judicial criticism quite so readily in 2022. Nevertheless, despite the increased prevalence of *extra curial* communication, the rationale underpinning the prohibition against unsolicited, unilateral communication with any judicial officer is just as applicable in a largely online litigation environment as it was in the nineteenth and twentieth centuries. Even when all pleadings, affidavit evidence and written submissions are filed online and *viva voce* evidence and oral submissions are given and made via AVL, it remains true that exposing a judicial officer to a suspicion of having had communications with one party in relation to a substantive aspect of the proceedings without the previous knowledge or consent of the other party may undermine confidence in the impartiality of that judicial officer (and therefore the administration of justice).

Consequently, the prohibition against unilateral communication with the court in the absence, and without the consent, of an opponent should be maintained and observed. Barristers should continue to be careful to ensure that any unsolicited communication with a judicial officer in the absence of an opponent in relation to a substantive aspect of a matter is only made in compliance with Rule 54, that is with the prior consent of the opponent. BN