Communicating with caution

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A RECENT DECISION HIGHLIGHTS THAT DEALINGS BETWEEN SOLICITORS AND JUDGES' ASSOCIATES MUST BE HANDLED WITH CARE.

Communication between members of the legal profession and associates is necessary and inevitable. Generally there is no impropriety in a party's unilateral communication with chambers in relation to procedural, administrative or practical matters.

However, there are circumstances where communications with the associate could become unprofessional or improper. At all times it must be ensured that the impartiality and integrity of the court is not undermined.

When is communication improper?

Whether or not a communication is improper will depend on the nature, subject matter and, potentially, the sequence and extent of the communication in question.

Communicating with a judge's chambers about substantive issues in the litigation is clearly inappropriate. Every communication of this kind is required to be circulated to the other parties unless there has been a previous agreement between the parties regarding unilateral communication to the judge.

By breaching this principle, there is an impropriety on the party making the communication and it could, in certain circumstances, be found to create a reasonable apprehension of bias or a factor contributing to it. Alternatively, it may constitute a lack of procedural fairness on the part of the judge.

The rule is that a judge should not receive any communication made with a view to influencing the conduct or outcome of the case they are to decide.

Communication made by one party without the knowledge of the other is governed by the principle that a judge should disqualify themselves from hearing a matter where a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the issues in the case.[1]

This is the apprehension of bias principle. It is not the case that the making of a unilateral communication automatically raises a presumption of impropriety.

John Holland v Comcare

In the case of *John Holland Rail Pty Ltd v Comcare* [2011] FCAFC 34, Holland submitted that the judge should recuse himself from the proceeding as there had been communications between Comcare and the associate concerning allegations or information that was material to the substantive issues in litigation.

Holland argued that this communication gave rise to a reasonable apprehension that the judge might not bring an impartial mind to the determination of the application.

Comcare's solicitor declined to make an affidavit setting out his conversation with the judge's associate.

In a strike-out application prior to trial, Holland relied not only on the unilateral communication to the associate but also on the fixing of a directions hearing, which allegedly disclosed differential treatment. The application was refused.

The judge had made it clear that there was general liberty to apply for a directions hearing. It was invoked for matters arising shortly prior to trial and, as Holland conceded, its strike-out application was of an entirely different character.

Comcare's solicitor then made an unambiguous and comprehensive written denial that it had raised issues of substance with the associate.

The Full Federal Court found that such communications could not raise any reasonable apprehension of bias on the part of a fair-minded lay observer. Sufficient doubt could not be attached to the judge's reasons for refusing to disqualify himself.

The receipt of an improper unilateral communication by an associate from time to time is unavoidable but of itself does not involve any impropriety or breach of duty on the part of chambers staff.

If, however, there was continued engagement with the associate, such communications may involve impropriety or misjudgement. Practitioners are encouraged to take care when dealing with associates.

Further guidelines for practitioners are available through the Supreme Court's Practice Note 1 of 2010 (**http://bit.ly/mvWxNE**). •

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1. *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 ("Ebner") at 344; *British American Tobacco Australia Services Ltd v Laurie* (2011) 273 ALR 429; [2011] HCA 2 ("British American v Laurie") at 464-5, [139]-[140]; *Re JRL* at 351.