

Solicitors' Conduct Rules apply to communications in the Online Court environment

Solicitors are reminded that the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015* (the Solicitors' Conduct Rules) apply to interactions with opposing parties and the court. Solicitors should be aware that the increased availability of electronic methods of communication such as email and the development of online environments (including the Online Court) create a risk that solicitors may unintentionally breach rule 22 of the Solicitors' Conduct Rules.

Rule 22 of the Solicitors' Conduct Rules applies to communication with an opponent. Rule 22.5 sets out 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 allows for two exceptions, namely where the court first communicates with the solicitor in such a way as to require a response (rule 22.5.1) and 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).

The terms of the rule were considered by the NSW Supreme Court in the case of *Ken Tugrul v Tarrants Financial Consultants Pty Ltd*¹, in which Kunc J made it clear that absent an exception, the precise terms of any proposed communication with the judge's chambers should be provided to the other parties for their consent. This view was emphasised by McDougall J in *FAL Management Group Pty Ltd v Denham Constructions Pty.*² In that case His Honour stated that copying the other side in on an email to the Court was insufficient to remedy the failure to inform the other party or seek their consent when communicating with the court about a matter of substance.

The Online Court is a virtual courtroom that is currently available in the certain lists of the Local Court, the Supreme Court and the Land and Environment Court. The Online Court is intended to operate as virtual courtroom and the Courts expect that practitioners will conduct themselves and use language in the Online Court as they would during an in-person court appearance.³

Rule 22 does not make any special provision for communication within an Online Court environment or provide for any exceptions to the rule in the case of the Online Court. Accordingly, practitioners operating in the Online Court environment should take care to ensure that they are acting consistently with rule 22 of the Solicitors' Conduct Rules.

The courts have spoken before about the risks associated with more informal methods of communication, such as email, and cautioned practitioners not to be distracted from their professional obligations by actions which may, at first glance, appear to promote the efficient conduct of proceedings.

Any actions which may appear to promote the efficient conduct of proceedings must always be subordinate to the cardinal consideration that the impartiality of the judge must never be compromised (in fact or in appearance) by communications sent without either the knowledge or the consent of all parties.⁴

¹ *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (in liquidation) [No 2]* [2013] NSWSC 1971.

² *FAL Management Group Pty Ltd v Denham Constructions Pty Ltd* [2015] NSWSC 1035.

³ See <https://onlineregistry.lawlink.nsw.gov.au/content/help/online-court>.

⁴ *Ken Tugrul v Tarrants Financial Consultants Pty Ltd (in liquidation) [No 2]* [2013] NSWSC 1971, [20].

The Online Court is an area to which this also applies. Solicitors must be careful not to view the electronic nature of the Online Court as an opportunity to engage with the court more informally than permitted by the Solicitors' Conduct Rules.

If you would normally seek the consent of your opponent before approaching the court in a matter before a physical courtroom, you should continue to do so in the Online Court environment. If you are unsure about whether rule 22.5 allows you to communicate with the court in your particular circumstances, you should approach your opponent to seek their consent.

November 2016