



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: LitigationLaw:GUeh1212948

21 November 2016

Mr Stuart Clark AM
President
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

By email: murray.hawkins@lawcouncil.asn.au

Dear Mr Clark, 

Solicitors' Conduct Rules and the Online Court

The Law Society recently received a query from a NSW solicitor who was concerned about how rule 22 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, relating to communication with opponents and the court, applies in the Online Court environment.

Attached is a paper setting out the issue and consideration that has been given to it by the Law Society.

The Law Society requests that the Law Council consider amending the rule to make express provision for communication in the Online Court environment or providing additional guidance to solicitors in the Commentary accompanying the Rules.

We appreciate the Law Council of Australia's consideration of this issue. Should you have any queries, please contact Ella Howard, Policy Lawyer, on (02) 9926 0252 or ella.howard@lawsociety.com.au.

Yours sincerely,



Gary Ulman
President

Solicitors' Conduct Rules and the Online Court

Practitioner query

A practitioner contacted the Law Society to raise the following issues regarding the Online Court:

I was particularly interested in the new facility which allows parties who have opted in to Online Court to send a "Request" which is a communication to the Court which is viewable to all parties and saved to the Court file. I understand that a "Request" could involve any application for the Court to make orders or directions, such as an application for an adjournment or an amendment to the timetable. Online Court is apparently set up to allow the opponent to consent or counter the "Request" and then the Court makes a decision.

I would ordinarily contact my opponent to seek their consent before communicating any matter of substance to the Court. Given rule 22.5 of the new Conduct Rules, can you please let me know whether I have any obligation to contact my opponent to seek their consent before making a "Request" in Online Court? Even if my opponent objects to a "Request" and the court ultimately refuses to make the order so that my opponent suffers no actual disadvantage, could my opponent have any legitimate grievance that I did not seek prior consent to communicate the information in the "Request" to the Court? Say I make a request to extend the timetable on the basis that my opponent has not yet served evidence, should my opponent have the prior opportunity to know what I intend to communicate to the Court so my opponent can correct any wrong information or quickly serve the outstanding evidence?

I would ordinarily tell my opponent about any communications from the Court, such as an unprompted phone call from the Associate, on the same day or the following day. I understand that Online Court includes a facility for the Registrar to make orders or communicate a message which is viewable to all parties when they log on. I imagine it could be a message to say that the "Request" has been granted or refused or a message requesting more information. The Online Court website says that users should check the dashboard regularly to find out if orders have been made. I don't know whether there is any other notification to the parties, say by email, that they should log on to see any orders or messages. Given rule 22.7 of the new Conduct Rules, can you please let me know whether I have any obligation, once I see orders or messages from the Court in Online Court, to tell my opponent about them?

The Online Court

The Online Court is currently only available for limited use in the Local Court, Supreme Court and the Land and Environment Court. Each jurisdiction has its own procedures to be followed, as well as specific cut off times. All parties must be registered to participate in the Online Court.

Local Court

In the Local Court, legal representatives can use the Online Court for interlocutory or procedural matters that can arise in the General Division Defence Call-over List. This includes requesting adjournments for further call-overs, requesting hearing dates and seeking directions for expert-evidence and other orders. In this List, all parties to the matter must be legally represented.

Supreme Court

In the Supreme Court, the Online Court is available for use in the Corporations, Registrar's Direction List. Legal representatives who have matters in this List can use the Online Court to request an adjournment for further directions, request to proceed to the next physical directions listing or seek to have a matter referred to the Judges List. Parties who are not

represented are not able to use this system, although the Court has noted that legal practitioners can, at their discretion, use Online Court to submit consent orders on behalf of an unrepresented party.

Land and Environment Court

In the Land and Environment Court, the Online Court can be used in all civil matters to request an adjournment, or future listing, of particular matters as prescribed by the Court. The Online Court can also be used to request certain other orders, including applications to vary the timetable or for a slip rule amendment. The Land and Environment Court has made Online Court available to parties or their legal representatives who are registered with the Online Registry and have matters with a future listing date in the Court. This means that self-represented parties can use the Online Court service.

Other Courts

While other Australian courts may have developed online initiatives or transaction sites, these operate separately to the Online Court and are not the basis of the practitioner enquiry. As such, this paper has not considered those facilities.

Communicating in the Online Court environment

The Online Court allows parties to make requests, consent to requests and make counter offers online. It also allows for messaging between the parties and the court.

Requests

Practitioners or their delegates (or unrepresented parties in the Land and Environment Court) are automatically notified by email when:

- A request is submitted via the Online Court;
- A response to an Online Request is made (consent or counter request); and
- The registrar has responded to a request and made an order.

Messaging

At any time during the Online Court:

- a practitioner (or unrepresented party in the land and Environment Court) may send a message to the registrar; and
- the registrar may send messages to legal representatives and parties.

Messages sent via the Online Court system will be visible to all parties. However, an automatic notification is not sent.

The relevant Solicitors' Conduct Rule

Rule 22 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* sets out when solicitors are required to communicate with their opponent in a matter before the courts.

22 Communication with opponent

22.5 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 in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court, or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.

22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.

The Law Council of Australia has prepared Commentary which accompanies the Solicitors' Conduct Rules and is intended to provide additional information and guidance in understanding how a particular rule might apply in some situations. Currently, the Commentary does not contain any additional guidance on rule 22.

Relevant case law

The Law Society notes that the courts do not yet appear to have considered the way that rule 22 operates in an Online Court environment. In the absence of specific guidance, the Law Society has reviewed previous cases where the courts have considered the general operation of the rule.

R v Fisher [2009]

In *R v Fisher* [2009] VSCA 100 the Supreme Court of Victoria's Court of Appeal stated that written communications between a party to litigation and the judge's associate should normally be confined to matters concerning practice or procedure. As stated by that court:

Unless the subject of express prior consent of the other parties, written communications should not include information or allegations which are material to the substantive issues in litigation. In all circumstances, the other parties to the litigation should be copied in on any such correspondence.¹

Ken Tugrul v Tarrants Financial Consultants Pty Limited [2013]

R v Fisher was cited by the NSW Supreme Court in *Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation) [No 2]* [2013] NSWSC 1971.

In that case Kunc J confirmed that the Solicitors Rules gave regulatory expression to the principles set out in *R v Fisher*. Justice Kunc noted that as a practical matter there should be no communication (written or oral) with a judge's chambers in connection with any proceedings before that judge without the prior knowledge and consent of all active parties to those proceedings.

In relation to written communication, the precise terms of any proposed communication with the judge's chambers should be provided to the other parties for their consent.² Justice Kunc outlined four exceptions to this rule:

- (a) trivial matters of practice, procedure or administration (e.g. the start time or location of a matter, or whether the judge is robing);
- (b) ex parte matters;

¹ *R v Fisher* [2009] VSCA 100 at [39]. See also *Hill as Trustee for the Ashmore Superannuation Benefit Fund v Halo Architectural Design Services Pty Ltd* [2013] NSWSC 878.

² *Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation) [No 2]* [2013] NSWSC 1971 at [21].

- (c) 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); and
- (d) exceptional circumstances.³

FAL Management Group Pty Ltd v Denham Constructions Pty Ltd [2015]

In *FAL Management Group Pty Ltd v Denham Constructions Pty Ltd* [2015] NSWSC 1035, McDougall J considered the operation of Rule 22.5 in circumstances where the defendant's solicitor had sent an email to the court seeking orders for leave to serve subpoenas on short notice. The email was not sent with the prior knowledge or consent of the plaintiff's solicitors, although they were copied on the email. Justice McDougall reinforced the importance of rule 22.5 and stated the following:

It is not appropriate for a party to litigation, or its legal advisers to communicate with the Court, except in very limited circumstances, without the prior knowledge and consent of the other party or parties to that litigation.⁴

Justice McDougall also 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.⁵ However, his Honour did note that the relevant email may have been acceptable if it had only sought an urgent listing of the matter for directions in respect of subpoenas. This appears to be consistent with the earlier views of the court that a party may approach the court without the consent of the other party only in relation to matter of practice or procedure.

Observations

Against this background, the Law Society makes the following observations.

Exemptions

Rule 22 does not specifically exempt communication in the Online Court environment. However, there are a number of other exemptions to the application of rule 22 that need to be considered when making a determination about whether the rule applies to communication in the Online Court environment.

Responding to the court

Rule 22 allows a solicitor to communicate with the court in their opponent's absence where the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court (rule 22.5). There may be cases where this occurs in the Online Court environment. However the Online Court allows parties to communicate with the court and their opponent other than where invited to by the court. Accordingly, while this rule may have some application it will not cover all communications in the Online Court.

Prior consent

The prohibition on communicating with the court does not apply 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). However, this consent is limited to "matters specifically notified by the solicitor to the opponent when seeking the opponents consent" (rule 22.7).

³ This was cited with approval in *Vincent Francis Stanizzo V Muhammad Badarne & Ors* [2014] NSWSC 689.

⁴ *FAL Management Group Pty Ltd v Denham Constructions Pty Ltd* [2015] NSWSC 1035 at [6].

⁵ *FAL Management Group Pty Ltd v Denham Constructions Pty Ltd* [2015] NSWSC 1035 at [4].

Although both parties must consent to using the Online Court, and would be aware that communication with the court was possible via the online platform, this general consent may not be enough to satisfy the requirement to obtain prior consent about specific matters referred to above. If parties were interested in this option, to abide by the rules they may need to consent to their opponent using the Online Court for all requests and messages that are available through the Online Court in the relevant jurisdiction.

The Online Court in the Supreme Court and Land and Environment Court allows parties to identify when making a request whether the orders sought are: consented to by the other party; opposed by the other party; or neither consented to nor opposed by the other party. This suggests that the Online Court does not envision entirely replacing communications that would take place between practitioners outside the Online Court environment.

Automatic notifications

The rule prohibits communication with the court “in the opponent’s absence” (rule 22.5).

Although the Online Court system sends an automatic notification to the other parties when a request is made, this may not be sufficient to discharge the duty to give prior notice. Similarly, although messages are visible to all parties, sending a message to the court without first communicating with the other party would still have the potential to breach the rule.

The judgment of McDougall J suggests that copying opponents into an email (which for present purposes is equivalent to opponents receiving an email notification from the Online Court) would not remedy any breach to rule 22.5.

Substantive matters

The prohibition is limited to communicating with the court about “any matter of substance” (rule 22.5). This point is reiterated in the relevant case law.

As such, the requirement to provide prior notice in the Online Court environment will depend in part on the subject matter of the communication. Matters to be dealt with by the Online Court are predominately matters of practice or procedure which may not go to the substantive issues in question. In such cases, the view that a practitioner is not obliged to discuss such a request with other parties prior to lodging it with the Online Court may not be inconsistent with existing case law.

It is possible to attach reasons for requests or to attach documents supporting a request in the Online Court function. This creates the possibility that requests through the Online Court may go beyond practice or procedure and may involve substantive issues. This would be problematic in light of the views of the Supreme Court on rule 22.5.

In addition, rule 22.8 imposes specific obligations on solicitors in relation to applications to adjourn a hearing which should be borne in mind by practitioners.

Comments from the Local Court

The Law Society has received some feedback from the Local Court that a practitioner is not under an obligation to foreshadow an application for an adjournment before raising it in open court at a call over or pre-trial review. Nor does the Local Court expect a practitioner to foreshadow such an application with the opposing party before raising it as a request through the Online Court. However it is unclear whether this is an available result of applying Rule 22 to the Online Court environment.

Next steps

The Law Society understands that the Online Court is intended to operate as a virtual courtroom, and that the requirement to comply with rule 22 may create impediments to the Online Court operating effectively.

The Law Society suggests that further consideration should be given to the way rule 22.5 operates in the Online Court environment. In particular, consideration could be given to:

- Amending rule 22 to clarify its application in the Online Court environment; and/or
- Developing guidance for practitioners on the application of rule 22 when operating in this environment.

The Law Society has advised practitioners operating in the Online Court environment that they should take care to ensure that they are acting consistently with rule 22. A copy of this guidance is enclosed.

Further information

Local Court

<https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt/defence-call-over-list>
http://www.localcourt.justice.nsw.gov.au/Documents/PN_1_of_2015_OLC%20Civil.pdf

Supreme Court

<https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt/corporations-list>
http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/a15f50afb1aa22a9ca2570ed000a2b08/e6574f94250a14d6ca2572ed000cecad?OpenDocument

Land and Environment Court

<https://onlineregistry.lawlink.nsw.gov.au/content/help/onlinecourt/land-and-environment-court>