



# COMMUNICATING WITH ANOTHER SOLICITOR'S CLIENT

These guidelines have been created to provide the legal profession with guidance in relation to Rule 33 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* ("the Conduct Rules").

*"A practitioner should never interview or communicate with the client of another practitioner except with the approval of that practitioner. This is so even if the client himself approaches the practitioner".<sup>1</sup>*

The Conduct Rules reaffirm the general rule, but provide some limited exceptions as follows:

1. The other solicitor has previously consented;
2. The solicitor believes on reasonable grounds that the circumstances are so urgent as to require the solicitor to do so and the dealing would not be unfair to the opponent's client;
3. The substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or
4. There is notice of the solicitor's intention to communicate with the other party or parties, but the other solicitor has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact

The Rule implements a safeguard against solicitors obtaining an unfair advantage over their opponents' clients.<sup>2</sup> However, "in practice the rule gives rise to various difficulties that are best addressed with patience, common sense and fair dealings".<sup>3</sup>

The consent of the opposing party to communicate directly with them is not sufficient consent. The solicitor

must receive consent from the opposing party's solicitor.

## When the other solicitor will not respond to you

The solicitor should ask the opposing party to advise if they have retained new solicitors, and if so, their contact details<sup>4</sup>. If new solicitors have not yet been appointed but are expected to be appointed shortly, then the solicitor should ask the opposing party to instruct their new solicitor to contact the solicitor. In addition, it is good practice for the solicitor to provide a copy of the communication to the opposing party's solicitors.

## When the opposing party contacts you directly

Where the opposing party contacts a solicitor directly, in any form, then unless one of the exceptions referred to above applies, the solicitor must avoid communicating with the opposing party, other than to ask the opposing party to contact their solicitor. The solicitor should immediately advise the opposing party's solicitor of the communication.

## When an opposing party's solicitor is not present at a meeting, teleconference or video conference

Where a solicitor is instructed to attend a meeting, teleconference or video conference with the opposing party and their solicitor will not be present, the solicitor must advise the opposing party that the solicitor is unable to attend without the opposing party's solicitor giving consent or being present.

## When a matter is urgent

When a solicitor is faced with a situation where the matter is so urgent that the solicitor must communicate with the

<sup>1</sup> K H Gifford, *Legal Profession Law and Practice in Victoria* (Law Book Co Ltd, Sydney, 1980), p. 376; Lewis, G.D., Kyrou, E. J., Dinelli, A. M., *'Lewis & Kyrou's Handy hints on Legal practice'*, Third Edition, Law Book Co. 2004 p.168.

<sup>2</sup> Lewis, G.D., Kyrou, E. J., Dinelli, A. M., *'Lewis & Kyrou's Handy hints on Legal practice'*, Third Edition, Law Book Co. 2004 p.175.

<sup>3</sup> *Ibid*

<sup>4</sup> Rule 33.3 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*

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opposing party, the solicitor can only do so if the communication would not be unfair to the opposing party.<sup>5</sup>

The solicitor should thereafter advise the opposing party's solicitor of the communication.

## Where the opposing party is a company

Difficulties can arise when the opposing party is a company. Generally, it is not appropriate to speak directly to company personnel who normally have authority to make admissions on the company's behalf, or to instruct in the conduct of the proceedings,<sup>6</sup> where the company has in-house counsel involved in the matter or external legal representation. It is recommended that the solicitor avoid communicating with the company's Chief Executive Officer, Chief Financial Officer, Company Secretary, Directors, General Managers and Heads of Business units, whether or not they have such authority in the particular matter.<sup>7</sup>

## In-house counsel

In-house counsel are bound by the Conduct Rules. However, it is often convenient in commercial transactions for in-house counsel to communicate directly with non-lawyers working for the opposing party, which is acceptable provided that prior consent is obtained from the opposing party's solicitors. Such consent could be general or limited to specific transactions.

## Email & social media

In order to communicate with another solicitor's client directly by way of any form of electronic communications (e.g. Email, Facebook and Twitter), a solicitor must first receive the other solicitor's consent to do so. Once consent has been received, it would be prudent practice to request from the other solicitor that such consent continue until the completion of the matter or until notified of any changes to the consent by the other solicitor.

A solicitor must be careful not to 'reply all' to emails if another solicitor's client is one of the recipients of the email (even if the other solicitor is also one of the recipients of the email), unless express consent has been provided by the other solicitor to so communicate<sup>8</sup>. Further, if (despite the foregoing) a solicitor has 'replied all' in an email including another solicitor's client but not the other solicitor, then the solicitor should immediately advise the other solicitor of the email, in addition to requesting consent to communicate with the other solicitor's client in the future.

If another solicitor's client's Facebook page, Twitter account or other social networking site (such as LinkedIn) is available to the public, a solicitor may view it. However, the solicitor must not make any comments via the other solicitor's client's 'Profile,' 'Tweet' or site as this may be regarded as communicating with another solicitor's client. In addition, if the other solicitor's client's Facebook page, Twitter account or other social networking site is blocked from public viewing and permission is needed in order to view it, a solicitor should not associate with the other solicitor's client by requesting permission to view the other solicitor's client's 'Profile,' 'Tweet' or site. The process of requesting permission to view the 'Profile,' 'Tweet' or site may also be regarded as communicating with another solicitor's client.

## Communicating with a former client directly regarding outstanding fees

There is no objection to a solicitor communicating with a former client represented by a new solicitor regarding outstanding fees unless the former client is represented by that new solicitor specifically in relation to the outstanding fees issue.

## Giving a second opinion is allowed

As a general rule a solicitor may accept instructions from a client, whether or not the client has already retained another solicitor in the same matter. This reflects the general principle that a person should have the freedom to instruct a solicitor of choice and allows clients to receive a second opinion about legal issues.

## How can we help you?

These are guidelines only and do not have the force of law. The information is intended to be a general guide only and is not intended to constitute professional or legal advice and you should rely on your own inquiries and assessment.

The Law Institute of Victoria expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this document.

A practitioner must comply with the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and the *Legal Profession Uniform Law (Victoria)* and any other applicable rules or legislation.

To discuss concerns about communicating with another practitioner's client, contact the Law Institute of Victoria's Ethics Department on 9607 9336.

Adopted by the Council of the Law Institute of Victoria on 17th December 2015

<sup>5</sup> Rule 33.1..2 (ii)

<sup>6</sup> Lewis, G.D., Kyrou, E. J., Dinelli, A. M., *'Lewis & Kyrou's Handy hints on Legal practice,'* Third Edition, Law Book Co. 2004 p.172.

<sup>7</sup> *Ibid*

<sup>8</sup> *Legal Services Commissioner v Paric (Legal Practice) (2015) VCAT 703*