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COMMUNICATON AND CONFERRAL IN CIVIL LITIGATION

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Introduction

1. This paper on Communication and Conferral in Civil Litigation is one of a series of guides/papers being developed and published by the Western Australian Bar Association on topics of civil litigation practice and procedure in Western Australia. The guides/papers seek to reflect best civil litigation practice in the Supreme Court of Western Australia, although many of the principles expressed in the guides/papers will be of more general application.

2. The purpose of each guide/paper is to improve civil litigation practice by expressing a clear and concise statement of the practices that should be followed in a particular skill area or in respect of a particular aspect of civil litigation practice. The guides/papers emphasise the ethical obligations of lawyers as officers of the court:

   - to ensure that they are not a mere mouthpiece for their clients;
   - to confine a dispute to the issues of importance that will determine the outcome in a case;
   - to plead a case for which there is a proper foundation;
   - to refrain from advancing a case for a collateral purpose;
   - to provide disclosure of relevant material; and
   - to present evidence that is frank and free from influence.

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3. In modern civil litigation with complex issues, often vast discovery, detailed expert testimony and witness statements in which evidence in chief is marshalled outside the courtroom, the integrity of the litigation process depends to a great degree upon lawyers adhering to proper standards and principles of litigation practice.

4. The potential for oppression by claim or defence to force a settlement by reason of mounting costs rather than by assessment of merit is a blight on the administration of the law. Of equal concern is the blight of excessive legal costs impeding settlement of civil disputes.

5. These concerns are moderated if lawyers fulfil their duties as officers of the court by using interlocutory processes only where necessary to understand the opponent's case and to present a proper case for their client. The rights of parties depend upon lawyers on both sides performing their duties to the court assiduously.

6. The duties of lawyers are often stated as general principles. The guides/papers seek to give greater content to those duties in the context of the particular issues that arise from day to day in civil litigation practice.

7. Before publication, this guide/paper was subjected to scrutiny and discussion at a forum attended by judges and experienced barristers and solicitors.

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Communication and Conferral

8. Rules of Court, the *Law Society Professional Conduct Rules* (**Conduct Rules**) and the *WA Bar Conduct Rules* (**Bar Rules**) entrench an ethos of co-operation on the part of litigants and their legal advisers; with this co-operation in turn designed to ensure that the real issues between parties are identified and presented for adjudication by the Court quickly and inexpensively. That disputes ought to be adjudicated and determined by Courts as quickly and inexpensively as possible is axiomatic.

9. Where parties do not co-operate, not only are they likely to incur costs which are unnecessary but the litigation process is likely to be drawn out and the Court's essential task rendered more difficult and the chance of error increased[1].

The Distinction between Communication and Conferral

10. Communication and conferral are, of course, distinct. All conferral involves communication, while communication can occur in a context distinct from conferral. At one level, conferral is a process that forms part of all dealings with lawyers acting for other parties. It commences with first correspondence. Lawyers should seek to establish and maintain an environment in which parties can communicate fairly and openly at all times.

11. Rules as to *communication* (in the Conduct Rules, the Bar Rules and elsewhere) are primarily concerned with how professional colleagues treat each other,

[1] *Access to Justice* Final Report, S 19 at 7

though they also have a most important role to play in moderating the way in which practitioners deal with unrepresented litigants.

12. Conforming to standards of professional behaviour is an aspect not only of courtesy but is necessary for the efficient and effective administration of justice.

13. Rules as to *conferral* refer more specifically to communications between professional colleagues for the purpose of identifying, confining and advancing issues relevant to resolving a particular dispute in a matter.

14. In determining standards appropriate for professional communications and conferral, resort to standards such as "recourse to [the practitioner's] own sense of right"[2] are no longer apposite (if they ever were). The profession is now too large and disparate to have confidence that a standard of such breadth and indeterminacy can practically assist.

The Conduct and Bar Rules as to Communication

15. The Conduct Rules are not in the nature of legislative prescription of a standard of conduct. They are to be regarded as a guide[3].

16. Rule 2.1 of the Conduct Rules contains the general obligation on practitioners to act honestly and ethically. A practitioner must also not engage in conduct which is dishonest or likely to a material degree be prejudicial to the administration of justice[4].

[2] *Kennedy v Broun* (1863) 13 CBNS 677 at 738
[3] *Quigley v The Legal Practitioner's Complaints Committee* [2003] WASC 8 at [17].
[4] Rule 2.2(a) of the Conduct Rules

17. Rule 5 of the Conduct Rules sets out a practitioner's duties of diligence. Relevantly, rule 5.4 requires, if it is in the client's best interests, a practitioner to try to reach a solution by settlement out of court rather than by commencing or continuing legal proceedings. Fulfilment of this duty invariably involves proper communication and conferral with colleagues.

18. Rule 14 of the Conduct Rules deals with practitioners' duties to the Court. Counsel must at all times use best endeavours to avoid unnecessary expense and waste of the court's time[5]. This requirement can invariably only be met by proper communication and conferral.

19. Rule 20.1 of the Conduct Rules states that a practitioner must treat professional colleagues with the utmost courtesy and fairness. Rules 20.5 to 20.7 of the Conduct Rules prescribe specific aspects of acceptable behaviour. A practitioner must not discriminate against any other practitioner (rule 20.5), sexually harass any person (rule 20.6) or engage in conduct which is offensive or is likely to offend a reasonable person because of its sexual nature (rule 20.7).

20. The Bar Rules contain similar obligations to the Conduct Rules in terms of duties to the court[6], duties to the efficient administration of justice[7] and duties to opponents[8]. In particular, a barrister must seek to ensure that work is done so as to confine the case to identified issues which are genuinely in dispute[9] and

[5] Rule 14.4(2) of the Conduct Rules
[6] Rules 20 to 31 of the Bar Rules
[7] Rules 41 to 42A of the Bar Rules
[8] Rules 50 to 57 of the Bar Rules
[9] Rule 42(a) of the Bar Rules

occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case[10].

Communication with a Professional Colleague generally

21. An adversarial system should not be unduly combative[11]. Litigation is neither a game nor an opportunity for practitioners to demonstrate their knowledge of "The Art of War".

22. Professional etiquette should be observed at all times. In a paper presented to the Law Society in 1984, David Malcolm QC (as he then was) said:

> *Etiquette seems to connote a higher plateau of behaviour than mere common courtesy. Professional etiquette has a particular connotation of its own. The law is essentially an honourable profession. It is the hallmark of a profession that its members regulate their conduct by a self imposed code of conduct.*

23. Practitioners are to treat their professional colleagues with "the **utmost** courtesy and fairness"[12] (emphasis added). Practitioners should be cognisant not only of content but the tone of communications. The tone of communications may inhibit conferral and thereby achievement of the ends of conferral[13].

24. Leaving aside rules 20.5 to 20.7 of the Conduct Rules, colleagues should, in accordance with their duties to the Court and their clients, communicate in a manner designed to advance the resolution of the issues in dispute. This requires attention to the matters in dispute, identification of the pertinent issues (covered by a separate paper), and the exercise of independent judgment as to these tasks.

[10] Rule 42(e) of the Bar Rules
[11] Ipp, *Lawyers' Duties to the Court*, (1998) 114 LQR 64 at 96
[12] See rule 20 of the Conduct Rules
[13] See generally Waller v Waller [2008] WASC 51

The communication should, accordingly, be focused and informed by a rigorous attention to the resolution of issues rather than the mere statement of positions[14].

Communication with a Professional Colleague Prior to the Issue of a Writ

25. Proceedings should not issue without a prior letter of demand, except in circumstances later described. A well drafted letter of demand may facilitate an early resolution of a dispute without litigation and will invariably result in disputes being resolved ultimately more cheaply and expeditiously.

26. The Victorian Civil Justice Review recommend the following pre-action steps:

> *[Prior] to the commencement of any legal proceedings the parties to the dispute shall take reasonable steps, having regard to their situation and the nature of the dispute, to resolve the matter by agreement without the necessity for litigation or to clarify and narrow the issues in dispute in the event that legal proceedings are commenced. Such reasonable steps will normally be expected to include the following:*
>
> *...*
>
> *(b) The letter from the person with the claim should:*
>
> *(i) give sufficient details to enable the recipient to consider and investigate the claim without extensive further information,*
>
> *(ii) enclose a copy of the essential documents in the possession of the claimant which the claimant relies upon,*
>
> *(iii) state whether court proceedings will be issued if a full response is not received within a specified reasonable period,*
>
> *(iv) identify and ask for a copy of any essential documents, not in the claimant's possession, which the claimant wishes to see and which are reasonably likely to be in the possession of the recipient,*
>
> *(v) state (if this is so) that the claimant is willing to undertake a mediation or another method of alternative dispute resolution if the claim is not resolved,*

[14] As to focus on interest and not positions, see generally Fisher and Ury, *Getting to Yes*, 1981 Penguin Books

(vi) draw attention to the courts' powers to impose sanctions for failure to comply with the pre-action protocol requirements in the event that the matter proceeds to court.

...

(e) The full written response to the claim should, as appropriate:

(i) indicate whether the claim is accepted and if so the steps to be taken to resolve the matter,

(ii) if the claim is not accepted in full, give detailed reasons why the claim is not accepted, identifying which of the claimant's contentions are accepted and which are disputed and the reasons why they are disputed,

(iii) enclose a copy of documents requested by the claimant or explain why they are not enclosed,

(iv) identify and ask for a copy of any further essential documents, not in the respondent's possession, which the respondent wishes to see,

(v) state whether the respondent is prepared to make an offer to resolve the matter and if so the terms of such offer,

(v) state whether the respondent is prepared to enter into mediation or other form of dispute resolution.

27. There is every reason for these standards to be expected in this State in every circumstance.

28. In addition, any demand should be factually accurate and any views about the law or basis for the claim must be genuinely held (including the right to claim interest). As a rule of practice, a solicitor in dispatching a letter of demand ought to exercise the same care as counsel in signing a pleading.

29. A practitioner should not threaten action that will not, or cannot, be taken if the demand is not met.

Communication with an Unrepresented Party generally

30. Professional etiquette equally applies when dealing with an unrepresented party. Indeed in some respects, it is with the unrepresented party that the obligation to observe proper professional standards of communication is most important. Practitioners should attempt to assist the unrepresented party (consistent with the duty owed to the practitioner's own client) in practical ways to ensure compliance with procedural rules[15]. Further to this, practitioners ought to take care to ensure that advantage is not taken of unrepresented parties, whatever the instructions of the client.

31. Practitioners should be selective with the points taken with an unrepresented party. Overly legalistic or formal points should not be taken unless absolutely necessary.

32. Other than in exceptional circumstances, communication with an unrepresented party should be in writing, though in certain circumstances it would be wise to confirm by telephone receipt by an unrepresented party of a written communication. Written communication avoids potentially protracted disputes about what was said and not said. Writing in plain English is essential.

Communication with an Unrepresented Party Prior to the Issue of a Writ

33. A letter of demand to an unrepresented party should follow the same guidelines as communications with professional colleagues.

34. The practitioner should ensure that the letter of demand is in plain English and the consequences of a failure to comply with the demand clearly stated.

[15] See rule 20.2 of the Conduct Rules

35. Where *ex parte* relief (such as an injunction or freezing order) has been obtained, the practitioner should write to the unrepresented party clearly setting out the effect of the order, the consequences of failing to comply with the order, the rights of the unrepresented party, why it was necessary to obtain the order *ex parte* and the material relied upon to obtain the order. It is inappropriate to simply provide a vast bundle of affidavits with the expectation that the party will be able to extract from it the essential material relied upon to obtain the order.

36. These practices may be unnecessary where the practitioner is certain that the party served with the order obtained *ex parte* will necessarily seek legal advice forthwith.

What is the preferred mode of Communication?

37. Practitioners should communicate with each other in a manner which most efficiently and expeditiously enables the expression of the practitioner's views on the relevant topic. This will in almost all circumstances be face to face or by telephone. In circumstances where matters of technical complexity or other difficulty arise, it may be appropriate to communicate in writing as a prelude to conferral face to face or by telephone.

What should never be communicated?

38. A practitioner should never communicate in a manner which constitutes abusive behaviour, threats, extortion or any other illegal conduct.

39. Untruths or half-truths should never be communicated. Practitioners who cannot be trusted soon become well-known and a reputation for deception is easily earned and shed with difficulty.

40. Practitioners should not use sharp practice to secure a tactical advantage. As examples, a practitioner should not exploit an ambiguity between "days" and "business days" in any deadline communicated to another party or provide unavailable dates which do not distinguish between unavailability caused by a professional as opposed to a personal commitment.

41. Practitioners should at all times communicate by reference to their role as professional advisers and officers of the court. This requires the exercise of professional judgment and the avoidance of communicating as a mere mouthpiece of the client[16]. The practitioner's duty is to ensure that only matters necessary for the proper disposition of the claim are dealt with.

What should you do if a party does not communicate properly?

42. If another practitioner does not communicate properly, you should first notify that practitioner that you consider their conduct to be inappropriate and urge them to communicate with courtesy.

43. Failure to return telephone calls of other practitioners is, not only impolite, but is a matter of substantial professional misconduct. If telephone calls are unanswered it is appropriate to speak with another practitioner at that practitioner's firm to seek for them to intercede. Alternatively, an email or letter

[16] See rule 17 of the Bar Rules

requiring the practitioner to respond ought to be sent. If this fails, then the matter is one of seriousness and reporting of the conduct to a professional disciplinary body ought to be considered.

44. Discourteous communication should not be returned in kind. It is appropriate to remind colleagues of their professional obligations, but in an unthreatening tone.

45. If despite the warning, the other practitioner continues to communicate discourteously, you should consider reporting of the conduct to a professional disciplinary body. As a practical guide, this should ideally occur only after consultation with another practitioner who is not involved in the matter.

What is conferral and what is the purpose of conferral?

46. Order 59 rule 9 is the key provision relating to conferral. There are other provisions of relevance including the usual directions in the Commercial Managed Cases List which require conferral before any interlocutory application is filed and conferral prior to a listing conference[17].

47. The purpose of conferral is to ensure that parties resolve issues between themselves without the expense of an application to Court. Only matters which are really in dispute ought to be referred to Court and on occasions when matters are to be determined by the Court all parties appreciate what the real issues in dispute are[18].

[17] See CMC usual orders 11-13 and 4.4.3.
[18] *Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd* (2006) 33 WAR 1 at [3] to [5]

48. The party seeking a particular outcome or order should be the party initiating conferral by telephone or a face to face meeting.

49. Proper conferral requires thought prior to initial communication. The party initiating conferral must have it clear in their own mind the precise matters that are to be the subject of conferral.

50. The party initiating conferral must acknowledge that the other party may not at the time of the first telephone call be equally familiar with the matter. If this is so, it is essential that the parties then agree a time at which proper conferral will occur. By the same token, having been alerted of the need for conferral, the other party should immediately familiarise themselves with the material to enable proper conferral to occur quickly.

51. Necessarily, these matters must occur within a time frame that will allow meaningful conferral.

Which matters or circumstances do not require conferral?

52. A practitioner should consider whether it is absolutely necessary to dispense with the requirement of conferral. There are only limited instances which justify a failure to confer.

53. One such circumstance is the proper making of *ex parte* application to obtain freezing[19] or search orders on the basis that notice or service may activate the feared dissipation or dealing with assets or evidence.

[19] See generally *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645 at 653

54. If an *ex parte* order is made, the practitioner should start conferring with the other party immediately after the order is served. If the other party obtains legal representation, the practitioner is obliged to explain why the *ex parte* application was made and provide the colleague with the material relied upon to obtain the order.

55. A further circumstance in which the requirement of conferral is dispensed with is the failure by an opponent to confer. This is not really an instance of dispensing with conferral but rather a failure of one side to confer.

56. Following recent decisions in this State it ought now to be expected that in respect of an interlocutory application brought by a party whose legal representative has properly sought to confer with a practitioner on the other side who has failed to confer - that if the orders sought are made the non-responsive practitioner may be required to provide to the Court an undertaking that they will not charge their client for the appearance and be the subject of a personal indemnity costs order payable forthwith.

57. Following these same decisions, it ought now to be expected that in respect of an interlocutory application brought by a party whose legal representative has properly sought to confer with a practitioner on the other side who has failed to confer - that if the orders sought are *not* made no order as to costs of the application ought to be made and the non-responsive practitioner may be required to provide to the Court an undertaking that they will not charge their client for the appearance. Where a client instructs a practitioner not to confer,

then, other than in most exceptional circumstances, the practitioner should decline to act on that basis.

58. Conferral is expected in applications for default judgment in mortgage actions[20]. The Court will not waive conferral unless there has been an unsuccessful attempt to speak to the defendant by telephone and in writing prior to the filing of the chamber summons[21].

Who should confer?

59. Determining who ought to confer requires consideration of two matters.

60. First, the person who has conduct of the matter or is most knowledgeable about it ought to be in attendance. This will enable discussions from the perspective of those with the knowledge and ability to make relevant forensic judgments[22].

61. Second, in accordance with the practice direction[23], the conferring practitioner should have the authority to resolve issues in dispute.

[20] See Common Practice Direction 9.4.1
[21] See Common Practice Direction 9.4.1 at paragraph 6. See also *Rams Mortgage Corp v Siddons* [2004] WASC 254 at [4]
[22] See rule 17 of the Bar Rules
[23] See Common Practice Direction 4.3.2 at paragraph 7