

COMMUNICATING WITH ANOTHER PRACTITIONER'S CLIENT GUIDELINES



These guidelines have been created to provide the **legal profession with guidance in relation to Rule 25** of the *Professional Conduct & Practice Rules 2005* (“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.”*¹

The Conduct Rules provide limited exceptions to the general rule in both litigious and non-litigious matters.

Matters not before a court or tribunal

In matters not involving a case in court a practitioner must not communicate directly with any other party for whom, to the practitioner's knowledge, another practitioner is currently acting, unless one of the following exceptions applies.²

- (a) notice of the practitioner's intention to communicate with the other party, in default of a reply from the other practitioner, has been given to that practitioner, who has failed, after a reasonable time, to reply;
- (b) the communication is made for the sole purpose of informing the other party that the practitioner has been unable to obtain a reply from that party's practitioner and requests that party to contact the practitioner; and
- (c) the practitioner, thereafter, notifies the other practitioner of the communication; or
- (d) the other practitioner consents; or
- (e) the circumstances are so urgent as to require the practitioner to do so; and
- (f) the communication would not be unfair to the other party.

¹ 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 p168.

² Rule 25.1.1 *Professional Conduct & Practice Rules 2005*

A practitioner who receives notice from another practitioner that the first practitioner's client has instructed or retained that practitioner may, after notifying the other practitioner, communicate with the client for the purpose of confirming the client's instructions and arranging for the orderly transfer of the client's matters to the other practitioner.³

The Rule implements a safeguard against practitioners obtaining an unfair advantage over their opponents' clients.⁴ However, “in practice the rule gives rise to various difficulties that are best addressed with patience, common sense and fair dealings”.⁵

The consent of the client to communicate directly with the other practitioner's client is not sufficient consent. The practitioner must receive consent from the other side's practitioner.

In matters before a court, practitioners should refer to Rule 18 of the Conduct Rules.

When the other practitioner will not respond to you

The practitioner should ask the other practitioner's client to advise if the client has retained new practitioners, and if so, their contact details. If new practitioners have not been appointed, then the practitioner should ask the client to instruct their practitioner to contact the practitioner. In addition, the practitioner must provide a copy of the communication to the opposing party's practitioners.⁶

When the opposing party contacts you directly

Where another practitioner's client contacts a practitioner directly, in any form, then unless one of the exceptions referred to above applies, the practitioner must avoid communicating with the other practitioner's client, other than to ask the

³ *Ibid.*, Rule 25.2

⁴ Lewis, G.D., Kyrou, E. J., Dinelli, A. M., ‘*Lewis & Kyrou's Handy hints on Legal practice*,’ Third Edition, Law Book Co. 2004 p175.

⁵ *Ibid.*

⁶ Rule 25.1.1(b) *Professional Conduct & Practice Rules 2005*.

client to contact their practitioner. The practitioner must immediately advise the other practitioner of the communication.⁷

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

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

When a matter is urgent

When a practitioner is faced with a situation where the matter is so urgent that the practitioner must communicate with the other practitioner's client,⁸ the practitioner can only do so if the communication would not be unfair to the other client.⁹ The practitioner must thereafter advise the other client's practitioner of the communication.

Where the other 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,¹⁰ where the company has in-house counsel involved in the matter or external legal representation. It is recommended that, (subject to Rule 17 of the Professional Conduct & Practice Rules 2005) a practitioner 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.¹¹

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 other party, which is acceptable provided that prior consent is obtained from the other party's practitioners. Such consent could be general or limited to specific transactions.

Email & social media

In order to communicate with another practitioner's client directly by way of any form of electronic

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

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

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

Giving a second opinion is allowed

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

How can we help you?

Visit the Ethics Department's website at:
www.liv.asn.au/Practising-in-Victoria/Ethics.

These are guidelines only and do not have the force of law. A practitioner must comply with the Professional Conduct & Practice Rules 2005 and Legal Profession Act 2004.

⁷ Rule 25.1.1(c) *Professional Conduct & Practice Rules 2005*.

⁸ *Ibid.*, Rule 25.1.3(a).

⁹ *Ibid.*, Rule 25.1.3(b).

¹⁰ Lewis, G.D., Kyrou, E. J., Dinelli, A. M., '*Lewis & Kyrou's Handy hints on Legal practice*,' Third Edition, Law Book Co. 2004 p172.

¹¹ *Ibid*