Interlocutory applications: Duties to court, client & colleague

In recent years the courts have emphasised that litigation must identify the real issues between the parties.[1] The parties and their legal representatives need to facilitate the "just an expeditious resolution" of the matters in disputation.[2] For interlocutory applications, Kunc J in *Ken Tugrul v Tarrants Financial Consultants Pty Ltd*[3] identified several points associated with the professional duties we owe with respect to the conduct of interlocutory applications. The following is an adaption of these points for Queensland practitioners:

1. Rule 5 of the *Uniform Civil Procedure Rules 1999* (UCPR) is "not just a pious exultation to be acknowledged and then ignored";[4] the rule has real consequences for litigants and their representatives.
2. It is the essence of being a professional that we conduct ourselves with courtesy, civility and integrity. These qualities are not restricted to an actual appearance before a court but apply to all we do, whether scrutinised or not. This should be reflected in how we communicate with our clients and our colleagues. It is important to robustly advance our client's position, but we should not at a client's behest engage in action which may bring discredit upon us. We must always remain independent.[5]
3. Resolving an issue may mean picking up the telephone to sort out what may be a misunderstanding; a telephone call can also promote clearer understanding of the issues. Kunc J observed: "It has been suggested that some lawyers no longer speak to their opponents on the telephone for fear of being 'verballed' in an affidavit. If that is true, then that is a retrograde development… which the profession should reverse".[6]
4. A request for information to another practitioner should be reasonable, focused and justifiable. The justification should accompany the request.[7]
5. The recipient of a reasonable request for information should not meet it with "an unthinking denial of legal entitlement to the information". Rule 5 *UCPR* requires the parties and their lawyers to proceed in an expeditious way. Kunc J in the course of judgment said: "…if it is information that would be required to be produced in a response to a subpoena or notice to produce then it is contrary to section 56 *Civil Procedure Act 2005* (*NSW) (CPA)* obligations of a party and that parties' lawyers do to resist providing it unless and until the court process is invoked."[8] In Queensland, Rule 5 *UCPR* is not as extensive as section 56 *CPA* (NSW). Notwithstanding this, attempts should be made to facilitate the just and expeditious resolution of issues between the clients. This may be possible by the provision of the information on the basis of an undertaking of the kind considered in *Hearne v Street*.[9]
6. Filing an interlocutory application should be a matter of last resort.[10]
7. Prior to filing an interlocutory application, "the putative respondent [should be] given final, written notice of the relief to be sought, the reason for it and a reasonable opportunity to respond."[11] As a rule of thumb,

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[1] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303.
[2] Rule 5 Uniform Civil Procedure Rules 1999 (UCPR).
[3] [2014] NSWSC 437.
[4] Ibid [69]. The judgment referred to the equivalent NSW provision which is in similar, but not in identical terms.
[5] Ibid [70].
[6] Ibid [71].
[7] Ibid [72].
[8] Ibid [73].
[9] (2008) 235 CLR 125.
[10] *Tugrul* [74].
[11] Ibid [75].

three clear business days is reasonable. If extensions are required, they should be justified. Prior to a challenge to pleading, opposing counsel should confer before a strike out application is brought.[12]

8. Once an interlocutory application is filed, the parties and their representatives should ensure that only the real or essential issues be litigated. It is unnecessary to deliver the whole of the file to provide the evidentiary basis on which the application is being made. The real and essential facts should be discerned before litigation commences.[13]
9. Similarly, in the days of instant 'note-up' sources, case citations should be an appropriate balance between our duty of candour and our obligation to prevent the introduction of extraneous, irrelevant or duplicate material.

Stafford Shepherd

Senior Ethics Solicitor

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[12] Ibid [75].
[13] Ibid [76].