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OF NEW SOUTH WALES

# WORKING WITH BARRISTERS

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# CONTENTS

<b>Introduction</b>	<b>3</b>	<b>Chapter Five: Complaints against barristers</b>	<b>20</b>
<b>Chapter One: Barristers and the work they do</b>	<b>4</b>	5.1 Bases for a complaint	20
1.1 Who is a barrister?	4	5.2 The complaints procedure	20
1.2 What work does a barrister do?	5	<b>Chapter Six: Professional liability issues</b>	<b>22</b>
1.3 Why brief a barrister?	6	6.1 Advocate's immunity	22
<b>Chapter Two: Selecting a barrister</b>	<b>7</b>	6.2 Risk management	22
<b>Chapter Three: The brief</b>	<b>9</b>	<b>APPENDICES</b>	
3.1 The scope of the brief	9	<b>Appendix 1: Sample front sheet of a brief</b>	<b>26</b>
3.2 Preparing the brief	9	<b>Appendix 2: Sample Index and Observations of a brief to counsel to advise on liability, quantum and generally</b>	<b>27</b>
3.3 Delivery of the brief	11	<b>Appendix 3: Sample Observations of a brief to counsel to advise generally and to draft statement of claim</b>	<b>30</b>
3.4 Acceptance of briefs	12	<b>Appendix 4: Sample Index and Observations of a brief to counsel to appear</b>	<b>31</b>
3.5 Circumstances in which a brief can be returned	12	<b>Appendix 5: Sample Index and Observations of a brief to counsel to advise on evidence</b>	<b>34</b>
3.6 When the brief is returned at short notice	15	<b>Appendix 6: Notes in relation to an advice on evidence</b>	<b>36</b>
3.7 Requesting the return of the brief	15	<b>Appendix 7: Specimen pleadings and particulars for a statement of claim</b>	<b>39</b>
3.8 Reviewing counsel's advice	16	<b>Appendix 8: Worksheet</b>	<b>41</b>
3.9 Updating counsel's advice	16		
3.10 Conflict of interest	16		
<b>Chapter Four: Financial implications of working with barristers</b>	<b>17</b>		
4.1 Disclosure of barristers' fees and costs agreements	17		
4.2 Costs agreements	18		
4.3 Billing	18		
4.4 Cancellation fees	18		
4.5 Disputes about barristers' fees	19		

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Disclaimer: This publication has been produced solely for legal practitioners to provide general information of an introductory nature about working with barristers. It is a general guide only and is not exhaustive of issues which may be encountered. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted, warranted or implied by the authors or the Law Society of New South Wales and any liability is hereby expressly disclaimed.

# Introduction

*Working with Barristers is a publication for solicitors that provides information about the relevant law and established practices governing the relationship between barristers and solicitors in New South Wales.*

It is critical that the interaction between solicitors and barristers is founded upon a clear understanding of the respective roles and expectations that each will have of the other in serving a mutual client. Since the publication of the first edition in 1992, this guide has recognised that our justice system works better when the team consisting of barrister, solicitor and client work together effectively and efficiently.

This edition of *Working with Barristers* reflects the changes to the law since the previous editions, most notably the commencement of the Legal Profession Uniform Law. The framework of the Legal Profession Uniform Law is

important when considering the work and responsibilities of barristers and solicitors. The following legislation is referred to throughout this guide:

- *Legal Profession Uniform Law (NSW)*
- *Legal Profession Uniform Law Application Act 2014*
- *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015*
- *Legal Profession Uniform Conduct (Barristers) Rules 2015*

The Law Society wishes to express gratitude to the New South Wales Bar Association for taking the time to review and comment on the updated version of this guide.

## Chapter One:

# Barristers and the work they do

The matter of who a barrister is, and what work they do, goes to the heart of the relationship between barrister, solicitor and client. As a solicitor, it is important that you understand the role of the barristers you work with.

We note that barristers are not limited to accepting instructions from solicitors. Where a barrister is briefed directly by the client it is referred to as ‘direct briefing’. This guide is focused on assisting solicitors to work with barristers and does not offer guidance in relation to direct briefing. However we note that different rules may apply for barristers in matters in which they are directly briefed.

## 1.1 Who is a barrister?

*The Legal Profession Uniform Law (NSW) (‘Uniform Law’)* provides that a barrister is an Australian legal practitioner whose Australian practising certificate is subject to a condition that the holder is authorised to engage in legal practice as, or in the manner of, a barrister only.<sup>1</sup>

The New South Wales Bar Association provides the following description of the role of a barrister, which emphasises their independence:

*Barristers specialise in court work and advice. Their independence is vital to our system of justice. It ensures legal representation for everyone, without fear or favour. Barristers cannot form any business association with partners which might compromise, or even appear to compromise, that independence. Nor are they tied to any particular client. A barrister can appear for a company or the government one day and against it the next.*<sup>2</sup>

Barristers can also be referred to as ‘counsel’. Those terms are used interchangeably throughout this guide.

Those seeking admission as a barrister in New South Wales must have been admitted as a lawyer in the Supreme Court of New South Wales or otherwise be eligible to practice in New South Wales by way of their admission in another state or territory. They must then complete the Bar exams<sup>3</sup> and undertake the reading program for a period of 12 months while being supervised by at least one experienced barrister.<sup>4</sup> During this period they are referred to as a ‘reader’. Depending on the reader’s progress, conditions imposed by their practising certificate are progressively lifted during the reading period.

You should be careful when briefing barristers who are still in their reading period to ensure that the reader is only asked to do something that they are permitted to do by the conditions imposed by their practising certificate. While readers may have relevant experience and high level skills, you must be sure that they possess the requisite experience, skill and expertise. If you are not completely confident about this, the reader should not be briefed.

In New South Wales, the Bar Council determines who is suitable to hold a barrister’s practising certificate.<sup>5</sup> The Bar Council may also impose conditions on the practising certificate.<sup>6</sup> It would be rare that you need to check whether a barrister holds the requisite practising certificate. In most cases the surest indicator that a barrister holds a current right to practise will be that they are located in established chambers in the company of other barristers. If there is any reason to be concerned, you should check with the New South Wales Bar Association.

Senior Counsel, previously known in New South Wales as Queen’s Counsel and also referred to as ‘silks’, are the most senior and eminent barristers. The Senior Counsel Protocol, governing the selection and appointment of Senior Counsel, is available from the New South Wales Bar Association. Senior Counsel are usually briefed to appear as advocates at trial or on appeal, or to provide advice on more difficult cases. They often require junior counsel to be briefed as well, although there is no rule that prevents Senior Counsel from appearing without junior counsel. Senior Counsel is entitled to refuse a brief to appear before a court if he or she considers on reasonable grounds that the case does not require the services of Senior Counsel.<sup>7</sup>

It is important to discuss with the client (and junior counsel if already briefed) whether there is a need to brief Senior Counsel. This question can arise during the course of a matter, especially if the matter raises complex issues or if it looks unlikely to settle before the hearing.

Solicitors in New South Wales may work with interstate barristers in the same way as local barristers. This provides greater choice, access to a broader range of expertise and possibly scope for financial economies.

## 1.2 What work does a barrister do?

The *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW)<sup>8</sup> ('Uniform Bar Rules') govern the nature and manner of work undertaken by barristers. The object of the Rules is to ensure that barristers:

- (a) act in accordance with the general principles of professional conduct;
- (b) act independently;
- (c) recognise and discharge their obligations in relation to the administration of justice; and
- (d) provide services of the highest standard unaffected by personal interest.<sup>9</sup>

Like solicitors, barristers owe duties to the court, to their clients and to their colleagues (both other barristers and solicitors).<sup>10</sup> However, the Uniform Bar Rules acknowledge that barristers are 'specialist advocates' and provide that barristers are required to exercise their forensic judgements and give their advice independently.<sup>11</sup>

Rule 11 of the Uniform Bar Rules sets out the parameters of a barrister's permissible work, which is:

- (a) appearing as an advocate;
- (b) preparing to appear as an advocate;
- (c) negotiating for a client with an opponent to compromise a case;
- (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
- (e) giving legal advice;
- (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
- (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
- (h) such other work as is from time to time commonly carried out by barristers.

The 'client' referred to in this provision is the solicitor's client and not the instructing solicitor.

Rule 13 of the Uniform Bar Rules sets out particular types of work that a barrister cannot do.<sup>12</sup>

13. A barrister must not, subject to rules 14 and 15:

- (a) act as a person's general agent or attorney in that person's business or dealings with others;
- (b) conduct correspondence in the barrister's name on behalf of any person otherwise than with the opponent;
- (c) place herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:
  - (i) conferring with the client, the instructing solicitor, prospective witnesses or experts;
  - (ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court;
  - (iii) viewing a place or things by arrangement with the instructing solicitor or the client; or
  - (iv) library research;
- (d) act as a person's only representative in dealings with any court, otherwise than when actually appearing as an advocate;
- (e) be the address for service of any document or accept service of any document;
- (f) commence proceedings or file (other than file in court) or serve any process of any court;
- (g) conduct the conveyance of any property for any other person;
- (h) administer any trust estate or fund for any other person;
- (i) obtain probate or letters of administration for any other person;
- (j) incorporate companies or provide shelf companies for any other person;
- (k) prepare or lodge returns for any other person, unless the barrister is registered or accredited to do so under the applicable taxation legislation; or
- (l) hold, invest or disburse any funds for any other person.

### 1.3 Why brief a barrister?

The following considerations may be relevant in deciding whether you should engage a barrister in a matter, or in explaining to your clients why it is important to engage a barrister.

#### **Barristers are specialists**

While they have equal status, solicitors and barristers are experts in different aspects of practice. Barristers are specialist advocates and have forensic skills and expertise in the rules of evidence that come from extensive court experience. Barristers' exposure to courts is generally greater than that of solicitors.

In some jurisdictions – such as family law, land and environment, and industrial relations – many first instance and appeal decisions are not reported, but barristers are made aware of them by their colleagues.

#### **Barristers provide second opinions**

Even experienced solicitors often recommend that their clients obtain a second opinion in relation to an issue. This may be because of a particularly complex issue or because the solicitor feels that they lack objectivity because of their relationship with the client. In addition to expertise, a barrister can provide independence and objectivity.

#### **Barristers can alter client perceptions**

Barristers bring a fresh view to an issue. A second opinion may change the client's perception. Barristers are free to ask the difficult questions, or to ask them in a manner that is different to that used by the solicitor. The independence of the barrister can sometimes enable barristers to get through to clients and change their perceptions.

#### **Barristers help solicitors manage their work**

Quite apart from the specialist expertise they offer, barristers can also perform the pragmatic role of providing a service when the solicitor is unavailable, or where the barrister will be cheaper, or where the solicitor has firm-related issues they need to attend to.

## Chapter Two:

# Selecting a barrister

As at 30 June 2016, the composition of New South Wales barristers was as follows:

Junior Barristers		
Male	1,497	63.6%
Female	466	19.8%
Senior Counsel		
Male	352	15%
Female	38	1.6%
<b>Total Barristers</b>	<b>2,353</b>	<b>100%</b>

*Figures from the NSW Bar Association Annual Report 2015-16.*

Choosing a barrister is an important decision. Ultimately the choice of barrister is a matter for instructions from your client, preferably in writing.

In some cases, your client may have a strong view about which barrister they would like to use. In such cases, you should still make enquiries about the barrister to determine how appropriate they are for the particular matter. If you develop any concerns about the choice of barrister you should raise those concerns with the client, preferably in writing.

If your client does not have an initial view on who should be briefed in a matter, it is your role to provide them with a shortlist of options or a single recommendation, depending on the preference of your client. It is useful to have a list of barristers to draw from which includes readers, juniors, senior juniors and Senior Counsel across a range of practice areas. Your list should contain both female and male barristers.

The consequences of a poor choice of barrister are potentially very serious. To avoid any problems, you should take notes of the enquiries you make when selecting the barristers to recommend and the representations that each barrister makes as to his or her experience and specialisation. Set out below are a number of factors that should be taken into account.

The New South Wales Bar Association's website provides a 'Find a Barrister' facility where a search of all New South Wales barristers can be conducted by a number of criteria, including name, gender, seniority and area(s) of practice.<sup>13</sup>

Clerks of barristers' chambers are also an invaluable source of guidance in finding the right barrister for a particular matter.

### Nature of the legal problem

When selecting a barrister you must consider the nature of the legal problem in the matter. Is it a legal problem that primarily involves complex issues of law or issues of fact? Is it a legal problem that neatly fits within one particular area of law, or does it involve several areas of law? Will the barrister perform the role of advocate, negotiator or technical lawyer? Which court or tribunal will be the forum for resolving the legal problem?

### Expertise

Based on the particular legal problem, it may be necessary to find a barrister who has expertise in a specific area of law. Some barristers are far better at dealing with factual issues (and so they may be good cross-examiners) while some excel at legal analysis (which is required for oral and written submissions). A poor advocate in court may be an excellent negotiator and drafter outside of court. A barrister with extensive experience in the Land and Environment Court may lack the knowledge of procedure in the Equity Division of the Supreme Court. Some barristers may not appear in the District Court or Federal Circuit Court, even though they have expertise in the legal matters dealt with in those courts. It is important to ensure that the barrister has the relevant experience and expertise in the specific matter that you are considering briefing them in.

The expertise required for some cases is an understanding of facts or procedure, rather than the substantive law. For example, you may want a barrister who is skilled in cross-examination or one who is skilled in financial matters. In that instance you will be looking for a barrister with expertise in the presentation, analysis and testing of the evidence.

Assessing expertise is not simply a matter of asking the barrister or checking their date of admission to the Bar. You should also consider talking to colleagues and reviewing decided cases in the area. You may also wish to check whether the barrister has published any work in the area in which they claim to specialise.

### Personality of the client

Although the barrister and client may not need to work together to a significant extent, the client should have confidence in their barrister. This will be assisted if the client and barrister can communicate well with each other. You may need to make an assessment of personality and determine whether the barrister and client will be able to successfully work together.

### Budget

It is important to get instructions from your client as to how much money they wish to invest in a barrister. There is significant variation in the fees charged by barristers having regard to their expertise and the areas in which they practise. You need to have regard to the nature and size of the legal problem and the cost of engaging a barrister. Make sure to discuss the matter with the client at the earliest possible stage.

### Geographical issues

Geographical considerations are relevant to both convenience and cost. In New South Wales there are barristers' chambers (or 'floors') in Sydney's central business district, Manly, Parramatta, Newcastle, Coffs Harbour, Dubbo, Lismore, Orange and Wollongong. There are courts located in each of these places or that visit the location as part of the court circuit. Clients, of course, can be located anywhere and it is increasingly common, for example, for rural clients to engage Sydney solicitors in specialist matters. Clients should be aware that they will usually be required to pay their barrister's travel costs when a hearing takes place away from where the barrister is located.

### Reputation

The legal profession in New South Wales is a relatively small one. It does not take long for a busy solicitor with a litigation practice to become aware of the reputation of counsel. While in some cases reputation can be based on perception rather than reality, it can be an important indicator of the suitability of a barrister. The most reliable indicators of reputation are direct experience, through briefing the barrister, or indirect experience, through observing the barrister in action.

### Seniority

Seniority is generally ascertained by reference to the date of admission to the Bar. Appointment as Senior Counsel is the Bar's own method for recognising seniority and eminence. When the choice is between a reader, junior counsel, senior junior counsel or Senior Counsel, the other factors relating to the legal problem and the client will determine what level of seniority is appropriate. It is as much a mistake to brief too senior a barrister as it is to brief too junior a barrister as seniority comes with a higher brief fee. Complex, large cases are usually better able to sustain Senior Counsel's fees.

### Availability

You will need to make enquiries in advance of briefing a barrister to ascertain whether the barrister is available to do the work in a timely fashion. When a court appearance is required this is straightforward – either the barrister is available to appear or they are not. It can be more complicated where the barrister has been briefed to provide an advice, or prepare a document. In such situations it is your role to ensure the barrister completes the work within the relevant time frame.

If a relationship has been formed with a barrister who is unavailable, you may wish to ask that barrister for a referral.

### Equitable briefing

A number of law firms have adopted the Law Council of Australia's 2016 'National Model Gender Equitable Briefing Policy', which has the ultimate aim of briefing women in at least 30 per cent of all matters and paying women barristers 30 per cent of the value of all brief fees by 2020. If your firm has adopted the Policy, you should bear this in mind when selecting counsel and ensure that you have an appropriate method of collecting data for reporting purposes.

Some clients may have their own policies on equitable briefing which they will require you to take into account when suggesting counsel for a matter. You should discuss the requirements of your client prior to briefing a barrister in the matter.



## Chapter Three:

# The brief

The relationship between solicitor and barrister is primarily defined by the brief. The brief is the set of papers given to the barrister retained to appear, advise or draft documents in a matter. The brief comprises observations, usually by the instructing solicitor, together with all the important documents relating to the matter. To prepare the best possible brief you will need to have adequate knowledge of the relevant area of law and the facts of your client's case.

### 3.1 The scope of the brief

Briefs can be of various types. Common examples are:

- to advise;
- to advise in conference;
- to advise on evidence;
- to advise on liability and/or quantum;
- to draw a document such as a statement of claim, or interrogatories;
- to settle a document; and/or
- to appear at a hearing.

While this section deals substantially with a brief on hearing for a client who has initiated civil litigation, much of it is relevant also to the other types of instructions that a solicitor provides to a barrister.

### 3.2 Preparing the brief

It is important to be selective about what is included in the brief and to give consideration to how it is presented. If the matter ultimately requires a costs assessment, a well prepared brief will indicate the work that you are seeking payment for.

Each brief will necessarily depend on the context of the case. Generally a brief should contain:

- an index;
- observations on brief;
- copies of all pleadings;
- copies of letters seeking and furnishing particulars (or composite particulars);
- copies of interrogatories and answers set out if possible in the same form as copies of letters;
- the proofs of evidence of the witnesses;
- a list of documents cross-indexed by reference to pages in the brief;
- copies of all documents which are to be tendered as evidence; and

- copies of documents produced on discovery by the opponent if not already included.

Other documents, depending on the type of case, could include:

- copies of the transcript of any prior proceedings with relevant parts highlighted;
- copies of reports (e.g. medical, scientific, otherwise expert or departmental) to the extent that they have not been included with the proofs of evidence;
- statements or extracts relating to damages if available (in a personal injury case this would include a list of paid and unpaid expenses and a summary of income losses);
- photographs, plans, relevant articles which for the sake of convenient access would usually be bundled separately;
- company and business name search results; and
- subpoenaed records, with a summary if they are too voluminous.

It is a good idea to enclose the brief in a folder and place dividers between the various documents. Whenever possible, documents should be supplied in standard A4 size.

Increasingly barristers will require both a hard copy and an electronic copy of the brief. When you are preparing the brief you should ask the barrister what they prefer.

#### Front-sheet

The front-sheet of a brief should contain the following information:

- the identity of the client;
- the court in which the matter is proceeding;
- the date the matter is listed;
- the identity of the instructing solicitor;
- whether or not there is to be a conference; and
- what has to be done.

The usual format of the front sheet is the same as that adopted for the front sheet of pleadings filed in the relevant court but the words 'Brief to Counsel' or 'Brief to Barrister' should appear in place of the words describing the pleading. The nature of the brief (i.e. whether it is a brief to advise on some point such as evidence or to settle documents, or to appear on a hearing or to do several of those tasks) should be clearly stated on this page.

Where both Senior Counsel and junior counsel are briefed, the names and contact details of the other barrister briefed should be included on the front sheet. For the front sheet sent to Senior Counsel, his or her name and contact details appear above that of junior counsel. The words ‘with you’ should be interposed between the two sets of contact details. For junior counsel’s brief, reverse the order and interpose the words ‘you with’.

There should also be a notation of the date upon which the brief is delivered. The most appropriate place for this is in the observations, although it may also be included on the front sheet if you wish. If there are any deadlines that counsel needs to be aware of, they should be included on the front page and also at the start of the observations.

### Index

The index sets out the documents appearing in the brief. It should be on a standalone page at the front of the brief. Indexing and page numbering are crucial in preparing a brief. Document numbering should be avoided. However, cross-references can be extremely useful.

The order in which the documents are presented in the brief is to some extent determined by the preferences of counsel or an individual solicitor. Generally, the index, observations on brief, pleadings, and further and better particulars should appear first. Often the best and most logical way to organise the documents is chronologically.

### Observations

This section of the brief should start by stating who the barrister is advising or appearing for and what the matter relates to. For example:

*Counsel’s instructing solicitor acts for Mr Citizen, plaintiff, on Tuesday 5 May 2XXX at the Parramatta District Court at the hearing of the action which he has commenced to recover damages for breach of a contract made in writing with the defendant on 24 April 2XXX. A copy of the contract is included in the brief at page 25.*

This should be followed by a clear outline of the facts of the case. The paragraphs should be numbered and sub-headings provided. Observations should be succinct but not in note form.

Acting in the best interests of your client will require you to bring to the attention of counsel all the relevant information that you are aware of. It is important that

the observations you provide are objective and grounded in the available evidence. The barrister will benefit from your experience working on the case and knowledge of the client (and perhaps even their opponent).

The other areas to be addressed by the observations will depend on the nature of the particular matter. However, the following may be appropriate:

- a report on any pre-trial conferences and directions hearings;
- whether the issues of liability and quantum are contested or whether the case is for the assessment of damages only;
- if the claim is one in which liability must be established before the court can give relief, counsel ought to be told if the plaintiff is in a position to give evidence and whether the claim is supported by the witnesses or other evidence in the brief; and
- an indication of the reliability of the plaintiff and witnesses and the manner in which they give evidence.

Generally, you should offer the barrister any views that you have on the strength of the cause of action. If, for example, you believe that the plaintiff’s own negligence was a contributing factor to an accident, you should say so and why.

With respect to damages, the following should be borne in mind:

- where relevant you should provide full details of any offers and counter offers made by the other party and whether offers of compromise in accordance with the rules of court have been made;
- it is unusual to include copies of accounts for special damages. Almost invariably these are admitted or agreed between the parties and counsel need only be told the amount of them. Of course there are occasions when the agreement is limited to accepting that the amount is reasonable without an admission the defendant is liable to pay those expenses;
- if the case involves a claim as to past and future loss of earnings, a reference should be made to the plaintiff’s occupation and the claim for these losses. Usually this will appear in letters of particulars or in some of the court documents.

If counsel is briefed to provide advice on a matter, the observations should set out specific questions that counsel is required to consider. If you are seeking counsel’s advice on evidence, this should be sought well before the hearing.

### Relevant documents

In assembling the documents for the brief, you should ensure that copies of all relevant documents have been included. These documents should only be included once. It is not unusual for affidavits to have annexed to them items of correspondence or perhaps even pleadings which will be included in the brief in any event. This is where cross-referencing can be useful. Similarly, if a number of witnesses have been subpoenaed to give evidence, it is only necessary to include a copy of one subpoena with an attached list of the witnesses who received the identical copy of that subpoena.

Do not include original documents. Some original documents may be needed as exhibits in proceedings and if the exhibit comes from counsel's brief it will have to be replaced. Additionally, there is the risk that counsel will not recognise that the document is an original and will annotate it. You should securely store copies of the original documents. In the event of two counsel being briefed, each should receive identical copies of all documents.

### Witness statements

When providing a statement, a witness will often refer to matters which are inadmissible as evidence. It is your role to have a clear understanding of the issues involved in the case and the evidence required so that you can reduce the chance of such material being included in the final proof. It is not always certain what evidence will be excluded and a decision to exclude material from a witness statement should only be taken with careful consideration.

In a witness statement, the witness should tell the story in strictly chronological order and in the words which that the witness will use when giving evidence. The actual text of a conversation should be shown in direct speech. For example:

*He said 'I have tested the brakes. They are in good working order'.*

*Not: He said he had tested the brakes and they were in good working order.*

Including a statement that the words quoted are 'to the effect of' the words spoken provides the witness with some room to move, particularly in cross-examination.

If the statement is to be used in litigation in other Australian jurisdiction, the relevant rules and customs of

that jurisdiction need to be taken into consideration. In some courts outside New South Wales, for example, the narrative form of describing conversations is permissible.

### Request for particulars and interrogatories

A request for particulars and the answers, as well as any interrogatories and the answers, should be placed opposite one another for ease of reference. Sometimes this means some waste of space on the request side or the interrogatory answer side but the end result is easier to read and understand. It will also save a great deal of time at the hearing. For the same reason, you should have extra copies of these documents available for use by the court.

### Plans and photographs

It is a good idea to keep unusually sized plans, photographs and other documents separate from the brief. Photographs should be delivered in an envelope and properly identified as being part of the brief. If possible, such documents should also be identified in the proofs of evidence.

## 3.3 Delivery of the brief

The brief should be delivered to counsel as soon as possible in advance of the hearing or other relevant deadline so that they can adequately prepare for the task to be performed. It is unlikely that the brief will be considered to have been prepared 'too soon'. The view that a brief should be delivered as early as possible has been supported by the former Chief Justice of the Supreme Court of Victoria, Chief Justice Madden, who said:

*Clients are not fairly treated by having their case prepared and put into the hands of counsel at the very last moment; and counsel, too are placed at a great disadvantage by this too common practice.<sup>14</sup>*

Early delivery of the brief has some obvious advantages. For instance, a barrister may conclude that the evidence is insufficient to establish a case in some respect and there will be time to bring this to the attention of the instructing solicitor so that matters can be put right.

When a matter is settled after the brief is delivered but before the trial, the fee payable on the brief is determined by the retainer agreement with the barrister. However, should these fees need to be assessed on a party/party basis, the fee allowed is usually that fee which would have been reasonable if the matter had gone to trial, provided delivery was not premature.

It is important for you to record the delivery of the brief to the barrister. Your file should record the:

- nature of the brief;
- name of the barrister briefed;
- fee negotiated;
- date of delivery to the barrister or clerk; and
- date of the return of the brief.

With the advent of electronic claims, the solicitor's file should note all important dates relating to the barrister's involvement in the matter which is the subject of the brief.

Your role does not end when the brief is delivered. It is important that you call and follow up with the barrister to check if there is anything further that he or she needs and confirm the next steps in the matter.

### 3.4 Acceptance of briefs

The Uniform Bar Rules set out barristers' obligation to accept a brief and the responsibilities that flow from that. The fundamental principle regarding the acceptance of a brief is known as the 'cab-rank principle' and requires that a barrister must not decline a brief except if they are unavailable.<sup>15</sup>

#### 17. Cab-rank principle

*A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:*

- the brief is within the barrister's capacity, skill and experience;*
- the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence;*
- the fee offered on the brief is acceptable to the barrister; and*
- the barrister is not obliged or permitted to refuse the brief under rules 101, 103, 104 or 105.*

18. *A barrister must not set the level of an acceptable fee, for the purposes of rule 17(c), higher than the barrister would otherwise set if the barrister were willing to accept the brief, with the intent that the solicitor may be deterred from continuing to offer the brief to the barrister.*

Legal Profession Uniform Conduct (Barristers) Rules 2015

### 3.5 Circumstances in which a brief can be returned

One of the greatest concerns for solicitors arises when a barrister seeks to return a brief that had previously been accepted. The Uniform Bar Rules establish a framework for when barristers may and may not return a brief. There are two categories to be considered: circumstances in which a barrister must refuse or return the brief; and circumstances where the barrister may refuse or return the brief.

#### When the brief must be refused or returned

Rule 101 of the Uniform Bar Rules sets out the circumstances in which a barrister must refuse a brief or instructions to appear. The rationale of this rule is that a barrister must refuse to accept a brief, or to continue to be retained, where to do otherwise would render it difficult for the barrister to maintain professional independence or would in some other way make acceptance of the brief incompatible with the best interests of the administration of justice. Many of the situations referred to in rule 101 relate to conflict of interest.

#### 101 Briefs which must be refused or must be returned

*A barrister must refuse to accept or retain a brief or instructions to appear before a court if:*

- the barrister has information which is confidential to any other person in the case other than the prospective client, and:*
  - the information may, as a real possibility, be material to the prospective client's case, and*
  - the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case,*
- the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate,*
- the barrister has a general or special retainer which gives, and gives only, a right of first refusal of the barrister's services to another party in the case and the barrister is offered a brief to appear in the case for the other party within the terms of the retainer,*
- the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case,*
- the brief is to appear on an appeal and the barrister was a witness in the case at first instance,*

- (f) *the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case,*
- (g) *the barrister has a material financial or property interest in the outcome of the case, apart from the prospect of a fee,*
- (h) *the brief is on the assessment of costs which include a dispute as to the propriety of the fee paid or payable to the barrister, or is for the recovery from a former client of costs in relation to a case in which the barrister appeared for the client,*
- (i) *the brief is for a party to an arbitration in connection with the arbitration and the barrister has previously advised or appeared for the arbitrator in connection with the arbitration,*
- (j) *the brief is to appear in a contested or ex parte hearing before the barrister's parent, sibling, spouse or child or a member of the barrister's household, or before a bench of which such a person is a member, unless the hearing is before the High Court of Australia sitting all available judges,*
- (k) *there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules,*
- (l) *the barrister has already advised or drawn pleadings for another party to the matter,*
- (m) *the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises, or*
- (n) *the brief is to appear before a court of which the barrister was formerly a member or judicial registrar, or before a court from which appeals lay to a court of which the barrister was formerly a member (except the Federal Court of Australia in case of appeals from the Supreme Court of any State or Territory), and the appearance would occur within 5 years after the barrister ceased to be a member of the court in question where the barrister ceased to be a judge or judicial registrar after the commencement date of this rule.*

While rule 101 is infrequently invoked, it has the potential to cause the solicitor and client much inconvenience and anxiety. Any issue that arises under rule 101 should be identified as early as possible in order to avoid inconvenience. It will not always be apparent when you make initial enquiries with the barrister, or even when the barrister receives the brief, that there is an issue. It is important for both you and the barrister to be conscious of the operation of this rule.

A barrister need not refuse or return a brief if the barrister believes on reasonable grounds that allegations of any matter that may prevent the barrister from taking a brief can be met without materially diminishing the barrister's disinterestedness.<sup>16</sup>

A barrister must also refuse a brief to advise if the barrister has information which is confidential to any person with different interests from those of the prospective client if:

- the information may, as a real possibility, affect the prospective client's interest in the matter on which advice is sought or may be detrimental to the interests of the first person; and
- the person entitled to the confidentiality has not consented beforehand to the barrister using the information as the barrister thinks fit in giving advice.<sup>17</sup>

Generally, a barrister is prohibited from accepting more than one brief to appear on a given day.<sup>18</sup> In the past, there have been instances where this rule has been ignored, causing much inconvenience for the solicitor and even more serious consequences for the client. You should be reluctant to participate in a situation where a barrister is allowed to take on more than one brief to appear on the same day as it creates a risk that the barrister will become 'jammed', i.e. be required to be in two places at once. Your client will usually (and understandably) find this unacceptable.

### When the brief may be refused or returned

Rule 105 of the Uniform Bar Rules sets out circumstances in which a barrister may refuse or return a brief.

#### 105 Briefs which may be refused or returned

A barrister may refuse or return a brief to appear before a court:

- (a) *if the brief is not offered by a solicitor;*
- (b) *if the barrister considers on reasonable grounds that the time or effort required for the brief threatens to prejudice the barrister's practice or other professional or personal engagements,*
- (c) *if the instructing solicitor does not agree to be responsible for the payment of the barrister's fee,*
- (d) *if the barrister has reasonable grounds to doubt that the fee will be paid reasonably promptly or in accordance with the costs agreement;*
- (e) *if the brief may, as a real possibility, require the barrister to cross-examine or criticise a friend or relative,*
- (f) *if the solicitor does not comply with a request by the barrister*



*for appropriate attendances by the instructing solicitor, solicitor's clerk or client representative for the purposes of:*

- (i) ensuring that the barrister is provided with adequate instructions to permit the barrister properly to carry out the work or appearance required by the brief;*
  - (ii) ensuring that the client adequately understands the barrister's advice,*
  - (iii) avoiding any delay in the conduct of any hearing, and*
  - (iv) protecting the client or the barrister from any disadvantage or inconvenience which may, as a real possibility, otherwise be caused;*
- (g) if the barrister's advice as to the preparation or conduct of the case, not including its compromise, has been rejected or ignored by the instructing solicitor or the client, as the case may be;*
- (h) if the prospective client is also the prospective instructing solicitor, or a partner, employer or employee of the prospective instructing solicitor, and has refused the barrister's request to be instructed by a solicitor independent of the prospective client and the prospective client's firm;*
- (i) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief does not require the services of a Senior Counsel,*
- (j) if the barrister, being a Senior Counsel, considers on reasonable grounds that the brief also requires the services of a junior counsel and none has been briefed,*
- (k) where there is a personal or business relationship between the barrister and the client or another party, a witness, or another legal practitioner representing a party,*
- (l) where the brief is to appear before a judge whose personal or business relationship with the barrister is such as to give rise to the apprehension that there may not be a fair hearing, or*
- (m) in accordance with the terms of a costs agreement which provide for return of a brief.*

Each of the paragraphs in rule 105 raises matters that would be cause for concern for the solicitor as well as the barrister. Generally, it is in the solicitor's interest for the barrister to refuse the brief when he or she is too busy (paragraph (b)) or is worried about being paid (paragraphs (c) and (d)) or is affected by conflict of interest (paragraph (e)). The issues in paragraphs (f) and (g) reflect good practice. As for paragraph (i), if good practice is followed Senior Counsel should not have been sent the brief in the first place. Ideally all of these issues are part of the agenda for the initial discussions with the barrister about their availability and suitability to take a particular brief.

Solicitors should note that paragraph (g) of rule 105 does not include advice about compromise. If a client does not agree with a barrister's advice regarding compromising the case, the barrister is not entitled to return the brief on these grounds unless the brief was accepted under a conditional costs agreement and the barrister believes that the client has unreasonably rejected a reasonable offer to compromise.<sup>19</sup>

There are other circumstances in which a barrister may refuse or return a brief. Where a brief is accepted under a conditional costs agreement a barrister may return it if they consider, on reasonable grounds, that the client has unreasonably rejected a reasonable offer to compromise contrary to the barristers advice.<sup>20</sup> The barrister's right to return the brief in these circumstances is significant and it is essential that you advise your client of the implications of this rule when a brief is accepted under a conditional costs agreement.

Generally, a barrister must not return a brief to appear in order to accept another brief to appear unless the barrister has informed the instructing solicitor in the first brief of the circumstances and of the terms of the relevant rules and the instructing solicitor has permitted the barrister to return the brief.<sup>21</sup> A barrister who wishes to return a brief which they are permitted to return must do so in enough time to give another barrister a proper opportunity to take over the case.<sup>22</sup> If you are asked to give such consent, you should only do so after obtaining clear instructions from your client, preferably in writing. The primary focus must be on the interests of the client and not the convenience of the barrister. The nature of the matter, the circumstances of the barrister and client, any cost implications and the timing of the request, all need to be taken into account.

A barrister may return a brief to defend on a charge of a serious criminal offence if the barrister believes on reasonable grounds that the circumstances are exceptional and compelling and there is enough time for another barrister to take over the case properly before the hearing and consent has been given.<sup>23</sup> Again, you need to take clear instructions from the client before providing the consent referred to in this provision. You and your client should take into account any 'exceptional and compelling' circumstances and the amount of notice that has been provided.

A barrister must not return a brief to appear on a particular date in order to attend a social occasion unless the instructing solicitor or the client has expressly

permitted the barrister to do so.<sup>24</sup> Again, whether this is permitted is a matter for instructions from your client.

### 3.6 When the brief is returned at short notice

As mentioned above, a barrister who wishes to return a brief which the barrister is permitted to return must do so in enough time to give another barrister a proper opportunity to take over the case.<sup>25</sup> To facilitate this, a barrister must promptly inform you as soon as they have reasonable grounds to believe that there is a real possibility that they will be unable to appear or to do the work required in the time stipulated by the brief or within a reasonable time if no time has been stipulated.<sup>26</sup>

Despite this rule, in some circumstances the notice provided will still be insufficient – for example, when a barrister has become ‘jammed’ at the last moment. Broadly, there are three options in these circumstances:

#### (1) Find another barrister

In such circumstances it may be necessary to find another barrister. The barrister or their clerk may be able to recommend an alternative counsel. However, it is still your responsibility to ensure that an appropriately qualified and experienced barrister is stepping in. It is also important to consider the financial implications of retaining a new barrister. Try to involve the client as much as possible in all relevant decisions in this regard and seek their instructions before final decisions are made.

#### (2) Seek an adjournment

Sometimes the best option is not to brief another counsel but to seek an adjournment of the proceedings. The granting of an adjournment is discretionary and depends on whether its refusal would result in serious injustice to any party. While the unavailability of counsel who has been briefed might cause an injustice to one party, the injustice caused to the other party in not having the matter determined also needs to be taken into account by the court in deciding whether the matter should be adjourned. The court is entitled to have regard to the broader public interests, including the interests of other users of the court system. As expressed by the High Court:

*In determining whether to grant an adjournment, the judge of a busy court is entitled to consider the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the courts as well as the interests of the parties.*<sup>27</sup>

It is also important to bear in mind section 56 of the *Civil Procedure Act 2005* (NSW) which provides that the ‘overriding purpose’ of that Act is ‘to facilitate the just, quick and cheap resolution of the real issues in the proceedings’, and that it is the duty of a party to the proceedings (and therefore the party’s solicitor) to assist the court to further the ‘overriding purpose’.

It is important to be aware that if an adjournment is granted it will probably be at the expense of an order for costs.

#### (3) Take over conduct of the matter

Another option is for you to take over the conduct of the matter. The decision involves a realistic appraisal of your own experience and confidence, and the requirements of the forum in which the matter will be heard, as well as the client’s instructions.

### 3.7 Requesting the return of the brief

Circumstances may arise in which you, on the client’s instructions, will want the brief returned. The circumstances in which the solicitor may request the brief to be returned are varied and include the following:

- the matter may have ended because it was determined, it was settled or it was discontinued;
- another barrister is being engaged;
- the client has instructed the solicitor to no longer engage a barrister;
- the barrister is unable to fulfil the requirements of the brief in a timely way; or
- there has been a loss of confidence in the barrister’s ability to do the work.

The financial implications of ending the engagement will be set out in the costs agreement and you should review the agreement before taking any steps to request the return of the brief. There may be fees owing as at the date of ending the engagement, or there may even be fees arising as a result of it. As a matter of courtesy to the barrister, once the client has instructed the solicitor to withdraw the brief, this should be communicated to the barrister as soon as possible.

While the return of the brief generally signals that the engagement of the barrister has ended, if this is your intention you should inform the barrister that they are no longer retained.

### 3.8 Reviewing counsel's advice

When a brief is returned to the solicitor at the outset of the matter, or at an interlocutory stage, there will often be a memorandum of advice from the barrister. Such a memorandum usually alerts the solicitor to problems or difficulties which require attention or instructions. Counsel's advice should always be examined carefully by the instructing solicitor and steps taken in response to the suggestions that have been made. You will also have to consider whether the client should be provided with a copy of the advice. This should always be done in situations where you believe there is a need for further instructions.

You should assess the work of counsel and ensure that they have performed the task requested. As set out later in this guide, a solicitor cannot rely on the shortcomings of counsel to avoid responsibility for inaction.

### 3.9 Updating counsel's advice

If you rely on advice obtained from counsel, you will need to review the advice in response to changing circumstances or if new information comes to light. For example, in cases where advice is given about the quantum in personal injury cases, the interest must be taken into account:

*The range of awards fluctuates greatly with inflation, the law changes very often and today plaintiffs are increasingly more imaginative in their claims. Further, the interest component keeps building up and items that were future losses (and likely to be discounted) become past losses (and not likely to be discounted). It is necessary that solicitor and barrister find some basis for giving and updating advices in this area.*<sup>28</sup>

### 3.10 Conflict of interest

There may be circumstances in which a barrister comes to believe that the interests of the client conflict with the instructing solicitor or that the client may have a claim against the instructing solicitor. In those circumstances, the barrister must advise the solicitor of their belief and, if the solicitor does not agree, advise the client in the presence of the solicitor of the barrister's belief.<sup>29</sup>

This rule is a manifestation of the barrister's duty to the court, the client, and to the administration of justice. It is an extreme measure. Good communication between the solicitor and barrister will help to avoid any conflict of interest arising. The obligation to communicate concerns about performance is two-way – it is just as important for barristers to do so as for solicitors and you should be open to receiving feedback from the barrister you work with.



## Chapter Four:

# Financial implications of working with barristers

This chapter explores the financial issues arising out of briefing a barrister, including the disclosure of fees by the barrister and costs agreements, billing, cancellation fees and disputes about barristers' fees. Many disputes between barrister, solicitor and client about fees arise from poor communication, miscommunication and/or false expectations. This important aspect of working effectively with barristers depends on the ability of both the barrister and solicitor to communicate with each other, and the solicitor's ability to communicate with the client.

As noted in Chapter One, this guide does not address the rules or considerations that apply when a barrister is directly briefed by a client, rather than being instructed by a solicitor. We note that different obligations regarding costs disclosures and fees apply in such circumstances. If you wish to obtain further information about financial implications in matters where a barrister is directly briefed, please contact the New South Wales Bar Association.

## 4.1 Disclosure of barristers' fees and costs agreements

The Uniform Law applies only to matters in which the client first instructed the barrister's instructing solicitor after 30 June 2015. Older matters – where the solicitor was first instructed before 1 July 2015 – are still governed by the *Legal Profession Act 2004* (NSW). When you engage a barrister, you should advise them when you were first instructed in the matter and which provisions apply. This guide relates only to matters governed by the Uniform Law.

Section 175(2) of the Uniform Law provides that when a solicitor retains a barrister on behalf of a client, the solicitor must disclose to the client the basis on which the legal costs will be calculated and an estimate of total legal

costs in relation to the barrister at the time the barrister is engaged or as soon as practicable after. You must also advise your client when there is a significant change to anything previously disclosed, including any change to the costs that will be incurred by the client. The barrister must provide you with all necessary information for you to comply with these disclosure requirements.<sup>30</sup>

When briefing a barrister as your client's instructing solicitor, you are responsible for the payment of fees incurred by the barrister as a 'third party'. Many disputes arise when there is not clear communication between the barrister and solicitor regarding who is responsible for payment of the fees incurred for the barristers' professional services. If you do not intend to accept responsibility for payment of fees incurred for the barristers' professional services, you must advise the barrister in advance.<sup>31</sup> In those circumstances, alternative arrangements should be made prior to any work being undertaken by the barrister.

There are additional disclosure obligations in relation to settlement of litigious matters.<sup>32</sup> If the barrister has negotiated the settlement of a litigious matter on behalf of a client and disclosed, before the settlement is executed:

- (a) a reasonable estimate of the amount of legal costs payable by the client if the matter is settled (including any legal costs of another party that the client is to pay); and
- (b) a reasonable estimate of any contributions towards those costs likely to be received from another party, then you are not required to also make that disclosure to the client.

## 4.2 Costs agreements

Under the Uniform Law, a barrister may make a costs agreement with the instructing solicitor who has retained them on behalf of a client.<sup>33</sup> A costs agreement must be written or evidenced in writing.<sup>34</sup> If you enter into a costs agreement with a barrister on behalf of your client, it is good practice to give a copy of the costs agreement to your client, explain it to them and have them sign it as an acknowledgement of the contents.

Conditional fee agreements with barristers are possible, as they are with solicitors. Under the Uniform Law, a conditional costs agreement is one that provides that payment of some or all of the legal costs is conditional on the successful outcome of the matter to which the costs relate.<sup>35</sup> Conditional costs agreements may not be entered into in criminal proceedings or proceedings under the *Family Law Act 1975* (Cth).<sup>36</sup> They are to be clearly distinguished from contingency fees agreements (i.e. a costs agreement under which the amount payable to the law practice is calculated by reference to the value of property or the amount of any award or settlement) which are completely prohibited.<sup>37</sup>

The incentive for both solicitors and barristers to enter into a conditional costs agreement is that on success of the matter, an uplift fee may be charged (not more than 25%).<sup>38</sup> While theoretically any range of conditions might be agreed to with the barrister, the operation of rule 106 of the Uniform Bar Rules must be borne in mind. Rule 106 states:

*A barrister may return a brief accepted under a conditional costs agreement if the barrister considers on reasonable grounds that the client has unreasonably rejected a reasonable offer of compromise contrary to the barrister's advice.*

This rule is intended to operate as a precaution against clients who take advantage of a conditional costs agreement to pursue a hopeless case.

## 4.3 Billing

The Uniform Law makes provision for how law practices are to provide their bills to clients. A barrister's bill may be in the form of a lump sum or an itemised bill.<sup>39</sup> If the bill is given in the form of a lump sum, the client may request an itemised bill within 30 days after the date on which the legal costs become payable.<sup>40</sup> If requested, the barrister must provide the itemised bill within 21 days of the request.<sup>41</sup> The bill provided by the barrister must be signed.<sup>42</sup> The Uniform Law makes provision for the manner in which a bill must be delivered to a client;<sup>43</sup> however the manner of service between barrister and solicitor is not regulated.

You may require a barrister to disclose to you any information relating to the costs in the matter so as to enable you to meet your obligation to provide a progress report to the client upon request.<sup>44</sup>

The bill provided by a barrister must not include any charge for preparing or giving a bill<sup>45</sup> and the bill must include a notification of the client's right in the event of any dispute and the relevant time limitations that apply to any such action.<sup>46</sup>

## 4.4 Cancellation fees

A source of much potential distress for clients and solicitors is cancellation fees – that is, the fees a barrister will charge if a case is settled or the hearing is otherwise vacated. These should be disclosed in the costs agreement.

It appears possible for cancellation fees to be recovered by a successful litigant from an unsuccessful one.<sup>47</sup> The New South Wales Supreme Court's Cost Assessment Rules Committee's 2016 Guideline 'Costs payable between parties under court orders' states that cancellation fees over and beyond the first day of a brief on hearing should not be allowed.<sup>48</sup> To ensure this is the case, you should negotiate the terms of the cancellation fee provision when entering into the costs agreement.

## 4.5 Disputes about barristers' fees

The best way to deal with barristers' fees is to have the client pay the amount in dispute into your trust account. Where the client cannot pay other than on conclusion of the matter, your agreement with the barrister should reflect this. The best way to avoid misunderstanding about the payment of barristers' fees is to have the agreement in writing and to communicate with the barrister about any questions or concerns.

Costs are assessed under Division 7 of Part 4.3 of the Uniform Law. Whether you immediately send the barrister's bill to the client or wait and include it as a disbursement in your bill to the client will depend on the circumstances of the matter and the client's preference.

If the assessment process does not resolve any outstanding dispute, a costs agreement may be enforced in the same way as any other contract.<sup>49</sup> However, the costs are not recoverable by legal proceedings against the person (who, in the case of a barrister recovering fees, is usually the solicitor) until at least 30 days after the bill has been provided and any costs dispute in relation to those costs has been finalised.<sup>50</sup>

There can be circumstances in which disputes about the barrister's fees are not between the solicitor and the barrister but between either:

- the solicitor and client; or
- the litigating parties, one of whom has been ordered to pay the costs of the successful party.

If the dispute is between you and your client, for example, where a client refuses to pay the solicitor's fees including the barrister's fees as a disbursement, you may seek to recover them under the Uniform Law. However, you are only entitled to recover the barrister's fees if you were authorised to incur them. That is partly why it is good practice to have the client sign the barrister's costs agreement as an acknowledgement of its contents.

The other concern is that the client exercises their right under the Uniform Law to have your bill assessed, including disbursements. Regrettably, even if the barrister's fees are reduced as a result of the assessment as between the solicitor and client, or between the parties to the litigation, your obligation to pay the agreed fees to the barrister remains.

The fees of a barrister incurred as a result of instructions from a solicitor on behalf of a client in the course of litigation become part of the costs of the action. If the client on whose behalf the barrister was retained is awarded costs, those costs may include the barrister's fees subject to the various rules of the courts, to the extent allowed on assessment under the Uniform Law, from the party against whom costs have been awarded. Your client needs to be fully apprised of the possibility (indeed probability in some jurisdictions) that the fees may not be recoverable from the other party to the litigation, thus leaving the client responsible for them.

## Chapter Five:

# Complaints against barristers

Even if you strictly adhere to all of the principles suggested in this guide, circumstances may still arise that require you to consider making a formal complaint against a barrister in relation to his or her professional conduct. This chapter considers the nature of the complaints that typically are (or can be) made against barristers, and provides a summary of the formal complaints procedure. However, as a general rule, you should only invoke those formal complaint procedures after exhausting all informal options to resolve a dispute or difficulty.

## 5.1 Bases for a complaint

Complaints and disciplinary proceedings against barristers are governed by Chapter 5 of the Uniform Law. Complaints may be made in relation to the ‘conduct’ of a barrister, which is defined broadly to mean ‘an act or omission or a combination of both’.<sup>51</sup>

There are two types of complaints in relation to conduct:

- consumer matters; and
- disciplinary matters.<sup>52</sup>

A consumer matter is a complaint about the services that a solicitor or barrister has provided to the complainant that does not amount to ‘unsatisfactory professional conduct’ or ‘professional misconduct’.<sup>53</sup> This includes a dispute about costs.<sup>54</sup> Disciplinary matters are matters that are capable of amounting to ‘unsatisfactory professional conduct’ or ‘professional misconduct’.<sup>55</sup>

Unsatisfactory professional conduct includes conduct occurring in connection with the practice of law that falls short of the expected standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.<sup>56</sup> The Office of the Legal Services Commissioner has provided the following examples of conduct that may be capable of being unsatisfactory professional conduct:

- threatening or abusive behaviour;
- failure to comply with an undertaking;
- poor advice and representation;
- serious delay;
- non-disclosure of costs; and
- minor breach of the Conduct or Practice Rules or confidentiality.<sup>57</sup>

Professional misconduct includes:

- (a) unsatisfactory professional conduct of a barrister, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of a barrister whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the barrister is not a fit and proper person to engage in legal practice.<sup>58</sup>

The Office of the Legal Services Commissioner has provided the following examples of conduct that may be capable of being professional misconduct:

- gross overcharging;
- conflicts of interest;
- acting contrary to instructions;
- misleading or dishonest conduct in or outside court; and
- misappropriation of trust money.

The Uniform Law provides further examples of the types of conduct that amount to either unsatisfactory professional conduct or professional misconduct.<sup>59</sup>

## 5.2 The complaints procedure

A complaint about a barrister should be made in writing to the Legal Services Commissioner.<sup>60</sup> The complaint must:

- (a) identify the complainant; and
- (b) identify the barrister about whom the complaint is made; and
- (c) describe the alleged conduct that is the subject of the complaint.

Generally, a complaint must be made within a period of 3 years after the conduct that is alleged to have occurred.<sup>61</sup>

The barrister against whom the complaint is lodged may receive a copy of the complaint, and be notified of his or her right to make submissions to the Commissioner within a certain time.<sup>62</sup> Generally, the rules of procedural fairness apply to the investigation of complaints and the procedures of the Commissioner.<sup>63</sup>

To the extent that a complaint concerns a consumer matter, the Commissioner may require the parties to attend mediation in good faith.<sup>64</sup> The mediation process is confidential. Evidence of anything said or admitted during mediation, or any document prepared for the purposes

of mediation, may not be used by the Commissioner in making a determination and is not admissible in any court proceeding.<sup>65</sup>

The Commissioner must conduct a preliminary assessment of a complaint.<sup>66</sup> At any stage after the preliminary assessment, the complaint may be closed without further consideration of its merits in certain circumstances, including where:

- the complainant does not give further information where required;
- the complaint is vexatious, misconceived, frivolous, or lacking in substance; or
- the Commissioner is satisfied it would be in the public interest to do so.

If the complaint is not summarily dismissed, the Commissioner will either investigate the complaint him or herself, or refer it to the Bar Council for investigation. If the complaint is referred to the Bar Council for investigation, the Director of Professional Conduct will refer it to one of four Professional Conduct Committees of the Bar Council. As delegates of the Bar Council, these committees investigate the complaint and make recommendations to the Bar Council.

A consumer matter may be resolved by the Commissioner or Bar Council making a determination that 'is fair and reasonable in all the circumstances'. The orders available include ordering the legal practitioner to apologise, to redo the work at no cost to the complainant, to reduce or waive their fees, to pay compensation of up to \$25,000 or to undertake training, education, counselling or be supervised.<sup>67</sup>

In relation to a disciplinary matter, the Commissioner or Bar Council may make findings that a barrister has engaged in unsatisfactory professional conduct and, in addition to those available on determination of consumer disputes, make orders that the legal practitioner be cautioned, reprimanded, pay a fine of up to \$25,000 or have conditions imposed on his or her practising certificate.<sup>68</sup>

If proceedings are commenced in the Disciplinary Tribunal (the New South Wales Civil and Administrative Tribunal) and a finding is made of unsatisfactory professional conduct or professional misconduct, the Tribunal may make any of the above orders as well as additional penalties, including:

- removal from the roll;
- suspension of practising certificate;
- imposition of a fine;
- imposing conditions on the practitioner's practising certificate;
- requiring the practitioner to be managed; and
- requiring the practitioner to be subject to periodic inspection.<sup>69</sup>

## Chapter Six:

# Professional liability issues

Being the subject of a professional negligence claim can be a negative experience for a solicitor from a financial, professional and personal perspective. Solicitors have become more aware of the need to effectively manage professional liability risk.

This Chapter is primarily concerned with understanding the professional liability exposure a solicitor faces when working on a matter with counsel, and identifying ways to manage that exposure. However, the first section considers the immunity barristers, or more properly ‘advocates’, enjoy from professional negligence claims. An understanding of that immunity is relevant and necessary to managing professional liability issues for two reasons:

- because a solicitor’s conduct may fall within the scope of the immunity in some circumstances; and
- because a solicitor’s ability to recover damages or seek contribution from a barrister is limited to the extent of the barrister’s immunity.

## 6.1 Advocate’s immunity

At common law, an advocate is immune from claims arising from work in court, or from work which leads to a decision affecting the conduct of a case in court. The protection afforded by the immunity is only invoked where the (allegedly negligent) work of the advocate has contributed to the judicial determination of the litigation.<sup>70</sup> The rationale for the immunity rests on public policy and the adverse consequences that would flow from the re-litigation of issues in collateral proceedings.<sup>71</sup>

An advocate’s immunity extends to both barristers and solicitors who are acting as advocates. By way of illustration, the case of *D’Orta-Ekenaike v Victoria Legal Aid*<sup>72</sup> considered the position of a solicitor who was alleged to have given advice to a client at the same time and for the same purpose as advice given by a barrister. The joint judgment in that case drew an analogy between the advice given by a solicitor, and advice given by a junior counsel who does not subsequently address the court, and held that the policy rationale concerning ‘finality’ did not permit a distinction to be drawn between the two.

It is also relevant to consider the boundaries of the immunity. As stated above and consistent with the underlying policy rationale on which it is based, the immunity extends beyond work actually done in court. However, pre-trial work will only be within the scope of

the immunity if there is a ‘functional connection’ between the work of the advocate and the determination of the case by the court.<sup>73</sup> The High Court has held that immunity does not apply in those circumstances where negligent legal advice made out of court leads to a settlement.<sup>74</sup>

## 6.2 Risk management

It is important to understand how working with counsel affects the scope of your professional responsibility as a solicitor, and your potential liability.

Generally, the standard of care expected of a solicitor is the care and skill to be expected of a qualified and ordinarily competent and careful solicitor in the exercise of his or her profession. If a solicitor holds himself or herself out as a specialist in an area, the standard becomes the higher standard of the reasonably competent solicitor who is an expert in that particular area of the law.

In the course of your relationship with a barrister, you should take steps to manage professional liability exposure by adopting appropriate risk management strategies. Most sources of risk arising from the relationship with a barrister can be effectively managed by following the principles:

- choosing competent, reliable and experienced barristers;
- preparing a thorough brief;
- establishing and maintaining clear communication with the barrister at all times;
- assessing for yourself what the barrister advises and reviewing documents prepared;
- having an effective diary system to manage timeframes including tasks for barristers; and
- treating the relationship with the barrister as a partnership of experts – a team working toward the same end – and recognising the responsibilities of each team member.

In many cases, barristers do not keep records of settlement discussions and they return or destroy the brief. This means that often only the solicitor’s records are available in the event of a claim against either the barrister or the solicitor. If counsel provides settlement advice, you should make a note on the file.



### Professional liability risks associated with litigation

A broad statement of the professional duty owed by a solicitor in relation to the conduct of litigation was made over 180 years ago in *Godefroy v Dalton* (1830) 6 Bing 460 at 467:

*It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded ... The cases, however, which have been cited and commented on at the bar, appear to establish, in general that he is liable for the consequences of ignorance or non-observance of the rules of practice of this Court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession.*

Generally this broad statement remains good law, and underlies the more specific application of those principles in subsequent cases. The following discussion is a non-exhaustive illustration of some of the bases on which a solicitor may be found negligent in connection with litigious proceedings.

Before commencing proceedings, a solicitor has a duty to properly investigate a cause of action and ascertain the relevant facts to determine whether a cause of action exists.<sup>75</sup> If the solicitor decides a cause of action does not exist they must inform the client.<sup>76</sup> Similarly, a client is entitled to be given a reasonable assessment of the prospects of success of a potential cause of action. Solicitors can be found to be negligent for giving excessively optimistic advice to a client about the prospects of success of litigation, and failing to warn of the significant difficulties that existed in connection with the recovery of damages in that case.<sup>77</sup>

A solicitor may also be liable in negligence if that solicitor fails to prepare the case properly for trial. For example, in *Ashby v Russell* (1997) ANZ ConvR 321 the court found a solicitor negligent on a number of grounds, including failing to investigate the claim and acquaint himself with the relevant facts, failure to obtain probative medical reports, providing deficient answers to interrogatories, and generally not preparing the matter for trial in the manner in which a reasonably competent solicitor would have prepared it.

There are also a number of cases in which a solicitor or barrister has been held liable for providing negligent advice regarding settlement of proceedings. Generally, such advice is not within the scope of advocate's immunity. For example, in *Hodgins v Cantrill* (1997) MVR 481 both a solicitor and a barrister were held liable for advising their client to settle proceedings for a figure significantly lower than the verdict which he could reasonably be expected to have obtained. The approach was recently confirmed by the High Court.<sup>78</sup>

Negligent advice regarding settlement is often related to poor preparation of the case. In *Ashby v Russell*, the court found that as a result of the poor preparation of the case undertaken by the plaintiff's solicitor, the client was negligently advised to accept a settlement offer that was significantly lower than the true value of the claim.<sup>79</sup>

### To what extent can a solicitor transfer professional risk by briefing counsel?

As discussed above, a solicitor is responsible for providing counsel with an appropriate and adequate brief and instructions. If the solicitor fails to do so, the solicitor may have failed to conduct proceedings with reasonable competence.<sup>80</sup>

A number of the older authorities suggest a solicitor has considerable scope to avoid liability by relying on the advice of counsel. For example:

- in *Manning v Wilkin* (1848) 12 LTR(OS) 249, a solicitor was not liable for bad pleadings when counsel had been employed;
- in *Godefroy v Dalton* (1830) 6 Bing 460, a solicitor was not liable for mistakes as to the proper evidence required when acting under counsel's advice; and
- in *Francis v Francis and Dickerson* (1955) 3 All ER 836, a solicitor was not liable when he acted on counsel's advice after giving proper instructions.

It has also been held that it rests with counsel to decide which witnesses should be called at trial: see *Hatch v Lewis* (1861) 2 F&F 467 at 472,480.

However, more recent authorities have placed a higher standard of professional responsibility on an instructing solicitor. In *Davy-Chiesman v Davy-Chiesman* (1984) 1 All ER 321, the English Court of Appeal held that while the solicitor in that case was entitled to rely on the advice of properly instructed counsel, that did not absolve him from his responsibility to exercise his own independent judgment. The fact that the solicitor had acted in accordance with counsel's advice was not sufficient to absolve him from being guilty of a serious dereliction of duty.

There is arguably a tension in the position that a solicitor is both entitled to rely and act on the advice of properly instructed counsel, but liable if doing so amounts to a serious dereliction of duty. This is particularly so if, as will often be the case, the advice given by the barrister is tendered in circumstances in which the barrister is able to claim the advocate's immunity, meaning that the solicitor ultimately bears full liability.

However, the legal position appears to be that a solicitor cannot simply rely on the advice of counsel where counsel is clearly wrong or has been manifestly negligent: see for example *Hodgins v Cantrill* (1997) MVR 481. Accordingly, a solicitor should exercise a level of independent professional judgment at all times. In particular, if a solicitor has reason to believe that a barrister is not performing competently the solicitor should withdraw the brief and instruct competent counsel.

It should also be noted that, to the extent that advocate's immunity does not apply, both solicitor and barrister may be jointly liable to a client in negligence. Indeed, it seems not uncommon that an unhappy, unsuccessful litigant will sue both solicitor and barrister and leave issues of contribution to be resolved by the respective professional indemnity insurers, or the court.



# Appendices

<b>Appendix 1: Sample front sheet of a brief</b>	<b>26</b>
<b>Appendix 2: Sample Index and Observations of a brief to counsel to advise on liability, quantum and generally</b>	<b>27</b>
<b>Appendix 3: Sample Observations of a brief to counsel to advise generally and to draft statement of claim</b>	<b>30</b>
<b>Appendix 4: Sample Index and Observations of a brief to counsel to appear</b>	<b>31</b>
<b>Appendix 5: Sample Index and Observations of a brief to counsel to advise on evidence</b>	<b>34</b>
<b>Appendix 6: Notes in relation to an advice on evidence</b>	<b>36</b>
<b>Appendix 7: Specimen pleadings and particulars for a statement of claim</b>	<b>39</b>
<b>Appendix 8: Worksheet</b>	<b>41</b>

## Appendix 1: Sample front sheet of a brief

In the District Court at Sydney no. 3802 of 2XXX

**CHRIS JONES**

Plaintiff

**BARRY JOHN BLOGGS**

Defendant

Brief to advise on quantum

**MR BARRY SMITH**

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ST LEONARDS NSW 2065

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Ref: XX

## Appendix 2: Sample Index and Observations of a brief to counsel to advise on liability, quantum and generally

### Index to Brief

DOCUMENTS	PAGE NUMBERS
MEDICAL EVIDENCE	
1. Hospital discharge summary and diary notes from Royal North Shore Hospital	1 – 4
2. Report of Dr J Caulfield dated 16 November 2XXX	5 – 6
3. Report of Dr Pearce dated 10 March 2XXX	7 – 9
4. Report of Dr Johnson dated 30 March 2XXX	10 – 11
5. Dental report from John Walker	12 – 13
6. Traffic Accident Report	14
7. Table of unpaid medical expenses	15
DOCUMENTS TO BE OBTAINED	
8. Motor Transport information regarding third party insurance and registration of motor vehicle registered number YYY-666.	
9. Details from our client’s employer of payments made to him generally but particularly in relation to the amount of wages actually paid through their office while he was unable to work.	
10. Hospital report from Sydney Hospital	
11. Report from Dr Joseph Chan	
12. Report from Dr John Perger	

## Observations

Counsel's instructing solicitors have been instructed to act for the plaintiff in connection with a claim for damages arising out of a motor vehicle accident which took place on 8 August 2XXX. In this matter, we are seeking Counsel's advice generally on the matters arising out of the details revealed in this brief and in particular answers to the specific questions at the end of these observations.

## Our Client

We act for Adrian Anderson who is aged 28 years. He is married and is supporting two children.

Mr Anderson was at the time of the accident the General Manager for manufacturing with a company called First Buildings Pty Ltd of Parramatta Road, Auburn and at that time, was paid a base salary of \$65,852 per year.

He is at present a general advisor to that company and has base salary of \$80,000 per year.

Between the time of the accident and the present, he has been off work in all for about six weeks and had several weeks in which he was only working part-time.

He suffers from continuing disabilities as a result of the accident. He received full payment of his salary during the time he was off work as a result of using his accrued sick leave with the company.

## The Accident

Time: 7.00pm on 8 August 2XXX.

Place: At the intersection of Phillip Drive and Mann Road, Strathfield.

Our client was driving a Ford Sedan registered number XXX-000, registered in his wife's name. The other car was a sedan driven by Steven Onus and was registered number YYY-666.

We are instructed that our client was travelling north in the kerbside lane of Philip Drive when he approached the intersection at Mann Road. That intersection is controlled by a two lane roundabout.

Upon entering the intersection, our client indicated his intention was to make a right hand turn to go east along Mann Road. He remained in the kerbside lane.

At that point where traffic travelling north in Philip Drive

leaves the roundabout, our client observed a red Holden sedan which was travelling in the innermost lane cut across in front of his vehicle in order to proceed along Philip Drive. Unfortunately, there was no time for our client to react and the front right hand portion of his vehicle came into collision with the front nearside of the other vehicle.

## Personal Injuries

Our client claims personal injuries as a result of the accident as follows:

- a) Fractured skull;
- b) Lacerated left ear;
- c) Fractured left clavicle;
- d) Fractured (4) ribs;
- e) Fractured pelvis;
- f) Coronary arrest; and
- g) Damage to teeth.

## Hospitalisation and loss of working time

Our client was in the intensive care ward for a week at Royal North Shore Hospital and was then transferred to Sydney Hospital and spent a further week there in intensive care. Thereafter, he remained in hospital until 25 September 2XXX. In summary, during that period, he was hospitalised for a period of three weeks and four days.

He was hospitalised again on 8 March 2XXX and remained in hospital until 15 March 2XXX.

He convalesced at home between 25 September 2XXX and 10 October 2XXX, i.e. two weeks and two days.

He resumed working on a part-time basis from 11 October 2XXX to 1 November 2XXX, a further period of three weeks. He has, apart from that, had odd days off work as a result of discomfort and pain.

## Pain and suffering

He was in intense pain for the first few days and he states that thereafter he lapsed into a state of semi-consciousness and to a large extent this avoided his awareness of pain and discomfort although he was aware of some pain and discomfort during the balance of the period. After he left hospital, he needed pain-killers and they were prescribed for him. He still has ongoing pain from time to time as a result of discomfort and as a result of the injuries.

### **Loss of physical function**

He finds that he is unable to do medium to heavy physical work. In particular, this is most noticeable when he tries to do any work in the garden or around his home. He also notices that he is unable to use his exercise bike and this has led to difficulties in relation to his weight problem.

The accident occurred five weeks after he had married and the strain placed on the family and his wife has caused many adverse effects.

### **Medical expenses**

None of these expenses have been paid at this stage. A table showing the medical expenses to date is enclosed with this brief.

### **Loss of earnings**

We are currently obtaining details of the amount paid during our client's absences from work. The fact that he received these of course does not, as we understand it, limit him from recovering those amounts and reimbursing his employer so as to allow reinstatement of his sickness entitlements.

Counsel is briefed to advise on the following matters:

- a) Counsel is requested to advise on liability generally and in particular we would ask that you apply your mind to the relevant Motor Traffic Act/Regulations controlling roundabouts and the changing of lanes with safety. A copy of the police report has been enclosed with this brief.
- b) What amount of damages does counsel believe are appropriate or reasonable in this matter?
- c) What should we do about commencing proceedings?
- d) Please advise generally in relation to the rights of action by Mr Anderson, including the correct defendant.
- e) Are there any further matters or enquiries which you would like us to attend to at this stage?
- f) Please advise generally.

## Appendix 3: Sample Observations of a brief to counsel to advise generally and to draft statement of claim

### Observations

Counsel's instructing solicitors act for John Horner who on 1 May 2XXX, during the course of his employment with Stiltskins Harvesting Pty Limited, sustained a severe injury to his right foot and leg.

Mr Horner is a shareholder and working director of Stiltskins Harvesting Pty Limited. The company carries on the business of harvesting. On or about 30 April 2XXX the company (in reality, Mr Horner) was approached by Andrew Farmer regarding the harvesting of a crop grown by Mr Farmer on land owned by Bill's Pty Limited. The land is known as 'Greenacres'.

In relation to the business of Bill's Pty Limited, letterhead from that business forwarded to us by Mr Horner states that Andrew Farmer is a director of that company. Counsel is briefed with a full company search of Bill's Pty Limited. Counsel is also briefed with a copy of the title search in relation to the farm known as 'Greenacres'.

On 1 May 2XXX Mr Horner, in the company of Andrew Farmer, attended at the farm to conduct an inspection to ascertain what equipment was required. After completing an inspection of the front paddock, Mr Horner needed to conduct an inspection of the back paddocks. For this purpose, he and Mr Farmer entered a partly constructed, two storey building to obtain a better view. That building was being erected by Bill's Pty Limited and had reached lock-up stage. It was basically just the timber frame however, and the stairs of the building had actually not been constructed at that stage. In order to get to the first floor of the building Mr Horner had to attempt to climb onto a stair platform which was approximately 1.8 metres above the ground floor. Because of the height of the platform, he could not climb onto it or step onto it. Mr Horner did not see any ladder on the premises which he could use to climb up onto the platform. In order to give himself some extra height, he positioned two bricks, one on top of the other, on the ground floor just beneath

the platform. He stepped onto those bricks, placed his hand on the timber floor and while pushing himself up he slipped and fell onto his right foot. As a result, he sustained a severe injury to his right leg.

Mr Farmer witnessed Mr Horner's accident.

As a result of the injuries sustained by Mr Horner, he was unable to walk on his right foot. Arrangements were made for Dr Jeckle of Hooterville to examine him at the farm. He was taken by ambulance directly to Hooterville Big City Hospital for x-rays. X-rays were taken which revealed that he had sustained multiple fractures of his right lower leg. On 2 May 2XXX Dr Hyde performed surgery on his right leg, inserting a plate in his right foot.

We shall not go into detail regarding Mr Horner's injuries and treatment. The medical reports enclosed in the brief speak for themselves. Counsel will note, however, that there have been several complications in his treatment.

Mr Horner seeks advice as to what rights he has to make a claim for common law damages.

Would counsel please advise whether Mr Horner has any cause of action against Bill's Pty Limited or Mr Andrew Farmer, or both? If counsel is of the opinion that there is a cause of action with reasonable prospects of success, we would ask that you draft the statement of claim.

Counsel's attention is particularly drawn to the construction safety legislation in regard to the building site (including *Trimp v S. A. Butler Pty Limited* (1964) 81 WN (Pt.1) (NSW) 511).

Further, please note *Stevens v Brodribb Sawmilling Co Pty Limited* (1986) 60 ALJR 194 in respect of control over the place or system of work.

Counsel is asked to advise generally on any other relevant matter arising out of this brief.

## Appendix 4: Sample Index and Observations of a brief to counsel to appear

### Index to brief

#### PLEADINGS

1. Copy of the Statement of Claim.
2. Copy of the Defence.
3. Copy of the plaintiff's further and better particulars.

#### PARTICULARS

4. Copy letter requesting further and better particulars of the Statement of Claim dated 8 June 2XXX.
5. Copy letter supplying further and better particulars dated 9 July 2XXX.
6. Copy letter requesting further and better particulars of the Defence dated 6 September 2XXX.
7. Copy letter supplying further and better particulars dated 19 September 2XXX.

#### WITNESS STATEMENTS

8. Statement of Oscar Love.
9. Statement of Barbara Hill.
10. Statement of Boris Mopper.
11. Statement of Jemimah Puddle.
12. Statement of William Tell.
13. Statement of Lillian Bopeep.

#### SUBPOENAS

14. Copies of subpoenas served (together with original affidavits of service).

#### MEDICAL EXPERT EVIDENCE

15. Report of Dr Smith dated 1 July 2XXX (obtained by the defendant).
16. Report of Dr Jones dated 2 March 2XXX (obtained by the defendant).
17. Report of Dr Brown dated 29 February 2XXX (obtained by the plaintiff).
18. Report of Dr Black dated 2 July 2XXX (obtained by the plaintiff).

#### MISCELLANEOUS

19. Investigation report by College Investigations Pty Limited dated 1 May 2XXX.
20. Surveillance report by College Investigations Pty Limited dated 18 December 2XXX.

## Observations

Counsel's instructing solicitors act for Rod's Reliable Insurance Company Limited in the interests of the defendant in these proceedings.

The plaintiff's claim arises out of an accident which occurred on the defendant's premises on 6th October 2XXX.

The plaintiff claims that on the night of the accident, at approximately 11.00pm she slipped and sustained injury whilst attending the discotheque as a guest of the defendant.

The plaintiff's allegation in the statement of claim is that the accident was caused by the negligence of the defendant in that it failed to clear broken glass and liquid from the dance floor. The plaintiff alleges that she slipped on the floor and cut her left wrist on the broken glass. The basis of our client's defence is that the plaintiff was drunk at the time and was behaving in a reckless manner. The reports of the witnesses and comments by those who attended upon the plaintiff on the night of the accident support this and indicate that the plaintiff fell while trying to put her own glass down.

Counsel is briefed with a copy of the full set of the hospital notes which includes a report from the ambulance driver who attended on the plaintiff and took her to Gotham City Hospital. The history taken by the ambulance driver states: *'The patient fell through a glass window'*. There is a further reference in the report to the patient smelling of alcohol. The discharge summary of the hospital states that the plaintiff presented having lacerated her left wrist under the influence of alcohol. The history sheet of the attending doctor, Dr Smith, states that on examination the plaintiff was *'drunk'*.

The defendant further says that at all times there was a proper system in place for the clearing of glasses and mopping up of spillages. On the night of the accident the club was very crowded. The defendant says there were two persons working full time in the club whose sole job was to clear away empty glasses. At the time, the club-

professional, Mr Love was employed on a casual basis by the defendant as a disc jockey. During the course of the evening he made numerous announcements over the public address system warning people not to enter onto the dance floor with glasses in their hands. It is proposed to call the following persons to give evidence:

### 1. Oscar Love

Mr Love was the club-professional and disc jockey at the dance on the night of the accident. His recollection of events is poor and his manner somewhat defensive. Despite this, he distinctly recollects the plaintiff behaving in a drunken manner while on the dance floor. Further, he advised us in conference that on many occasions throughout the evening he warned patrons over the public address system to leave the dance floor if they were holding glasses or drinking alcohol while on the dance floor. He says that one or two people, including the plaintiff were quite drunk and ignored his warnings.

### 2. Barbara Hill

Ms Hill is the manager of the defendant club. She is in charge of the staff and was responsible at the time of the accident for supervising and instituting the cleaning system. Her evidence is that the polishing of the disco floor was cut back to approximately once every six weeks, three or four years ago and that there have been no complaints of accidents since then. She further advises that there were two or three staff performing the task of clearing glasses continuously on the night in question and that the brooms and mops were readily available for staff to mop up spillages and dry the floor if any spillage occurred.

### 3. Boris Mopper

Mr Mopper was working in the club on the night of the accident and has stated that he was called to the scene of the accident immediately after it happened. He looked over the dance floor and could see what he thought was blood on it, but no evidence of any other liquid. There was also broken glass on the stage with blood on it. Mr Mopper's recollection of the accident is quite good and he is more than happy to give evidence in the proceedings.



## Appendix 4: Sample Index and Observations of a brief to counsel to appear

### 4. *Jemimah Puddle*

Ms Puddle was an employee of the defendant at the time of the accident. Her recollection appears to be quite good and she is prepared to give evidence. She witnessed the accident and states that it occurred when the plaintiff was attempting to put a glass on the edge of the stage, when it somehow slipped and she fell on it.

### 5. *William Tell*

Mr Tell is a club patron who was visiting the club on the night of the accident. He stated that the plaintiff had a clean cut across the wrist. He further states that someone had told him that the plaintiff had had an argument with her husband and had deliberately slashed her wrist with a piece of broken glass.

### 6. *Lillian Bopeep*

Ms Bopeep was a visitor to the defendant club. She states that immediately prior to the accident, she observed the plaintiff engaged in a heated argument with her husband.

We have issued a subpoena to produce to the Gotham City Hospital seeking production of their medical records

in relation to the plaintiff's injuries. In addition, we have arranged for subpoenas to witness to be issued and served on each of the above mentioned witnesses. (Counsel is briefed with the original affidavits of service for all subpoenas).

Counsel is instructed to appear at the hearing of this matter in the Sydney District Court on the 17th day of February, 2XXX where the matter is number four in the list.

We understand Mr Harry of counsel will appear on behalf of the plaintiff instructed by Law & Co.

### *Settlement negotiations*

The plaintiff has offered to settle for the amount of \$100,000, inclusive of costs at the pre-trial conference in October, 2XXX. The defendant at the same conference made a counter offer of \$2,500 inclusive of costs.

No further offers have been made or received. We look forward to discussing the matter with counsel as soon as possible.

## Appendix 5: Sample Index and Observations of a brief to counsel to advise on evidence

### Index to Brief

DOCUMENTS PAGE NUMBERS	PAGE NUMBERS
PLEADINGS	
1. Copy of Statement of Claim	1 – 3
2. Copy of Notice of Grounds of Defence	4 – 5
PARTICULARS	
3. Letter seeking further and better particulars in relation to Statement of Claim	6 – 7
4. Copy of the letter supplying answers to a request for further and better particulars	8 – 10
DOCUMENTS	
5. Copy of Notice to Produce to the defendant	11
6. Copy of Agreement for Sale	12 – 14
7. Statement of Mr Jack Spratt	15 – 16
8. Statement of Mr Georgie Peorgie	17 – 18
9. Accounts for Mother Goose Hotel for years 2XXX to 2XXX	19 – 22
10. Copy of memoranda dated 30 April 2XXX	23
11. Copy of undated memoranda	24
12. Copy of title search of Mother Goose Hotel	25 – 26

## Observations

Counsel's instructing solicitors act for Jack Spratt in connection with a claim for misrepresentation on the purchase of a public house with alternate claims for fraud and breach of warranty.

We are instructed that Mr Spratt was induced to enter into an agreement for purchase as a result of a number of false representations made to him by the vendor, Mary Contrary, as to the takings. These representations may be summarised as follows:

- a) that the takings were approximately \$35,000 per month;
- b) that the outgoings and expenditures were approximately \$20,000 per month;
- c) that Mr Spratt could expect at least \$15,000 profit per month before tax.

As a result of the false representations, Mr Spratt purchased the public house for an amount of \$200,000 on or about the 8th of June 2XXX.

Upon taking over the control of the hotel, Mr Spratt found that he was taking in on average an amount of \$20,000 per month while his expenditures were approximately \$18,000 per month leaving him with a total profit of \$2,000 per month before tax.

Mr Spratt contends that his purchase was worth much less than the price paid and now claims damages for the loss.

We consider that the following matters will need to be proved in order to establish Mr Spratt's case:

- a) that he agreed in writing to purchase the hotel;
- b) that the purchase price of the hotel was agreed at \$200,000;
- c) that the amount of \$200,000 was paid by Mr Spratt pursuant to the agreement;

d) that Mary Contrary represented the monthly payments to be \$20,000 made up as follows:

- (i) beer;
- (ii) wines;
- (iii) spirits;
- (iv) sundries

e) that Mary Contrary represented the monthly receipts to be \$35,000 made up as follows:

- (i) beer and ale;
- (ii) wines and spirits;
- (iii) sundries.

f) that Jack Spratt was induced to sign the agreement as a result of the representations;

g) that the representations were untrue;

h) that Mary Contrary knew the representations to be untrue;

i) that Jack Spratt has repudiated the agreement; and

j) that Jack Spratt suffered loss or damage.

Counsel's attention is specifically drawn to the following cases:

1. *McAllister v Richmond Brewing Co (NSW) Pty Ltd (1942)* 42 SR (NSW) 187
2. *Donaldson v Freeson (1928)* 29 SR (NSW) 113
3. *Selman v Minogue (1937)* 37 SR (NSW) 280.

Statements from Mr Spratt have been included for Counsel's attention together with a statement of Mr Georgie Peorgie who was present when at least one of the above representations was made by Mary Contrary. Mr Peorgie is Mr Spratt's brother-in-law.

Counsel is instructed to advise on evidence generally. In particular, Counsel is asked to advise in relation to any steps that should be taken in obtaining further evidence in respect of this matter together with advice as to which witnesses should be subpoenaed and whether any further documentation is required to be obtained.

## Appendix 6: Notes in relation to an advice on evidence

### Introduction

- 1.1 A solicitor or counsel is sometimes asked to prepare an advice on evidence in respect of an existing litigation matter. This appendix is aimed at solicitors who are considering whether it is necessary to prepare or seek such an advice.
- 1.2 The following notes pre-suppose that:
  - a) there has been some investigation of a cause of action;
  - b) an action has been commenced;
  - c) pleadings have been prepared and filed;
  - d) such pleadings have reached the stage of joinder of issue; and
  - e) no other interlocutory proceedings have been taken.
- 1.3 Against this background and at this stage it is considered prudent to seek advice as to what evidence should be sought to present the case properly.

### Why advice should be sought?

- 2.1 There are many advantages in seeking formal advice on evidence from counsel.
- 2.2 If you are an instructing solicitor who is responsible for the orderly arrangement of all the evidence available at the trial, the result and quality of your work directly affects the case which counsel will be able to put in support of the litigant's case. You should therefore prepare the case in as much detail as possible.
- 2.3 Consideration of the available evidence will isolate or identify any legal issues which are to arise. In order to do this, depending upon a your experience in litigious matters, you may well profit by having someone assumed to have a more specialised knowledge of litigation, lay out the guidelines which the solicitor should follow in their investigation.
- 2.4 Counsel will have been given the task of considering what evidence should be presented and addressing themselves at an early stage to the material available, to the tactics and even the likelihood of success. Such knowledge may be vitally important if settlement is to be discussed.

### The first investigation

- 3.1 The first consideration in advising is usually to set out the items in respect of which proof is required. These will be indicated by the pleadings where some allegation by the plaintiff will have been admitted by

the defendant (and vice versa) and will therefore need no further proof (except perhaps on the score of tactics or full presentation). Other allegations will be denied (or not admitted) so that it is part of the onus of the plaintiff or party bringing the allegations forward to satisfy the court in respect of them.

- 3.2 The person who undertakes the advice will have the preliminary investigation material, which should include the statements of witnesses, documents and any other available evidentiary material such as models, plans and photographs which are already in existence.
- 3.3 If and when appropriate, the person may find it necessary to add to their knowledge by carrying out an inspection of a relevant location so that the advice may have particular reference to that location. If the litigation is in an area of work with which you are not familiar you should study it again before providing advice.

### Considerations preceding advice

- 4.1 There are a number of ways one may seek to prove a fact, for example:
  - a) the testimony of a witness as to the witness' observations or, if an expert as to the witness' opinion;
  - b) an admission by the testimony of a witness of the opposite party;
  - c) an admissible document which tends to support the case;
  - d) a concession or admission in a pleading;
  - e) the existence of other litigation in which a fact to be proved may already have been litigated and resolved against the opposing party;
  - f) the availability of statutory or regulatory provisions enabling proof of some fact to be offered, at least prima facie, by means of some certificate or formal statement;
  - g) the existence of the facility (in an appropriate case) of averring a fact which will then be accepted as prima facie evidence – an example from the criminal area is Section 255 (1) Customs Act 1901 (Cth);
  - h) the existence of relevant legislation or current authority by which the proof of one fact may provide evidence of another; i) by asking the other side to make an appropriate admission so as to save the cost of proving what may be a formality anyway; j) by way of circumstantial evidence.

- 4.2 Apart from this array of devices, which counsel will consider employing in an appropriate case, or for the purpose of a particular issue, knowledge of the aspects of any business or commercial activity may also provide a source of valuable information into which investigators may probe with great profit.
- 4.3 Examples of such matters are set out in the following paragraphs. However, bear in mind that some aspects of business or commercial activity may be protected by privilege.
- 4.4 In relation to very many articles of heavy equipment, whether they be semitrailers or other engines, there is very often kept by the owner or the user, a log book in which there will be set out times and places of travel or hours of work performed by the machine and maintenance or replacement of parts performed on it.
- 4.5 If there has been an accident on a railway system, there would be a strong possibility that a departmental investigation has taken place before any litigation was envisaged at which witnesses may have given evidence or furnished statements and where information was recorded.
- 4.6 If you were concerned to investigate something happening at a police station on a particular date you might hope that you would find some record of it on what is very often referred to as the 'Occurrence Pad' in the police station.
- 4.7 Many large industrial undertakings have a first aid room where records are kept of treatment given.
- 4.8 More obvious examples of official records are the depositions of a coroner's inquest, the reports of police officers as to a road accident, the records of a bank as to the movement of a customer's account and of statements made to bank managers recorded by them in a situation where say, a customer is seeking a loan.
- 4.9 With all this knowledge and experience at your disposal you may now sit down to consider the preparation of the advice on evidence. Perhaps most usefully it may be considered by you as if you were writing the advice for the solicitor who is to obtain the evidence.

### Preparation of advice

- 5.1 A useful way to begin is to set out the facts known or briefed. The gaps to be remedied will be more apparent and, if you omit any, the reader may notice and remind you.
- 5.2 If issue has been joined on pleadings, the particular issue to be proved will be indicated there.
- 5.3 The advice on the evidence relevant to these issues must be a comprehensive specific document which will enable a person of the degree of advancement in the profession to whom it is directed to read it and to understand quite clearly what must be done so that the person may return to counsel exactly what has been requested. The reference to 'counsel' does not necessarily imply a barrister; there may be cases in which one member of a firm who is engaged in the advocacy side of the work will be relying upon another member of the firm to produce the evidence.
- 5.4 It is impossible to lay down what must be done in each type of case. Bear in mind that some persons who prepare cases may be so conversant with the particular form of action and the way of getting evidence that they may need only a general instruction.
- 5.5 It is always excusable to offer a more comprehensive advice than the situation demands; it will seldom be adequate if less is offered.
- 5.6 Preparation which you suggest may include recourse to:
- a) Subpoenas  
These are of three kinds:
    - i) a subpoena for production – which is used to compel a person to produce documents;
    - ii) a subpoena to give evidence – to require the presence of a witness;
    - iii) a subpoena to attend to give evidence and to produce – a hybrid of the above two forms.  
Only in an exceptional case should you fail to recommend the serving of a subpoena on a witness whose testimony is needed. Any application for an adjournment based on the fact that a witness who has 'promised to come' has gone on holidays, will rarely be granted.
  - b) Discovery and inspection  
By these interlocutory proceedings, one party is able to inspect all documents that an opponent has in the opponent's possession or control relevant to the facts in dispute between the parties (subject to certain exceptions).
  - c) Interrogatories  
Certain questions may be asked of the opposite party.
  - d) Notices to produce
  - e) Notices to admit facts and/or authenticity of documents

5.7 The setting out in detail, either on a 'work sheet' or on the advice itself, of the issues to be established or refuted by your client and the method which you recommend should be adopted to discharge the onus of proving them or avoid their being proved against you, will serve to clarify your own mind and to make a permanent record. You may have to pick this case up again in six months' or a year's time when its details do not readily come to mind. You will then welcome the fact that you have thoroughly and carefully nominated and documented the various steps to be taken.

5.8 Sometimes you may set out in detail the issues your client wishes to establish or refute on one side of the page, with the suggested means of dealing with them on the other.

5.9 It will be convenient at this stage by way of an exercise to assume that all ingredients essential to the plaintiff's case are denied and to tabulate the more obvious avenues of proof which counsel will employ.

5.10 The claim in Appendix 5 is that a Mr Spratt has purchased the lease and goodwill of a hotel upon certain representations relating to payments made for and liquor and sundries sold on the premises. He contends that he was induced to purchase. The representations were false and made fraudulently, so his purchase was worth much less than the price paid. He claims damages for the loss.

A standard form of statement of claim taken from Bullen & Leake's Precedents of Pleadings has been adapted as a specimen form of statement of claim for consideration (Appendix 7).

An example of counsel's worksheets of the proofs and evidence required to prove the claim are shown in Appendix 8, with allegations on the left and modes of proof on the right. Appendix 8 is an example of the standard working paper which should be expected and from which the final advice on evidence will be drafted.

### Setting out the advice

6.1 It is sound practice first to set out the facts (as has been suggested earlier) in the following way:

The plaintiff in these proceedings, A, has commenced an action for damages against the defendant B. I am

instructed that A was induced to enter into a certain agreement for sale by a number of false representations as to the takings, namely: (set out the actual situation).

In fact the representations were so far short of the defendant's assurance that the plaintiff is said to have suffered great loss.

6.2 Then set out the issues:

- a) the pleadings briefed indicate that the plaintiff will have to prove the following;
- b) you could go on:  
I shall consider the proof of each of these matters in turn;
- c) here you might make some general recommendation as to further avenues of enquiry, or as to interlocutory proceedings. It might be appropriate to suggest some test or experiment, or carefully to describe some matter to be established by expert evidence, or you might wish for instruction on matters you find necessary for cross-examination.

6.3 Then set out a summary of what is to be obtained:

- a) statements from the following persons:
  - i) A B Brown;
  - ii) C D Smith.
- b) subpoenas to be addressed to the following persons:
  - i) the NA Bank, Phillip Street;
  - ii) E F Robinson.
- c) photographs to be taken of the following:
  - i) the intersection of Broad and Swift Streets from a point in Broad Street approximately 20 metres north of the intersection;
  - ii) the front mudguard and door on the offside of vehicle ABC-100.

6.4 A last sentence should be added to the effect that when all the above preparations are complete, a conference should be appointed to assess the results and consider what further steps, if any, should be taken to obtain necessary evidence.

## Appendix 7: Specimen pleadings and particulars for a statement of claim

(Claim for misrepresentation on the purchase of a public-house, with alternative claims for fraud and breach of warranty. In appropriate matters, NSW solicitors should have regard to the *Uniform Civil Procedure Rules 2005* (NSW) and forms available through the Courts.)

1. By a contract in writing dated the 1st day of May 2XXX, the plaintiff agreed to purchase from the defendant and the defendant agreed to sell to the plaintiff, the lease and goodwill of a public-house called The Pig and Whistle in Victoria Road, St Leonards for \$200,000.
2. The contract was completed on the 8th day of June 2XXX and the plaintiff paid to the defendant \$100,000 and executed a memorandum of charge in favour of the defendant to secure the remaining \$100,000 and interest thereon.
3. In order to induce the plaintiff to make and complete the contract by payment of the money and by execution of the memorandum of charge, the defendant represented to the plaintiff and in consideration of the plaintiff doing so warranted:
  - a) that the payments made at the public-house for beer and ale, wines, spirits and sundries, amounted to \$20,000 a month, as follows, namely:

Beer and ale	\$11,000.00
Wine	\$500.00
Spirits	\$8,000.00
Sundries	\$500.00
	<u>\$20,000.00</u>
  - b) that the figures represented payments actually made by the defendant for goods actually delivered at the public-house;
  - c) that the payments were made in respect of goods delivered at the public-house and sold and consumed at the public-house in the ordinary and legitimate course of business there;
  - d) that the payments represented a genuine trade and honestly showed the amount of bona fide and legitimate trade done at the public-house.
4. The representations and warranties were made by and are to be inferred from:
  - a) two memoranda, one dated 30th day of April 2XXX and the other undated, handed by the defendant's agents, Wiley & Co, to the plaintiff's agent in the early part of May, 2XXX.
  - b) oral statements made by the defendant's agents Wiley & Co to the plaintiff on the 30th day of April, 2XXX.
5. The plaintiff was induced to and did make and complete the contract and pay the money and execute the memorandum of charge by and on the faith of the representations and warranties.
6. The plaintiff has since discovered and the fact is that each of the representations was untrue and the warranties broken in that:
  - a) the payments did not amount to the sums or anything like so much;
  - b) the payments were not made in respect of goods actually delivered at the public-house;
  - c) the payments were not made in respect of goods delivered at or sold or consumed at the public-house in the ordinary and legitimate course of business there but were fictitious or represented payments for goods delivered or consumed elsewhere than at the public-house or disposed of otherwise than in the ordinary and legitimate course of business there;
  - d) the payments did not represent a genuine trade or honestly show the amount of bona fide and legitimate trade done at the public-house.
7. Further or in the alternative, the plaintiff says that the defendant made the representations fraudulently and either well knowing that the same were false or reckless and not caring whether they were true or false.
8. As soon as the plaintiff discovered that the representations were untrue, the plaintiff by letter dated the 31st day of August, 2XXX, repudiated the contract.
9. By reason of the matters set out in paragraph 6, the lease and goodwill were worthless or worth far less than the \$200,000 and the public-house can only be worked at a loss and the plaintiff has lost the \$200,000 and interest thereon and all the expenses and trouble the plaintiff was and will be put to in acquiring and going into and out of the public-house.

Particulars: Estimated expenses \$8,000 made up as follows (state them):

  - i) .....
  - ii) .....
  - iii) .....and the plaintiff claims:
  - a) rescission of the contract;
  - b) cancellation of the memorandum of charge;
  - c) return of the \$200,000 and interest thereon at the rate of per cent from the 8th day of June, 2XXX until payment or judgment;
  - d) damages.



## Appendix 8: Worksheet

The essentials to prove

1. The plaintiff agreed in writing to purchase the hotel.

Prepare to offer proof by

Subpoena to produce to the defendant to produce the original agreement.

Have witness available to prove the defendant's signature, one who saw the defendant sign (who may be the plaintiff) or one who knows the defendant's signature; or the agreement may have been received under cover of a letter from the defendant's solicitor, in which case have the letter and the agreement at court.

**Prove:**

2. The purchase price was \$20,000.

**Proof:**

In a proof, the plaintiff should set out how the purchase money was paid, e.g. by cheque. Subpoena to produce to the defendant's bank to produce the cheque and the pass sheets for the year ended 30 June, 2XXX and subpoena to the defendant to produce the cheque butts.

**Prove:**

3. The defendant represented the monthly payments to be for:

Beer and ale	\$11,000.00
Wine	\$500.00
Spirits	\$8,000.00
Sundries	\$500.00
	<hr/>
	\$20,000.00

**Proof:**

The plaintiff in a proof of evidence should set out the various conversations in the first person with the defendant or in the defendant's presence and with the selling agent. Have in court any newspaper advertisement for the sale of the hotel. Subpoena the newspaper to produce the application form on which the advertisement was requested. A subpoena to the hotel broker to produce

the record listing the hotel for sale. A subpoena to the liquor supplier who served the defendant. Proof of evidence should be obtained from other witnesses who can depose as to these matters. Have available all other writings which refer to these matters.

**Prove:**

4. Representations appear as follows.

**Proof:**

This may be dealt with as the occasion demands; it is probably covered factually in 3.

**Prove:**

5. The plaintiff was induced to sign the agreement by the representations.

**Proof:**

The plaintiff in the proof should set out the nature of the inducement to purchase and whether there was any reliance on anything the defendant said.

**Prove:**

6. The representations were untrue.

**Proof:**

The plaintiff in the proof and other persons who can corroborate should be prepared to prove what liquor purchases have been made and produce all invoices to substantiate the purchases. The liquor supplier should corroborate the delivery of the various quantities and types of liquor to the defendant for the period one year prior to the date of purchase and to the plaintiff after the date of purchase. Subpoena the defendant to produce all books of account, wage and other records, invoices and copy invoices and copy income tax returns for the last two years and stock sheets. Former members of the defendant's staff should be interviewed to elicit and set out in a proof of evidence such information as may bear upon this and other issues.



**Prove:**

7. To the knowledge of the defendant.

**Proof:**

If shown to be untrue, the inference would likely follow. Enquiries should be made of other hotel brokers and by reference to other advertisements and earlier potential purchasers, if in the earlier advertisements the figure given for such payments was much less. The plaintiff should be ready to prove that with all industry and comparable staff the represented amount of liquor is not sold.

**Prove:**

8. The plaintiff repudiated the agreement.

**Proof:**

In an appropriate case, set out in what document or conversation this was done. See *McAllister v Richmond Brewing Co (NSW) Pty Ltd (1942)* 42 SR (NSW) 187, 191.

**Prove:**

9. The plaintiff suffered loss or damage.

**Proof:**

The plaintiff should submit all records of payments for liquor to: a) a hotel broker; b) an accountant; both skilled in this trade. The plaintiff should submit all details and such information as these people require as regarding, for example, staff and conditions of trading. They should be asked to value the hotel on the plaintiff's figures so to show by what amount the purchase price exceeded that sum. They should be given also a list of the plaintiff's takings over the relevant period and be requested to offer an opinion as to whether they are consistent with the liquor purchases. If available, the defendant's takings should be submitted to them with the records of purchase to establish if possible that such takings are at too low a level for such purchases. This will fortify the inference that such purchases themselves were not on the scale represented. Note in passing *Donaldson v Freeson (1928)* 29 SR (NSW) 113; *Selman v Minogue (1937)* 37 SR (NSW) 280.

## Further information

Further information about barristers, including 'Find a Barrister' is available from the New South Wales Bar Association ([www.nswbar.asn.au/](http://www.nswbar.asn.au/)).

The Law Society website has a range of information and services for New South Wales solicitors at [www.lawsociety.com.au](http://www.lawsociety.com.au).

## Endnotes

- 1 Legal Profession Uniform Law (NSW) s 6.
- 2 New South Wales Bar Association, Briefing Barristers, available at: <http://www.nswbar.asn.au/briefing-barristers>.
- 3 Legal Profession Uniform Law (NSW) ss 44 and 45.
- 4 Legal Profession Uniform Law (NSW) s 50.
- 5 Legal Profession Uniform Law (NSW) s 45.
- 6 Legal Profession Uniform Law (NSW) ss 47-53.
- 7 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 105(i).
- 8 The Uniform Bar Rules are developed by the Australian Bar Association, and are made by the Legal Services Council, under the Uniform Law.
- 9 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 3.
- 10 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) rr 4(c), 4(d). See also Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) rr 3, 4.
- 11 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 4(e).
- 12 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 13.
- 13 This facility is available at <http://find-a-barrister.nswbar.asn.au>.
- 14 *International Financial Society v Smith* (1896) 22 VLR 114 per Madden CJ at 119.
- 15 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 17.
- 16 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 102.
- 17 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 103.
- 18 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 104.
- 19 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 106.
- 20 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 106.
- 21 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 108.
- 22 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 110.
- 23 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 107.
- 24 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 109.
- 25 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 110.
- 26 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 111.
- 27 *Sali v SPC Ltd* (1993) 116 ALR 625 at 629.
- 28 The Hon John Dowsett AM, "The Professional Role of the Solicitor and Barrister in Preparation for Trial and During Trial" (1987) 17 *Queensland Law Society Journal* 85, 88.
- 29 Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW) r 120.
- 30 Legal Profession Uniform Law (NSW) s 175.
- 31 Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) r 35.
- 32 Legal Profession Uniform Law (NSW) s 177.
- 33 Legal Profession Uniform Law (NSW) s 180(1).
- 34 Legal Profession Uniform Law (NSW) s 180(2).
- 35 Legal Profession Uniform Law (NSW) s 181.
- 36 Legal Profession Uniform Law (NSW) s 181(7).
- 37 Legal Profession Uniform Law (NSW) s 183. Legal Profession Uniform Law (NSW) s 181(7).
- 38 Legal Profession Uniform Law (NSW) s 182.
- 39 Legal Profession Uniform Law (NSW) s 186.
- 40 Legal Profession Uniform Law (NSW) s 186(1), (2).
- 41 Legal Profession Uniform Law (NSW) s 186(3).
- 42 Legal Profession Uniform Law (NSW) s 188.
- 43 Legal Profession Uniform General Rules 2015 (NSW) r 73.
- 44 Legal Profession Uniform Law (NSW) s 190.
- 45 Legal Profession Uniform Law (NSW) s 191.
- 46 Legal Profession Uniform Law (NSW) s 192.
- 47 *Commissioner of the Australian Federal Police v Razzi* (1991) 101 ALR 425; *Wilkie v Gordian Runoff & Anor* [2005] NSWSC 873; *Levy v Bergseng* [2008] NSWSC 294.
- 48 Costs Assessment Rules Committee "Guideline: Costs payable between parties under court orders", dated 16 March 2016, available from the NSW Supreme Court website.
- 49 Legal Profession Uniform Law (NSW) s 184.
- 50 Legal Profession Uniform Law (NSW) s 194(2).
- 51 Legal Profession Uniform Law (NSW) s 262(3).
- 52 Legal Profession Uniform Law (NSW) s 268(1).
- 53 Legal Profession Uniform Law (NSW) s 269(1).
- 54 Legal Profession Uniform Law (NSW) s 269(2).
- 55 Legal Profession Uniform Law (NSW) s 270.
- 56 Legal Profession Uniform Law (NSW) s 296.
- 57 See of the Office of the Legal Services Commissioner, "Complaints" at [http://www.olsc.nsw.gov.au/Pages/lsc\\_complaint/lsc\\_complaint.aspx](http://www.olsc.nsw.gov.au/Pages/lsc_complaint/lsc_complaint.aspx).
- 58 Legal Profession Uniform Law (NSW) s 297(1).
- 59 Legal Profession Uniform Law (NSW) s 298.
- 60 Legal Profession Uniform Law (NSW) s 267.
- 61 Legal Profession Uniform Law (NSW) s 272.
- 62 Legal Profession Uniform Law (NSW) s 279. Pursuant to section 281, this notification is not required in some circumstances.
- 63 Legal Profession Uniform Law (NSW) s 319.
- 64 Legal Profession Uniform Law (NSW) s 288(2).
- 65 Legal Profession Uniform Law (NSW) s 288(6).
- 66 Legal Profession Uniform Law (NSW) s 276.
- 67 Legal Profession Uniform Law (NSW) s 290.
- 68 Legal Profession Uniform Law (NSW) s 299.
- 69 Legal Profession Uniform Law (NSW) s 300.
- 70 *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16, [5]-[9].
- 71 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92.
- 72 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92.
- 73 *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 at 49.
- 74 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16.
- 75 *Ottley v Gilby* (1845) 8 Beav 602.
- 76 *Re Clark* (1851) 1 De G M and G 43.
- 77 *Hyland and Ors v Campbell and Ors* (1995) *Aust Torts Reports* 81-352.
- 78 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16.
- 79 *Ashby v Russell* (1997) ANZ ConvR 321.
- 80 See for example *Locke v Camberwell Health Authority* [1989] 1 Med LR 253; although note that, as a result of fresh evidence, this decision was reversed on appeal: see (1991) 2 Med LR 249.

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