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RULES COMMITTEE CONSULTATION PAPER

CASE MANAGEMENT – WRITTEN BRIEFS

Date of issue: 26 February 2009
Date submissions due: 16 March 2009

Preliminary

1. The Rules Committee invites comment on any of the issues raised in this consultation document. Please return comment to the Clerk to the Committee, Ms Sophie Klinger, by 16 March 2009. Her contact details are DDI: 09 916 9642; email: sophie.klinger@justice.govt.nz .

2. Throughout this document, both the old rule and new rule numbers are used. Readers can access the new Rules on the Rules Committee's website (the Rules come into force on 1 February 2009).

Introduction

3. There is a concern that civil cases often come before the Courts without adequate attention having been given to the issues in the case and to the pre-trial directions that best suit those issues, including in particular the way in which evidence is to be presented at trial. This consultation document has been prepared in response to this concern.

4. Comment is sought as to whether there should be any change to the High Court Rules as they relate to the pre-trial conference and written briefs. If so, views are sought on the proposed changes.

5. It is a particular concern of the High Court Judges that almost all evidence in civil trials is adduced by written briefs. This practice does no more than reflect the way in which the relevant High Court Rules are presently drafted. The rules state that written briefs of all evidence "must" be prepared (rr 441B – 441E; new rr 9.2–9.5), and set out in detail the limited circumstances in which oral evidence-in-chief might be allowed (rr 441F – 441G; new rr 9.6-

9.7). Given the directory nature of these rules, it is not surprising that it is stated in *McGechan on Procedure* at para HR 441G.01:

> [t]he rules make it clear that the opportunities for oral evidence-in-chief are now severely limited.

While r 441A(2)/new r 9.1(2) reserves to the Court a general discretion to modify or exclude the operation of these rules, this discretion is seldom utilised.

6. The problems with written briefs were set out in Lord Woolf's report to the Lord Chancellor on the civil justice system in England and Wales in June 1995. Three matters in particular were referred to and can be applied to the New Zealand context.

7. First, the practice of lawyers reducing evidence to written briefs adds to costs. Lawyers treat witness statements as documents which must be as precise as pleadings and consequently go through many drafts. The perception is that far more time is spent on preparing written briefs than would be spent on preparing a witness for examination in chief. While it was once thought that written briefs would save trial time and hence costs, this assessment must now be revisited with the advent of FTR (real time recording and transcribing of Court proceedings), which will considerably reduce the time taken by oral evidence-in-chief.

8. Secondly, written briefs generally contain the words of the lawyer rather than the witness. Oral evidence-in-chief was always an important device for ascertaining the truth. A written brief may help a dishonest witness, who can hide behind another's words. A written brief may equally hurt an honest witness, who might be cross-examined on written evidence not recorded in the witness's own words.

9. Thirdly, written briefs can lead to opposing lawyers spending hours preparing and then cross-examining at length on the words used in the statements. The fact that every 't' is crossed and 'i' dotted in the brief without judicial culling potentially exposes more material to challenge. This can add to costs which probably would not arise if counsel were cross-examining on the spoken words as they unfolded in Court. Further, the witness is thrust immediately into a hostile cross-examination without having had time to adjust to giving evidence in evidence-in-chief.

10. The High Court Judges consider these problems are evident in High Court litigation in New Zealand.

Proposed changes to rules and practice

11. It is suggested that the issue of whether written briefs are desirable in whole or in part in a particular case may be is best considered:

    (a) only after the parties and their counsel appreciate fully the issues, usually after a failed settlement conference;

(b) by counsel and a Judge; and

(c) as part of a general pre-trial case management conference within 20 working days of an unsuccessful settlement conference, or if there is no settlement conference, within 20 working days of setting down.

12. At present rr 428(1)(b) and 428(6)/new rr 7.3(1)(b) and 7.3(5)(a) are usually the basis for a direction of a date for filing written briefs. Such a direction must be made by an Associate Judge in the constraints of the conference whether or not the parties have come to grips with the issues. Then, about 10 working days after the exchange of written briefs, r 428(1)(c)/new r 7.3(1)(c) provides for the final pre-trial conference. The matters that must be considered under Schedule 7/new Schedule 8 at such final pre-trial conferences are:

(a) a review of timetable compliance; and

(b) a review of the time required for the hearing; and

(c) agreement on relevant facts not in dispute; and

(d) identification of the issues requiring resolution at trial; and

(e) openings to include –

(i) a summary of the plaintiff's or the defendant's claim:

(ii) chronology;

(iii) an issues statement;

(iv) a summary of legal principles with reference to directly relevant authorities; and

(f) a bundle of documents; and

(g) any other issues raised by a party that should be dealt with before the trial.

13. This rule was introduced so that a Judge (preferably, but not always, the trial Judge) could review trial directions at a time close to trial when counsel would be expected to have focussed more attention on the issues and to avoid last minute adjournments. By this time, it was assumed, all written briefs would have been exchanged.

14. It is suggested that instead of this pre-trial conference taking place 10 working days after service of the written briefs, consideration be given to holding it within 20 working days of any unsuccessful settlement conference, or if there is no settlement conference, within 20 days of setting down. The conference could therefore be held before directions have been given as to the mode of evidence. It would be compulsory and it is suggested that senior counsel should appear.

15. The conference could be presided over by a Judge rather than by an Associate Judge. The Court could consider afresh the issues and assess the adequacy of the pleadings. It could determine the way in which the evidence is to be placed before it. There might be no presumption that written briefs are to be provided. The power to order a chronology could be specified to require the chronology to be detailed and cross-referenced to the bundle.

16. Further, it is envisaged that guidelines as to whether evidence-in-chief be written or oral could be developed. Thus uncontroversial evidence, such as evidence as to an exchange of correspondence or accepted factual background, could be by written brief. However, evidence strongly in contention and involving issues of credibility, at the discretion of the presiding judge, could be presented orally. The possibility of a witness's evidence being partly written and partly oral could be available. It is suggested expert evidence should normally be by written brief as at present.

17. There could be the ability to direct that "will say" statements rather than written briefs be filed. If "will say" briefs are to be presented at trial, there would need to be directions as to what they would cover, and their treatment at trial.

18. If the changes outlined were made, the pre-trial conference would take place earlier than it does presently. It would involve a Judge engaging with the particular issues of the case and ensuring that the case were ready for trial. The Judge would not necessarily have to be the trial Judge. Indeed that would not be possible in Auckland, given the way the fixtures are presently allocated. The evidence directions could be tailored to the issues and the type of evidence required to address them.

19. The Judge could therefore consider:

    (a) The trial issues;

    (b) The state of the pleadings;

    (c) The evidence to be adduced and the best mode of putting it before the Court; and

    (d) The other matters referred to in Schedule 7/new Schedule 8, with any necessary modifications.

20. It would be desirable that the evidence directions be tailored to the issues and the type of evidence required to resolve them. Where necessary, a further pre-trial conference could be directed closer to trial.

21. It is stated in Schedule 5 (both old and new Rules) that the second case management conference before an Associate Judge will involve a listing of the essential issues of fact and law (item 2). This would not need to be changed, although the issues could be considered again at the pre-trial conference. It would not be appropriate to make orders as to the nature of the evidence at

trial at the second case management conference, as this would be done at the pre-trial conference.

22. The Associate Judge at the second case management conference is also to consider under Schedule 5 whether a settlement conference should be directed under r 442/new r 10.19. In that case management conference, "will say" statements could be directed to be filed prior to the settlement conference. It is envisaged that after the completion of a settlement conference the "will say" statements could remain on the file, but sealed in an envelope. At the pre-trial conference one of the issues could be whether those "will say" statements could be used for the trial in whole or in part, and whether new "will say" statements should be directed.

"Will say" statements

23. Any provision in the High Court Rules for "will say" briefs would be new. It is suggested that the new rules could give an indication of the nature of such statements. They would be relatively short, and would summarise the key elements of the evidence. Thus, if there were an issue as to whether at a meeting two people had agreed on a contract, the "will say" statement would not set out the full details of their meeting or chronologically outline who said what. Rather, the statement would give a summary of what the witness will say happened, e.g. "I met with X on 10 July 2008 at 10 am for half an hour at Y and at the end of our discussion he offered ABC. I accepted that offer and we shook hands."

24. It is envisaged that the existing rules as to directions, adjournments and costs would be sufficient to deal with the issues that could arise in relation to such statements.

The specific rules

25. Comment is sought as to whether any change to the rules is supported. If change is supported, are the proposals set out in this paper appropriate? Alternative suggestions or modifications are welcomed.

26. If change were to occur as proposed, the following amendments would need to be made to the new rules (the old rules will not be amended as they have been revoked):

    (a) No change to the rules relating to case management conferences other than to rule 7 would be necessary. Rule 7.3(5)(a) would be deleted. Rules 7.3(1)(c) and 7.3(6) would need to be amended to provide that the pre-trial conference is to take place before a Judge on a date 20 days after any unsuccessful settlement conference and/or setting down.

    (b) The default rules as to when briefs are to be filed would need to be redrafted. The provisions of rules 9.1 to 9.12 would need amendment.

(c) Schedules 5 and 8 would require amendment to reflect the changes in the matters to be considered.

27. The regime would also apply to full trials under the new District Courts Rules (these Rules are anticipated to come into force in about November 2009). It would not apply to the new short or simplified trials.

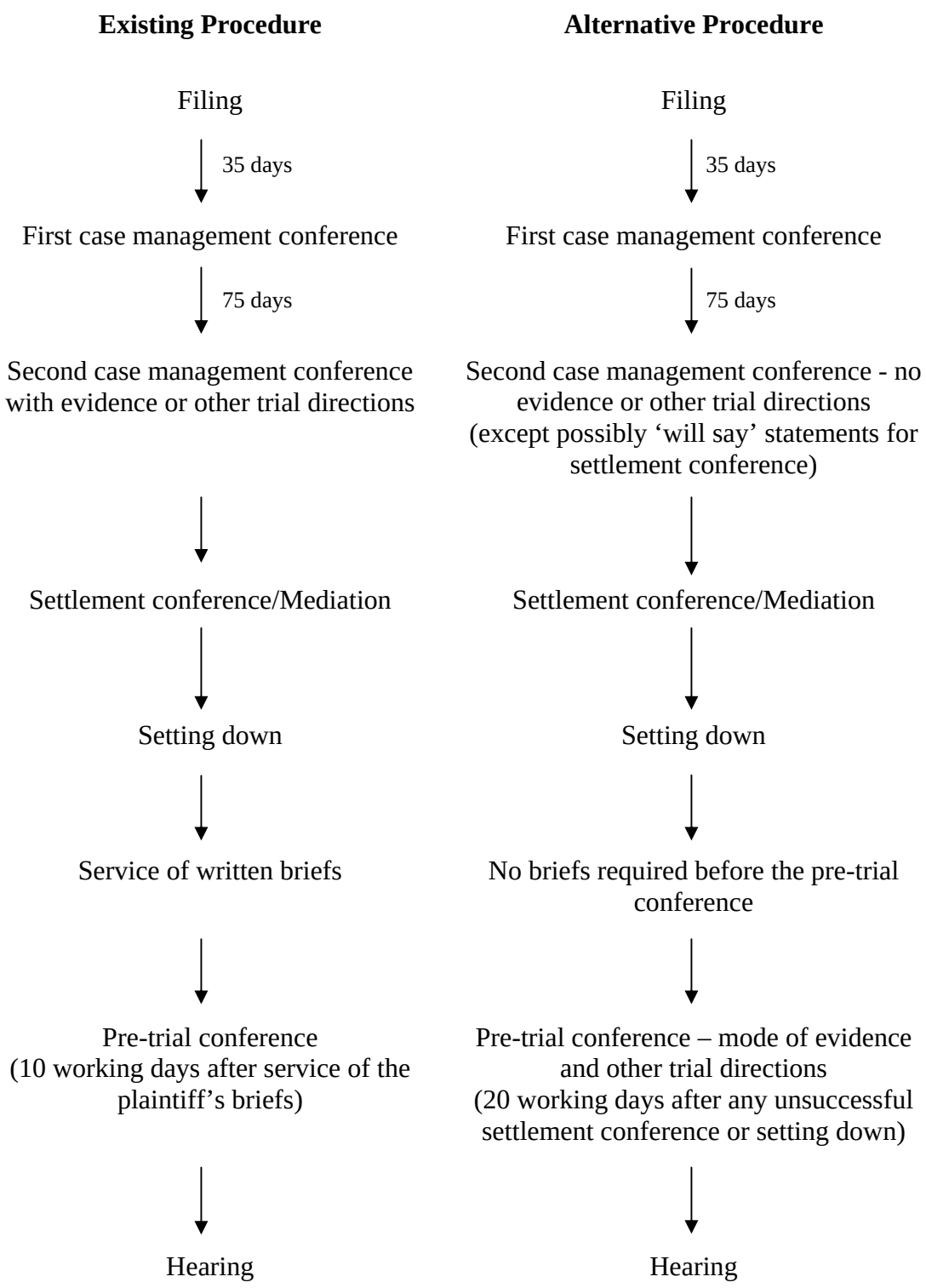
Appendix

28. The existing and alternative procedures are shown diagrammatically in the attached appendix.

Time for response

29. Comments and submissions on any issues arising from this paper are to be submitted to the Clerk, Ms Sophie Klinger, by 16 March 2009.

APPENDIX


Existing Procedure
Filing
35 days
First case management conference
75 days
Second case management conference with evidence or other trial directions
Settlement conference/Mediation
Setting down
Service of written briefs
Pre-trial conference
(10 working days after service of the plaintiff's briefs)
Hearing
Alternative Procedure
Filing
35 days
First case management conference
75 days
Second case management conference - no evidence or other trial directions
(except possibly 'will say' statements for settlement conference)
Settlement conference/Mediation
Setting down
No briefs required before the pre-trial conference
Pre-trial conference – mode of evidence and other trial directions
(20 working days after any unsuccessful settlement conference or setting down)
Hearing