RULES COMMITTEE CONSULTATION PAPER

PROPOSALS FOR REFORM OF THE RULES RELATING TO WRITTEN BRIEFS

Date of issue: 1 September 2009
Date submissions due: 20 November 2009

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Background

1. There has been debate from December of last year concerning reform to the Rules relating to written briefs. A Consultation Paper issued on 10 December 2008 sought comment on whether there should be any change to the High Court Rules as they relate to the pre-trial conference and written briefs. That Paper referred to the fact that written briefs have been perceived as adding to the costs of litigation. Further, it was observed that written briefs often contained the words of the lawyer rather than the witness, and that was a factor that could stand in the way of ascertaining the truth. The present system meant that Judges did not have the benefit of hearing the witness give oral evidence on disputed matters of fact without being led.

2. A change to the Rules was put forward in the Paper, as an option for consideration. The option put forward in essence involved an earlier pre-trial conference where orders would be made as to the way in which evidence should be adduced at trial. The presumption in favour of written briefs would be dispensed with. The Court would have the option, in relation to all or part of the evidence, of directing that rather than the evidence being filed by way of written brief, 'will-say' statements would be served. A copy of that Consultation Paper is annexed marked as Appendix "A".

3. Submissions were then received from a number of parties. The submissions are summarised in Appendix "B". In essence there was a divergence of views amongst those consulted. There was some support for the proposals, but other submissions were opposed to the change. While there was general agreement about problems identified with written briefs, including concerns about cost and the fact that they consisted of the evidence of lawyers rather than the witnesses, it was also noted that there were advantages such as the avoidance of ambush and the promotion of settlement. There was general agreement that oral evidence was useful when the credibility of a witness was at issue. There was not widespread support for the use of 'will-say' statements, and caution was expressed as to their content and use at trial. There was a concern that

'will-say' statements could in the end be not dissimilar to written briefs, with added problems as to how they could be used at trial.

4. Following the submissions, draft Rules were prepared to reflect the option put forward in the Consultation Paper. These are attached and marked as Appendix "C". They have been considered by the Rules Committee, which has decided that there is force in the concerns expressed. Particular concerns were:

   (a) The necessity for 'will-say' statements to avoid ambush meant there was a danger that 'will-say' statements would quickly develop as a matter of practice into written briefs. Problems arising from the use of 'will-say' statements could complicate the trial process. How detailed would 'will-say' statements be? What would be the consequences if a witness departed from a 'will-say' statement when giving evidence? To what extent could 'will-say' statements be referred to in cross-examination?

   (b) In Auckland, where shorter cause fixtures are set down on the basis that a pool of Judges will be available to hear them, it is not usually possible to have Judges allocated to hear a trial some months before trial. The particular Judge will only be determined shortly before the hearing. This means that it is not generally possible in Auckland for the trial Judge to conduct a pre-trial hearing some months before the trial begins, and make the evidence orders that suit that particular Judge.

   (c) Written briefs work well in some areas such as expert evidence, and uncontentious background evidence.

5. For these reasons, the Rules Committee does not favour proceeding with the option set out in the Consultation Paper (Appendix A) and the Draft Rules (Appendix C).

6. Nevertheless, a concern remains that it is unsatisfactory to receive evidence-in-chief in relation to disputed matters of fact, or where a witness's credibility is at issue, by way of written brief. At best, that contested evidence is still given by what is effectively a response to leading questions. At worst, the briefs are not in the words of the witness. This makes the task of determining the truth more difficult. A written brief may help a dishonest witness to hide behind another's words. A written brief may equally hurt an honest witness, who may be cross-examined on written evidence not recorded in the witness's own words. The evidence is not a spontaneous and immediate response to an open question, given in the context of the courtroom.

Overseas developments

7. While other common law jurisdictions have, like New Zealand, moved to a system whereby evidence in civil litigation is prepared by way of written brief or affidavit, concerns have been frequently expressed about the need to have evidence given orally where it concerns disputed questions of fact, or where

credibility is at issue. The rules in England reflect this. Rule 32.1 of the Civil Procedure Rules provides:

> **32.1 Power of court to control evidence**
> (1) The court may control the evidence by giving directions as to –
> (a) the issues on which it requires evidence;
> (b) the nature of the evidence which it requires to decide those issues; and
> *(c) the way in which the evidence is to be placed before the court.*
> (2) The court may use its power under this rule to exclude evidence that would otherwise be admissible.
> (3) The court may limit cross-examination.
>
> [emphasis added]

8. The White Book (2009 Vol 1 at 869) states in relation to r 32.5(2):

> A court retains a discretion and may order that the witness's evidence or part of it should be given *viva voce.*

In *Cole v Kivells* [1997] EWCA Civ 1323 (25 March 1997), it was stated by Lord Justice Mummery:

> This case invites comment on the use of witness statements at the trial of this action. Under paragraph 5 of the Practice Direction [1995] 1 WLR 262 Vol 2 of the Supreme Court Practice page 270 it is provided that:
> "unless otherwise ordered, every witness statement should stand as the evidence-in-chief of the witness concerned."
>
> That course was adopted, even though there was a conflict of evidence on the crucial issue of Kivells' retainer. In the interests of saving time and costs the opening of the case was short and the documents were not opened before oral evidence was called. The Practice Direction on witness statements should not be inflexibly applied. To the extent that the witness statements reveal that there is no factual dispute, it is sensible that they should stand as evidence-in-chief. That is consistent with the requirements of fairness, expedition and saving costs. It is stated in Volume 1 of the Supreme Court Practice page 651 38/2A/4 that, even where directions are given for the pre- trial exchange of witness statements, the trial judge retains a discretion to require a witness to give evidence orally. That discretion is unfettered. In this case it would have been appropriate to ask the judge to exercise his discretion, so that the key witnesses, Mr Hicks and Mr Ray Cole, could have given their evidence-in-chief orally on the issues where there was a conflict of fact. That course might have clarified the issues of fact and sharpened focus on the conflicts of evidence to be resolved.

In *Mercer v Chief Constable of the Lancashire Constabulary* [1991] 1 WLR 367, at 371-372, Lord Donaldson stated:

> But perhaps the most important factor of all will be the extent to which the evidence of a particular witness is likely to be controversial and his credibility in issue. If so, the way in which he responds to oral examination-in-chief may be of great importance. Against this background it is wrong in principle to make a general order applying to all witness statements which may be exchanged pursuant to an order under Ord. 38, r. 2A without regard to whether the witness is an expert giving opinion evidence or a witness as to matters of fact and without regard to the extent to which the witness's evidence is likely to be controversial and go to the heart of the dispute.

In *Phipson on Evidence* (16th ed. 2005) at 318-319, it is stated:

> Where there is a conflict of fact, particularly where the witness's credibility may be in issue and his evidence is contentious, it may be appropriate for the trial Judge to direct that at least part of the evidence-in-chief be given orally.

9. In the Federal Court of Australia, s 47(1) of the Federal Court of Australia Act 1976 gives an express discretion to the Court or Judge to direct or allow evidence to be given orally. The focus of directing that evidence be given orally on matters where there is a dispute as to the fact or credibility issues is reflected in some judicial pronouncements in the State Courts. For instance, in *Morris v Bliss* [2007] ACTSC 72 (5 September 2007) Supreme Court ACT at [16]:

> … Regrettably, from my perspective, the parties seem to have agreed at a relatively early stage that evidence should be on affidavit. … In an action where the outcome will depend upon findings of fact, and where the facts, as here, are vigorously disputed, it is in my view undesirable that the evidence in chief of the witnesses be in affidavit form. The Court is deprived of the opportunity of evaluating the witnesses as they give their evidence orally and without being led. An important opportunity to assess the demeanour of witnesses and to form a view as to the quality of their recollection of events a number of years earlier is lost. I suspect, also, that proceeding by way of affidavit adds significantly to legal costs on both sides.

Proposal

10. It is proposed that the existing Rules relating to written briefs and pre-trial conferences be amended to give a Judge the express power to direct that evidence be given orally when there are disputed questions of fact or credibility issues. It is also proposed that the Rules be amended to provide a procedure whereby at the pre-trial conference, or if there is no pre-trial conference, at the start of the hearing, a Judge may direct evidence to be adduced orally. Against that prospect, Counsel will have to be prepared to lead evidence in relation to such matters. Draft rules have been prepared. Rule 9.4, attached as Appendix "D", sets out the possible requirements for written briefs. Rules 9.6, 9.6A and 9.7 with suggested amendments, attached as Appendix "E", sets out the other possible rules.

11. Comments are now sought on this proposal. Alternative suggestions are welcome.

12. Please return comment to the Clerk of the Committee, Ms Sophie Klinger by **30 November 2009**, by email or post. Her contact details are listed on the first page of this paper.

‘A’

RULES COMMITTEE CONSULTATION PAPER

CASE MANAGEMENT – WRITTEN BRIEFS

December 2008

Preliminary

13. 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 .

14. 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

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

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

Proposed changes to rules and practice

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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.

34. 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

35. 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."

36. 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

37. 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.

38. 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.

39. 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.

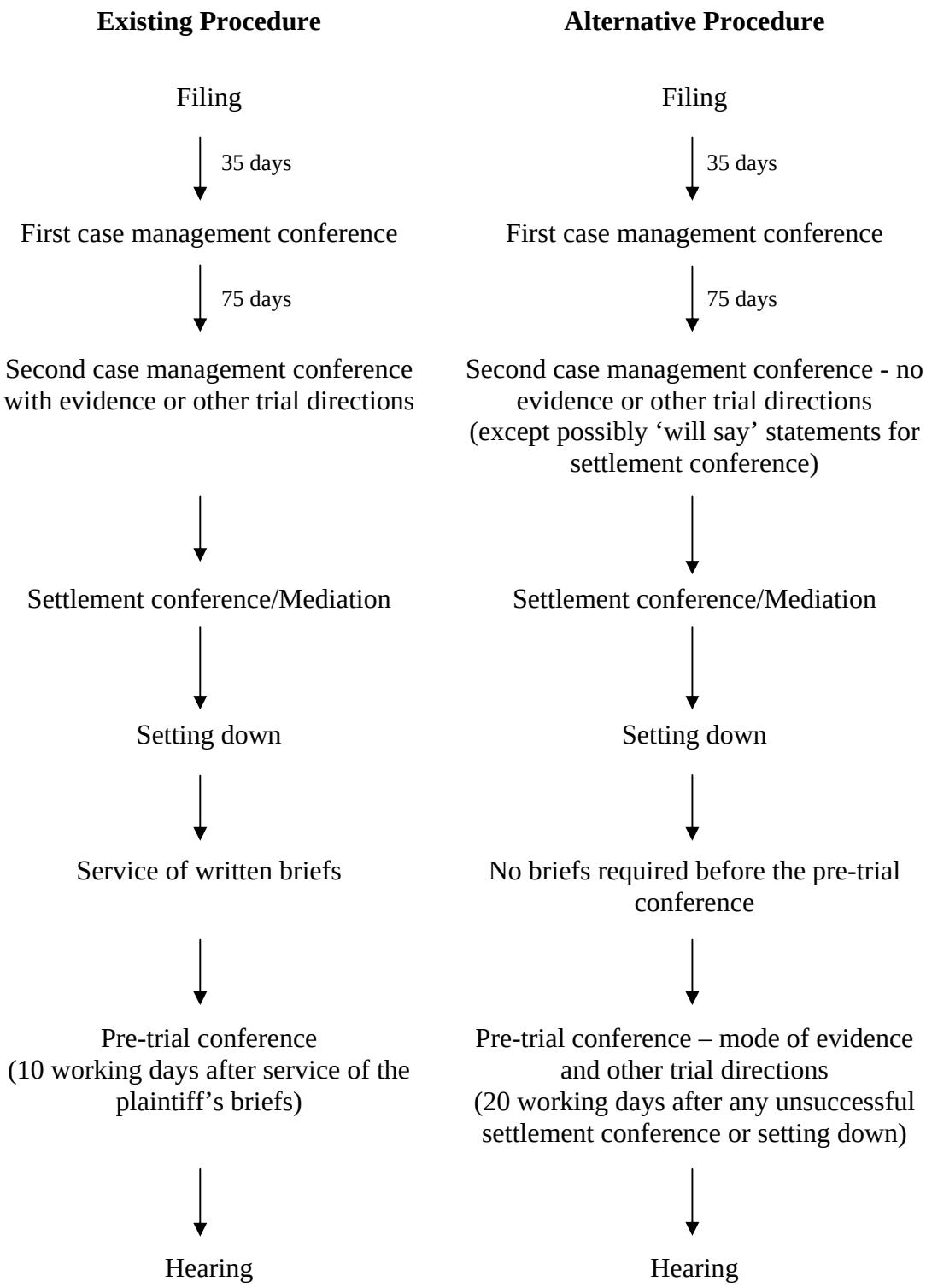
Appendix

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

Time for response

41. 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

'B'

SUMMARY OF SUBMISSIONS RECEIVED TO RULES COMMITTEE CONSULTATION ON WRITTEN BRIEFS

Introduction

1. A consultation paper was issued in December 2008 regarding possible reform of case management and written briefs procedures. Submissions closed in March 2009.

2. Submissions were received from:

   a. New Zealand Law Society
   b. Auckland District Law Society
   c. New Zealand Bar Association
   d. Alan Galbraith QC
   e. James Farmer QC
   f. Justice Hansen - Legal Issues Centre at Otago University
   g. Graham Kohler
   h. C S Henry
   i. Les Taylor

Executive summary

3. There is a divergence of views among those consulted. There is some support for the proposals. Other organisations do not support any change to the current system of exchanging written briefs.

4. There is general agreement about the problems identified with written briefs, including concerns about cost and that they consist of the evidence of lawyers, not witnesses; however, it is considered there are advantages to their use as well, such as promoting settlement. It is generally agreed that oral evidence is useful when the credibility of a witness is at issue.

5. Some organisations support the use of will-say statements, with cautions on their content and use at trial; some parties consider will-say statements may suffer similar shortcomings to written briefs.

6. Most organisations support early involvement of the trial Judge at conference to allow directions relating to mode of evidence that are tailored to the issues.

Summary of each organisation's comments

7. Please find below a broad overview of each organisation's submission.

New Zealand Law Society

8. The Society's Civil Litigation and Tribunals Committee considers that the High Court Rules provide adequate scope for tailoring of evidence in chief and does not support the move to a system of oral evidence in chief as the default position. Accordingly the committee does not support the proposal put forward by the Rules Committee.

9. The committee is of the view that there is no need for any change to the current system of exchanging written briefs. The committee does not believe that the

exchange of written briefs adds significantly to costs. Briefs at trial save a considerable amount of time. Oral examination in chief is generally an inefficient way of illustrating an accurate sequence of events. Exchanging briefs leads to a better understanding of the case, and contributes to the likelihood of settlement.

10. The committee believes that the concern is overstated that written briefs generally contain the words of the lawyer rather than the witness. Cases where actual words of the witness are vital to a decision are only a small minority. In the majority of cases, a statement is likely to assist rather than hinder the judicial process. Clients often do not have the skills to communicate effectively.

11. Written briefs enable cross-examination to be focused and limited. Without briefs, the opportunity for ambush is greater and more wide-ranging cross-examination is inevitable.

12. The committee accepts it may be beneficial to have the involvement of the trial Judge at a conference to allow tailored directions relating to evidence. It considers, however, that this may be counter-productive unless the same Judge presides at the trial. It would be wrong for a pre-trial conference to be held too early in the proceedings as the issues relevant at trial are likely to be different from those identified at an early pre-trial conference.

13. The committee does not support an extension of the use of will-say statements. They are useful in part because they are privileged. If there is a possibility of further reference to them at a later stage, it is likely they will become de facto briefs, leading to no cost savings. The sealed envelope proposal also leads to undesirable uncertainty as to what status the will-say statements might finally occupy.

Auckland District Law Society

14. Summary

    a. The ADLS Courts Committee supports relaxation of the current prescriptive regime, so as to promote greater flexibility suited to the particular circumstances of each case.

    b. In some cases the preparation and exchange of briefs of evidence (even in will-say form) is an important step towards refining issues and for settlement initiatives.

    c. There can be disadvantages in leaving until the final pre-trial conference the question of how and when evidence should be exchanged. This submission recommends that this should be an issue covered at the second case management conference, and revisited at the pre-trial conference.

    d. The committee concurs in the view that the current written briefs procedure results in inadequate consideration being given to the issues and the evidence at an early stage. The committee therefore supports the proposal for an early pre-trial conference provided that the presiding judicial officer has adequate time to focus on those issues.

15. Will-say statements

a. The committee generally supports the concept of will-say statements, but is concerned that it should not develop into a hybrid which sees the disadvantages retained while the advantages are lost.

b. A will-say statement must be such as to fairly inform the other party of the substance of the witness' evidence and in such detail as will avoid the other party or its witnesses being taken by surprise at the hearing.

c. It would not be appropriate to cross-examine a witness on a previous inconsistent statement in the case of will-say statements.

d. Judges will have an important role in promoting the use of will-say statements without elevating them to a standard equivalent to the present witness statement. There may need to be clear guidelines by way of a Practice Note as to the use of will-say statements.

16. Order of case management directions concerning evidence

a. The current default regime which requires written briefs to be exchanged within a certain time after setting down is unrealistic. However, it is helpful to have an exchange before the final pre-trial conference. A possible solution would be that the usual provision is for will-say statements to be exchanged prior to the pre-trial conference.

17. Bundle of documents

a. Having a bundle of documents available at the pre-trial state would assist counsel and the Court to focus on the issues and may help promote settlement at an early state.

New Zealand Bar Association

18. There is a divergence of views within the Council and wider NZBA membership.

19. Will-say statements

a. The proposal for more widespread use of will-say statements calls for careful consideration because of concerns about a lack of integrity in the process which is perceived to be a likely consequence if the will-say statement is not admissible at trial (and there is strong opposition to these statements being admissible).

b. There is also a view held by some that these statements will attract their own difficulties and suffer similar shortcomings as the existing regime.

20. Any consideration of the respective merits of written and oral evidence needs to give equal weight to the implications for both settlement and trial. Written briefs assist settlement by enabling a properly informed consideration of trial risk. On the other hand, there is support for the contrary view that the cost of preparing written briefs prior to mediation is often a serious obstacle to settlement.

21. Greatest support seems to be for closer consideration of the appropriate mode of giving evidence, but with the retention of signed written briefs even where all or part of the evidence is to be given *viva voce*.

22. There is some support for the retention of the status quo, but with a greater use of the judicial discretion conferred by the existing rules, combined with a serious effort to address the problems identified in the consultation paper.

23. There is little support for a return to all evidence routinely being given by oral testimony. Reinstating oral evidence is no guarantee that trial lengths will be considerably shorter. In complex cases, the leading of *viva voce* evidence and cross-examination risks being longer with the absence of written briefs.

24. It would be desirable to have specific consideration of the mode of evidence prior to trial. Judicial insistence on proper pleadings and well-informed counsel will be essential. Likewise, the process would be enhanced by the involvement of the trial Judge at this conference.

25. There is a consensus that the present rule adds costs. However, removing the rule will not remove the need to prepare a brief in some form. At least in more complex cases, the time difference is likely to be marginal in the overall cost of the litigation.

26. The concern that the briefs are the evidence of lawyers, not the witnesses, finds virtually unanimous acceptance.

27. Unless written briefs are abolished entirely, with all evidence to be *viva voce*, a course that is not supported, the issues regarding the quality of written briefs has to be addressed irrespective of the decisions taken on the principal issues raised in the consultation paper. This is an educational issues and a responsibility on the judiciary to insist that evidence is properly admissible and to intervene in a timely way when it is not. One suggestion is the use of senior practitioners to deal with these issues.

28. Regarding cross-examination, written briefs do that the potential to enable more carefully focused and prepared cross-examination which is ultimately more efficient than cross-examining without precise knowledge as to what the evidence will be. A return to oral testimony might lead to a much greater reliance on interrogatories. This would bring its won costs and delays.

29. Support for retention of written briefs arises in part because members believe they assist settlement by allowing lawyer rand client to make a well-informed assessment of risk.

30. There is a contrary view that because mediation is now the dominant method of settling cases, a focus on the legal merits of disputes is no longer of central importance. This school of thought favours the proposal in the consultation paper, namely that only will-say statements need to be prepared prior to mediation because this will reduce the front-end loading of costs. However, against this is a view that courts should require properly prepared written briefs for mediation. The Council considers it likely that the majority of its members believe briefs of evidence assist settlement, and it should be up to the parties whether they require briefs or will-say statements, or nothing at all, for mediation.

31. The timing proposed for the pre-trial conference seems sensible. Anything which assists a greater focus on the identification of trial issues and the mode of evidence ahs the potential to assist the efficiency of the trial itself.

32. In conclusion, there is a divergence of views. The Council doubts that abolition of the rule will remedy the problem. It may be better to have a combination of an early pre-trial conference, identification at that conference of the areas of evidence to be

covered, judicial discretion whether to dispense with written briefs (maybe in favour of will-say statements e.g. where credibility or reliability is in issue), greater intervention where written briefs contain submissions, irrelevant evidence, and the deferral of provision of written briefs until after a judicial settlement, may be a better option than abolition of written briefs.

Alan Galbraith QC

33. Mr Galbraith QC supports the proposed rule change for the reasons set out in the consultation paper.

34. In his experience written briefs have been the principal factor adding unnecessary and unsustainable costs to litigation.

35. Written briefs obscure evidence by substituting for the witness' own words and recollections the words of the drafting lawyers usually derived from documents. That is disadvantageous to the honest lay witness who knows his subject but has no skills in the written word or in reading some lawyer's written words.

36. Written briefs do not encourage a focus on the core facts, as oral evidence necessarily must. Written briefs invite unnecessary cross-examination and added time and cost.

37. Written briefs generally pay no regard to the rules of evidence. This also means that counsel are becoming less competent at cross-examining because they no longer lead evidence.

38. Will-say statements:

    a. Should fairly summarise the essence of what the witness will say so that the other party is not taken by surprise on a matter of substance.

    b. Should be as brief as is practicable and judges should enforce that brevity.

39. The presumption should favour oral evidence. Written brief or part written brief should be the exception, not the norm.

James Farmer QC

40. Mr Farmer QC supports the proposals in the consultation paper on written briefs.

41. Will-say statements

    a. He considers that will-say statements should not be able to be referred to at trial in any circumstances. Counsel's ethical obligations should be adequate to discourage lawyers from putting forward deliberately false written statements. The relevant witness should sign the statement as a safeguard.

    b. Will-say statements are probably only appropriate in relation to a settlement conference. So as not to add to the problem of front-end cost loading, they need to be kept short.

42. There should be a discretion as to some use of written briefs to deal with matters of formal proof; however it should be clear that the norm at trial will be oral evidence on crucial factual issues and contentious matters.

Justice Hansen – Legal Issues Centre, Otago University

43. Written briefs were introduced to address a problem creating significant difficulties at trial, that the failure to exchange briefs of evidence before trial was unfair to the parties. If changes are made, it is critical to ensure that opposing parties are fully aware in advance of the case and the evidence they will face at trial.

44. Critical documents to be relied on by a party and the will-say statement of the critical witnesses should be filed with the pleadings.

45. The timeline set out in the appendix after the first case management conference should be tightened up and there should be very specific time frames. There needs to be significant incentives for practitioners to comply with any timelines proposed and significant and serious penalties for breach.

Graham Kohler

46. The introduction of briefs of evidence was intended to eliminate trial by ambush, speed up litigation, and promote earlier settlements. The advantages that were to come from briefs of evidence have not been achieved to the extent suggested. Basic changes are needed to written briefs. However, complete elimination is not necessary.

47. The brief system considerably reduces the filter on inadmissible and irrelevant evidence. It is also a problem that witnesses feel the need to stick to the 'script'.

48. Practitioners preparing briefs are not experienced in leading evidence and this problem will only increase over time if briefs remain the predominant method of giving evidence.

49. Cost has considerably increased with written briefs. The cost of briefing witnesses itself is considerable. With briefs every issue tends to be gone into. As a consequence trials have become longer and more expensive.

50. Mr Kohler does not consider that written briefs promote settlement. The high costs of parties who have prepared briefs can act as an impediment to settlement.

51. There are some cases where full or limited briefs are very useful. Mr Kohler supports reversing the default position so that briefs are only ordered when they are necessary.

52. The major concern that needs to be addressed is 'trial by ambush'. Whilst there are inherent problems with will-say statements as well, the requirement to provide will-say statements does address to a significant extent the major mischief that briefs were designed to deal with, namely 'trial by ambush'. They will be cheaper to produce and much more limited in scope.

C S Henry

53. Written briefs can no loner be said to save time, as oral evidence can now be given at normal speaking pace.

54. Written briefs should be used on a case by case basis, depending on the nature of the issues and the witnesses, a determination which should be made after the issues are fleshed out, in a pre-trial conference.

55. Mr Henry supports the proposal that a pre-trial conference be held within 20 days of an unsuccessful settlement conference or of setting down. Uncontroversial evidence and expert testimony may be presented by written briefs.

56. It would be preferable if a judge could be assigned to each matter from very early in the piece, to take it through to trial. Both counsel should be provided with the opportunity to object to a particular judge before the assignment becomes final.

Les Taylor

57. Mr Taylor had comments on the evidence of fact witnesses. He agrees that the use of written briefs for expert witnesses should be retained.

58. The problem with briefs being in lawyers' language rather than the language of the witness is really only significant when there are real credibility issues and/or direct conflicts in the evidence as to what has been said by witnesses.

59. He is not convinced that dispensing with written briefs would significantly reduce cost. In practice, when preparing evidence of a witness something similar to a brief is likely to be prepared and discussed in detail with the potential witness. That is particularly so in commercial cases which often involve a large number of documents and events over periods of years.

60. The problem of extensive and pedantic cross-examination could be met by more rigorous judicial indications that such cross-examination is not helpful to the Court.

61. The current requirement for exchanging briefs has several advantages: properly prepared briefs ensure that what is being said to the Court is not incorrect or misleading; briefs are useful where there are a large number of documents and events of a period of years; briefs may assist settlement; and briefs encourage assessment of the strengths and weaknesses of the case.

62. Oral evidence is useful where there are clear conflicts between witnesses (and/pr credibility issues). Application should be made after the briefs have been exchanged and the existence of such conflicts identified.

63. In the absence of exchange of written briefs, Mr Taylor does not believe will-say statements will be sufficient. He considers it inevitable that over time will-say statements will turn into written briefs or something very close to them. In addition, preparing will-say statements is likely to be just as time consuming and costly as the current requirement for preparing full witness briefs.

64. If a decision is made to dispense with exchange of written briefs, the best course is to remove any pre-trial requirement of exchange of evidence and return to the previous system of leading the evidence *viva voce*.

65. Mr Taylor's preference is to retain the current system of requiring exchanges of briefs of evidence before trial, but make it easier to deal with applications to have some evidence led *viva voce* in cases where there are direct conflicts of fact on the evidence and/or issues of credibility.

‘C’

Part 9

Evidence Directions

Subpart 1

9.1 Directions as to method of giving evidence

(1) At a trial directions conference for a proceeding the presiding Judge must make an order giving directions as to the most appropriate method of giving evidence in the proceeding.

(2) The Judge may direct that evidence be given:

(a) By brief under rule 9.2;

(b) Orally under rule 9.2;

(c) By affidavit under rule 9.56;

(d) By will-say statement under rule 9.4;

(e) By an agreed statement of facts under rule 9.57;

(f) By production of statements or documents by consent; or

(g) By any combination of these methods.

(3) Despite rules 9.1(1) and (2), this sub-part does not apply to proceedings on the swift track or to a proceeding where these rules require evidence to be given by affidavit.

(4) In this part, **brief** means a written statement of the evidence of a witness.

9.2 Briefs and oral evidence

(1) A Judge may direct that the evidence of a witness be given by written brief or orally or a combination of both.

(2) In making an evidence direction under this Rule the Judge must be guided by:

(a) the principle that evidence by way of brief is not normally appropriate for matters of disputed fact:

(b) the principle that oral evidence should normally be required on any matter which it is known will raise a question of the credibility or the reliability of the witness:

(c) the principle that evidence should normally be given by way of brief if it is evidence:

(i) of background or of historical detail; or

(ii) that is formal in nature and likely to be accepted by the other parties as true; or

(iii) that merely introduces or explains accounts or documents; or

(iv) that would occupy a disproportionate amount of the court’s time if given orally; or

(v) that all the parties agree may be admitted in evidence without calling the witness.

(d) the principle that the evidence in chief of an expert witness should normally be given by way of brief.

9.2A Variation of evidence orders

A Judge may vary an evidence order if it is appropriate to do so in the interests of justice.

9.3 Will-say statements

In this rule and in rules 9.1, 9.4 and 9.5 a **will-say statement** means a statement conveying the substance of what the party offering a witness intends or expects the witness to say in his or her evidence at the trial or hearing, without the detail required for a brief.

9.4 Procedure in respect of will-say statements

(1) If a party is directed to adduce the evidence of a witness by way of oral evidence, that party must serve the other parties with a will-say statement for that witness.

(2) Any will-say statements prepared by a party must be served on other parties at the same time as the first brief of any witness is required to be served under rule 9.7 or rule 9.8 (or would be required to be served if either rule applied).

(3) The evidence of a witness for whom no brief or will-say statement has been served is inadmissible unless the Judge, for special reasons, permits it to be given.

9.5 Will-say statements not generally admissible

(1) Subject to subclause (2), a will say statement is inadmissible at the trial or hearing of a proceeding and may not be referred to.

(2) If a party satisfies the Judge that the oral evidence of a witness is:

(a) Wholly or in significant part, fundamentally different from his or her will-say statement (which may be examined for this limited purpose); and

(b) The difference has prejudiced the party;

the Judge may make whatever order justice requires, including—

(a) an order that the oral evidence of the witness be excluded:

(b) an order adjourning the trial or hearing:

(c) an order for costs against the party offering the oral evidence of the witness.

9.6 Rules relating to briefs

Rules 9.7 to 9.16 apply to a proceeding when an evidence direction under rule 9.2 directs that the evidence in chief of a witness or witnesses must be given wholly or partly in a brief.

9.7 Service by plaintiff of briefs

(1) The plaintiff or other party responsible for serving the first briefs in a proceeding must, not later than the specified date, serve on every other party who has given an address for service a brief of the evidence in chief of each witness to be offered by the plaintiff or that party and whose evidence must be contained in a brief in accordance with rule 9.6.

(2) For the purposes of subclause (1), the **specified date** is—

(a) the date fixed by the court for the purpose; or

(b) if no date is fixed, 15 working days after the setting down date.

Compare: 1908 No 89 Schedule 2 r 9.2

9.8 Service by other parties of briefs of evidence in chief

If a party who has been served with a brief under rule 9.7 wishes to offer evidence that has been

directed to be given by way of brief, the party must, not later than 15 working days after the date on which the party was served with that brief, serve on every other party who has given an address for service a brief of the evidence in chief of each witness to be called by the party.

Compare: 1908 No 89 Schedule 2 r 9.3

9.9 Supplementary briefs

(1) A party to a proceeding who wishes to offer new or further evidence after a brief has been served on that party under rule 9.7 or 9.8 (not being evidence in response to any matter contained in that brief) may serve on every other party who has given an address for service a supplementary brief.

(2) A supplementary brief served under subclause (1) must be served as soon as possible after the party wishing to offer the new or further evidence becomes aware of its existence or its relevance.

(3) The evidence contained in a supplementary brief served under this rule may be offered as evidence only with the leave of the court.

Compare: 1908 No 89 Schedule 2 r 9.5

9.10 Requirements in relation to briefs

A brief served under rule 9.7, 9.8, or 9.9—

(a) must be signed by the witness by whom the brief is made; and

(b) must not contain evidence that is inadmissible in the proceeding.

(c) must not repeat the contents of documents produced or referred to.

Compare: 1908 No 89 Schedule 2 r 9.4

9.11 Evidence in chief at trial

(1) A brief signed by a witness that has been served under rule 9.7 or 9.8, together with any supplementary brief that may be offered under rule 9.9,—

(a) must, unless the trial Judge otherwise directs, be read by the witness at the trial as the witness's evidence in chief; and

(b) is, when read by the witness at the trial, the evidence in chief given by the witness at the trial; and

(c) must, after being read by the witness at the trial, be endorsed by or on behalf of the Registrar with the words "Given in evidence on [*date*]".

(2) The endorsement made under subclause (1)(c) must be signed and dated by or on behalf of the Registrar.

Compare: 1908 No 89 Schedule 2 r 9.6

9.12 Oral evidence in chief generally not permissible

(1) When the evidence of a person has been directed to be given wholly by way of a brief, the oral evidence in chief of that person (whether or not a brief of that person's evidence has been served) may be offered at the trial only if that oral evidence—

(a) is in response to evidence offered by another party; or

(b) is offered with the leave of the trial Judge.

(2) Leave may be granted only if—

(a) the evidence relates to matters contained in a brief that has been served and is required to explain, elaborate, or otherwise clarify those matters; or

(b) the evidence relates to evidence in response to matters contained in a brief that has been served; or

(c) the evidence relates to new or further matters that could not reasonably have been included in the witness's brief or a supplementary brief; or

(d) the admission of the evidence is required in the interests of justice; or

(e) every party to the proceeding who is represented at the hearing consents.

Compare: 1908 No 89 Schedule 2 r 9.7

9.13 References to briefs not given in evidence

If, by the time that a party opens the party's case, the brief of another party's witness has not been given in evidence, the party may, in opening, refer to that brief only with the leave of the trial Judge.

Compare: 1908 No 89 Schedule 2 r 9.8

9.14 Cross-examination in relation to briefs not given in evidence

(1) When any part of the evidence contained in a brief served under rule 9.7, 9.8 or 9.10 is not given in evidence at the trial by the person who signed the brief, any other party to the proceeding may, unless the trial Judge otherwise directs, put that part of the statement to that person in cross-examination.

(2) When a brief served under rule 9.7, 9.8 or 9.10, or any part of the brief, has not been given in evidence, any party may, with the leave of the trial Judge, put that brief or that part of it to any witness in cross-examination.

Compare: 1908 No 89 Schedule 2 r 9.9

9.15 Privilege and admissibility not affected by briefs

Nothing in rules 9.6 to 9.14—

(a) deprives any party of that party's right to treat any communication as privileged; or

(b) changes inadmissible evidence into admissible evidence; or

(c) changes admissible evidence into inadmissible evidence; or

(d) deprives any party of that party's right to cross-examine any party to a proceeding on a brief, served under these rules, that is inconsistent with a statement previously made by that party; or

(e) allows a brief, served under these rules, to be made available, before it is given in evidence, for use for another purpose or proceeding.

Compare: 1908 No 89 Schedule 2 r 9.10

9.16 Cross-examination duties

The exchange of briefs under this subpart does not affect the cross-examination duties referred to in section 92 of the Evidence Act 2006.

Compare: 1908 No 89 Schedule 2 r 9.11

9.16A Exchange of indexes of documents intended for hearing

(1) A party who wishes to rely on documents at a trial or hearing must refer to those documents in an index and serve that index on every other party to the proceeding at the same time that the

party serves briefs of evidence under these rules.

(2) An index served by a party under subclause (1) must include only documents that—

(a) will be referred to in evidence to be given, or submissions to be made, at the trial or hearing; and

(b) are not already included in any index previously served under this rule on the party by another party.

Compare: 1908 No 89 Schedule 2 r 9.12

9.16B Bundle of documents for hearing to be prepared and filed

(1) After the expiry of the period of 15 working days specified in rule 9.8, the plaintiff must prepare a bundle of documents (in this rule and in rules 9.16C and 9.16D referred to as the **common bundle**) that contains every document referred to in—

(a) the index served by the plaintiff under rule 9.16A; and

(b) each index (if any) served by another party under that rule.

(2) In preparing the common bundle, the plaintiff must—

(a) set out the documents in chronological order or any other appropriate order agreed on by counsel; and

(b) number each page of the common bundle in consecutive order; and

(c) set out before the first document an index that shows—

(i) the date and nature of each document; and

(ii) the party from whose custody each document has been produced; and

(iii) the page number of each document as it appears in the common bundle.

(3) The plaintiff must, not later than 5 working days before the hearing,—

(a) file 2 copies of the common bundle in the court; and

(b) serve 1 copy of the common bundle on every party to the proceeding.

Compare: 1908 No 89 Schedule 2 r 9.13

9.16C Consequences of incorporating document in common bundle

(1) Each document contained in the common bundle is, unless the court otherwise directs, to be considered—

(a) to be admissible; and

(b) to be accurately described in the index to the bundle; and

(c) to be what it appears to be; and

(d) to have been signed by any apparent signatory; and

(e) to have been sent by any apparent author and to have been received by any apparent addressee; and

(f) to have been produced by the party indicated in the index to the common bundle.

(2) If a party objects to the admissibility of a document included in the common bundle or to the application of any of paragraphs (b) to (f) of subclause (1) to a document, the objection must be—

(a) recorded in the common bundle; and

(b) determined by the court at the trial or hearing or at any prior time that the court directs.

(3) The fact that a document has been included in the common bundle is not relevant to the determination, under subclause (2), of an objection that relates to the document.

(4) A document in the common bundle is received into evidence when a witness refers to it in evidence or when counsel refers to in submissions (made otherwise than in a closing address).

(5) A document in the common bundle may not be received in evidence except under subclause (4).

(6) The court may direct that any provision of this rule is not to apply to a particular document.

Compare: 1908 No 89 Schedule 2 r 9.14

9.16D Consequence of not incorporating document in common bundle

A document that is not incorporated in the common bundle may be produced at the trial or hearing only with the leave of the court.

Compare: 1908 No 89 Schedule 2 r 9.15

9.16E Plaintiff's synopsis of opening and chronology

The plaintiff must, not later than 2 working days before the hearing, file in the court and serve on every other party to the proceeding—

(a) a copy of the plaintiff's opening; and

(b) a chronology of the material events that form part of the plaintiff's evidence.

Compare: 1908 No 89 Schedule 2 r 9.16

Delete rule 7.3 and substitute:

7.3 Case management and trial directions conferences for proceedings on standard track

(1) Unless the court otherwise directs, the following provisions apply to a proceeding on the standard track:

(a) a first case management conference must be held within 35 working days after the commencement of the proceeding:

(b) a second case management conference must be held within 75 working days after the commencement of the proceeding:

(c) a trial directions conference must be held on a date fixed under subclauses (5) and (6).

(2) After the commencement of a proceeding on the standard track,—

(a) the Registrar must make arrangements for a case management conference to be held in accordance with subclause (1)(a); and

(b) the plaintiff must, as soon as practicable after being notified of the date of the case management conference, give notice of that date to every other party.

(3) The Registrar must make arrangements to ensure that, within 25 working days after a proceeding is moved to the standard track from the swift track, a case management conference is held for the proceeding.

(4) Unless the court otherwise directs, the first case management conference that is held for a proceeding must be conducted by telephone or video link.

(5) At the second case management conference, the presiding Judge or Associate Judge must—

(a) issue directions for the trial (other than the directions which will be given in an evidence order under rule 9.2); and

(b) fix a date for the holding of the trial directions conference, or direct the Registrar to do so:

(c) fix the setting down date under rule 7.13:

(d) record the estimated time for the duration of the trial.

(6) The trial directions conference must be held on a date which is—

(a) before the setting down date; and

(b) as soon as possible after any settlement conference under rule 7.79 has concluded without success.

(7) The Registrar must—

(a) make arrangements for the trial directions conference to be held; and

(b) at least 10 working days before the date fixed for the trial directions conference, remind the parties or their counsel of that date.

(8) At the trial directions conference the parties must be prepared to discuss with the presiding Judge the matters listed in Schedule 8.

(9) Counsel for the plaintiff must file and serve, 6 working days before the trial directions conference, a memorandum addressing each of the items in Schedule 8, and counsel for the other party or parties must file and serve such a memorandum at least 2 working days before that conference.

(10) Despite subclause (9) counsel for the parties may file a joint memorandum.

Delete Schedule 8 and substitute:

Schedule 8

r 7.3(8)

Matters for consideration at trial directions conference for proceedings on standard track

The agenda for each trial directions conference must include—

(a) a review of timetable compliance; and

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

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

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

(e) the making of an evidence order under rule 9.2:

(f) the possible direction of a conference of expert witnesses under rule 9.44:

(g) in relation to openings—

  (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

(h) the format of a bundle of documents;

(i) any other issues raised by a party that should be dealt with before the trial; and

(j) any other directions that may be needed concerning the general conduct of the trial.

‘D’

Change to rule 9.1:

Delete present rule 9.1(1) and substitute:

(1) The evidence in chief of witnesses in a proceeding must be given in accordance with this subpart.

9.4 Requirements in relation to briefs

(1) A brief served under rule 9.2, 9.3, or 9.5—

(a) must be signed by the witness by whom the brief is made;

(b) must be in the words of the witness and not in the words of the lawyer involved in drafting the brief;

(c) must not contain evidence that is inadmissible in the proceeding;

(d) must not contain any material in the nature of a submission;

(e) must avoid repetition;

(f) must avoid the recital of the contents or a summary of documents which are to be produced in any event;

(g) must be confined to the matters in issue.

(2) If the written brief does not comply with these requirements the Court, prior to or during the trial, may direct that it not be read in whole or in part, and may make such order as to costs as the Court sees fit.

‘E’

9.6 Evidence in chief at trial

(1) A brief signed by a witness that has been served under rule 9.2 or 9.3, together with any supplementary brief that may be offered under rule 9.5,—

(a) must, unless and to the extent the trial Judge otherwise directs, be read by the witness at the trial as the witness's evidence in chief; and

(b) is, when read by the witness at the trial, the evidence in chief given by the witness at the trial; and

(c) must, after being read by the witness at the trial, be endorsed by or on behalf of the Registrar with the words “Given in evidence on [date]”.

(2) Any portion of the written brief which the Judge has directed be given orally under r 9.6A, does not form part of the evidence-in-chief of the witness, but the witness may be cross-examined thereon.

(3) The endorsement made under subclause (1)(c) must be signed and dated by or on behalf of the Registrar.

9.6A Oral evidence directions

(1) In the memorandum prepared for a pre-trial conference, or if there is no pre-trial conference then at the commencement of the trial, counsel must identify any disputed issues of fact or the credibility of witnesses and the evidence in the briefs relating to any such issues.

(2) The trial Judge may at any pre-trial conference, or if there is no pre-trial conference then prior to the giving of evidence, direct that evidence be given orally if it relates to disputed matters of fact or there is an issue as to the credibility of the witness.

9.7 Oral evidence in chief

(1) Oral evidence in chief of any person (whether or not a brief of that person's evidence has been served) may be offered at the trial only if that oral evidence—

(a) is in response to evidence offered by another party;

(b) is directed to be given orally under r 9.6A; or

(c) is offered with the leave of the trial Judge.

(2) Leave may be granted under sub-rule 1(c) only if—

(a) the evidence relates to matters contained in a brief that has been served and is required to explain, elaborate, or otherwise clarify those matters; or

(b) the evidence relates to evidence in response to matters contained in a brief that has been served; or

(c) the evidence relates to new or further matters that could not reasonably have been included in the witness's brief or a supplementary brief; or

(d) the admission of the evidence is required in the interests of justice; or

(e) every party to the proceeding who is represented at the hearing consents.

New Schedule 8

Add:

(e) Identification of disputed matters of fact or credibility issues for the purposes of determining what evidence should be given orally.

Consequentially re letter (e) as (f), (f) as (g) and (g) as (h).