



13 March 2009

Sophie Klinger
Clerk to the Rules Committee
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By email: Sophie.Klinger@justice.govt.nz

Dear Sophie

Case Management – Written Briefs

Thank you for the opportunity to comment on the Rules Committee's consultation paper *Case management – written briefs*. The Society's Civil Litigation and Tribunals Committee is of the view that there is no need for any change to the current system of exchanging written briefs.

The committee is aware that High Court Judges are concerned that written briefs are an expensive branch of the legal process, and that over-reliance on written briefs may erode the benefits of oral evidence in chief.

The committee does not believe that the exchange of written briefs adds significantly to costs. In any civil case, diligent counsel will ensure that full written briefs are prepared for each witness regardless of whether briefs are exchanged. The exchanging of those briefs in advance of trial leads to a better understanding of the case, and contributes to the likelihood of settlement.

Where briefs are provided in advance, the Court may dispense with the reading of briefs altogether. Even where briefs are read in full, reading the briefs at trial saves a considerable amount of time, and ensures that the factual situation is presented in a coherent way. Oral examination in chief is generally an inefficient way of illustrating an accurate sequence of events.

The committee acknowledges the concern that written briefs generally contain the words of the lawyer rather than the witness, and may assist a dishonest witness to hide behind another's words. The committee believes that this concern is overstated. Cases where actual words of the witness are vital to a decision are only a small minority, and in those cases it is always possible for the Judge to give directions regarding the giving of oral evidence.

For the majority of cases, a clear, well-organised statement is likely to assist rather than hinder the judicial process. Clients often do not have the skills to communicate effectively, and the input from lawyers aids the fact-finding process.

Written briefs enable cross-examination to be focused properly, and limited to the matters that are in issue. The Court is able to assess for itself where the critical issues lie, and to control the trial process more effectively. In the absence of briefs, the opportunity for ambush is greater, and looser, more wide-ranging cross-examination is inevitable.

The committee accepts that 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 it can be guaranteed that the same Judge will preside at the trial. Judicial styles vary considerably, and directions given by one Judge may be ignored by another. It would be wrong for a pre-trial conference to be held too early in the proceedings. Civil litigation is an evolving process, and the issues that are ultimately regarded as relevant at trial are likely to be different from those identified at an early pre-trial conference.

The committee does not support an extension of the use of “will say” statements. They are useful in the context of a settlement conference, partly because they are privileged. If there is a possibility of further reference to them at a later stage, in the spectre of cross-examination on previous inconsistent statements, it is likely that they will become de facto briefs in any event, 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.

The committee considers that the High Court Rules provide adequate scope for tailoring of evidence in chief, and that the few cases where oral testimony is vital can be dealt with appropriately. It would be a retrogressive step to return 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.

The committee hopes that the above comments are of assistance. If you wish to discuss this further please contact the committee secretary, Rhyn Visser phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Andrew Beck', with a stylized flourish at the end.

Andrew Beck
Convener, Civil Litigation & Tribunals Committee