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Caroline Anderson
Clerk to the Rules Committee
Auckland High Court
PO Box 60
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By email: caroline.anderson@justice.govt.nz

Dear Caroline

Representation of companies in court

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on Justice Chambers' proposal to revisit the rule in *Re G J Mannix Limited* [1984] 1 NZLR 309 (CA), that companies must be represented in court by lawyers.

Justice Chambers bases his proposal on international practice, as researched by his clerk Anthony Wicks. The draft rules would allow a company that is a party to a proceeding to apply for leave to file pleadings by an authorised agent (without a solicitor on the record). They would also allow a company to apply for an "authorised advocate" of the company to appear at the trial or hearing of the proceeding, or in any interlocutory application. The Judge to whom such an application is made would be required to grant it except in limited, defined circumstances.

Anthony Wicks' memoranda focus on the common law position in New Zealand but do not address relevant statutory provisions, in particular those in the Lawyers and Conveyancers Act (LCA).

Representing another person in proceedings is a "reserved area of work" in terms of s6 of the LCA, that is, it is reserved to lawyers. To give effect to Justice Chambers' proposal would involve either reliance on s 27(1)(a) (based on a fiction that a company representative representing a company is a litigant in person) or use of s 27(1)(b) (allowing appearance or representation by a non-lawyer if that is allowed or required by any Act or regulations, or by the court or tribunal).

The Law Society considers that significant issues arise out of the proposal. In particular:

- A company is not a natural person and cannot, therefore, be a "litigant in person". The fundamental rights of access to justice for individuals were never designed to secure representation for artificial persons by unqualified agents;
- While there may be an issue about access to justice in respect of some small, one-man-band companies without financial resources, the same does not apply to larger companies or to thriving small ones. The proper vehicle to address a lack of resources is the legal aid scheme;
- Litigants in person already cause substantial difficulty and delay in the court system. Their conduct is not regulated other than by the court itself. Extending rights of audience would inevitably exacerbate the problem, and would place a considerable burden on the judiciary and the court system. The interests of justice include the public interest in the effective, efficient and expeditious disposal of litigation;

- The rule in *Mannix* is reinforced by the benefit of courts being served by lawyers who are officers of the High Court. Lawyers are regulated, are subject to a disciplinary regime, and are trained advocates. It seems ironic that this proposal should be made at the very time lawyers are being subjected to stronger regulation, by way of emphasis on continuing professional development, increased training for those (including barristers) who wishing to start practising on own account, and an enhanced complaints and disciplinary regime;
- One unintended result of the change proposed could well be a proliferation of "legal advisers" without practising certificates employed by companies. Those people, even if legally qualified, would be unregulated and not subject to the Rules of Conduct and Client Care. They would effectively be able to circumvent the provisions of the Lawyers and Conveyancers Act 2006. Care needs to be taken to avoid prejudice to the interests of other parties to litigation, especially those who have taken the responsible step of instructing counsel. Where a company acts through an unqualified representative, any savings would probably be surpassed by the additional costs imposed on the other party.

It would seem that the overseas examples referred to as supporting the current proposal are themselves much more limited in their application. By way of example:

- The English Civil Procedure Rules 1998 provide that, in deciding whether to grant permission for a company or corporation to represent itself as a litigant in person, the matters to be taken into account include the complexity of the issues and the experience and position in the company or corporation of the proposed representative. Neither "complexity" nor "experience" are criteria in the draft rules presented to the Rules Committee;
- In Scotland the Court of Session has recognised that there may be exceptional circumstances where a company may be represented by a non-lawyer;
- In Canada there seems to be a limited number of "special circumstances" exceptions to the general rule that representation must be by a lawyer, the exception being in Manitoba and Nova Scotia, which permit corporate parties to appoint agents;
- In Australia, the situation varies between states, but the general position seems to be that companies may appear without legal representation only in limited circumstances and subject to judicial discretion.

It is our view that *Re Mannix* is as applicable today as it was when the case was decided. The policy considerations endorsed in *Re Mannix* are even more relevant to modern times and the rigours imposed by the effective management of litigation. While other jurisdictions have legislation, there does not appear to have been any call for the rule to be relaxed in the manner suggested in the proposal.

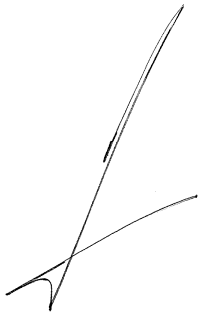
Allowing a company to represent itself as of right in Court proceedings would create an imbalance between parties as there would be no consistency of ethical and professional obligations. The controls in place to ensure a fair hearing would be at the mercy of the company representative's understanding of court procedure and confidentiality.

The Law Society considers that the interests of justice outweigh any potential unfairness to a small one-person company. The wider public interest in ensuring the effective, efficient and expeditious disposal of litigation outweighs the practical problem of assisting under-resourced litigants. To the extent that there is a significant issue regarding under-resourced companies, consideration should be given to adjusting the legal aid regime.

In short, the proposal as put forward is much wider than, and lacks the proper safeguards of, the more limited provisions in place in some other jurisdictions. If it is to proceed, then it should not be by way of the rule-making power. It is a matter that should be addressed by Parliament with full debate and appropriate protections and limitations.

The Law Society hopes that the above comments are of assistance to the Rules Committee. If you wish to discuss any matters raised in this letter please contact the Civil Litigation and Tribunals Committee convener, Andrew Beck, through the Civil Litigation and Tribunals Committee secretary, Rhyn Visser (phone (04) 463 2962 or email rhyn.visser@lawsociety.org.nz.

Yours sincerely



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