

is becoming an increasing focus of the NZBA and members will be aware from the website of the extensive programme being developed by our Training Committee.


Recent Submissions and Consultations

The Council, Criminal and Law Reform Committees as well as a number of members who work in the family jurisdiction have assisted in recent consultations and submissions including:

- Ministry of Justice consultation on proposed changes to the legal aid audit and complaints procedures;
- Submissions and appearance in the Court of Appeal on *R v Clode* review;
- Submissions to the Rules Committee on persons in custody who attend sentencing by AVL link;

- Ministry of Justice consultation on domestic violence;
- Submissions to the Rules Committee on access Court documents in civil and criminal proceedings;
- Representations to the Law Commission on the national security information in evidence in proceedings;
- Submissions to the Minister of Housing on amendments to the Construction Contracts Act; and
- Dealings with the Ministry of Justice on the extensive Courts Modernisation Bill.

Obituaries

Our sympathies go to the family and friends of the late Sir Thomas Gault QC, Sir Peter Williams QC and John Marshall QC. 

The New Intervention Rule

Because of the importance of the intervention rule for members, the NZBA has provided the following article for their information. This is not a substitute for reading and familiarising oneself with the relevant Rules. The NZBA thanks in particular three former members of the Bar Council, Chris Gudsell QC, Stephen Mills QC and Miriam Dean QC, for the sterling work put into this project over the years and for their contributions and review of this article.

Following an extensive consultation and review process, on 1 July 2015 the long awaited changes to the intervention rule comes into effect. From that date, barristers are able to apply to the Law Society for approval to take direct instructions in certain situations.

The rule continues to recognise the essential distinguishing feature between practising as a barrister and as a barrister and solicitor and preserves that distinction, but recognises that with particular areas of work – principally family and criminal – there is less need for an instructing solicitor. Importantly, the rule generally emphasises the need for instructing solicitors once a matter is in Court, apart from the family and criminal law exceptions. There is also an overriding obligation on counsel to consider the best interests of the client in acting, or continuing to act, without an instructing solicitor.

In this way the new rule stresses the continuing importance of the barrister's role as an independent advocate.

In practical terms, lawyers can choose whether to practice at the independent bar or in a firm. Clients in turn can choose to go to litigation specialists in a firm, or request a barrister sole. But those lawyers who have chosen to practice as barristers sole have elected to be bound by the intervention rule. That is their choice. They in turn must accept the responsibilities and limitations that choice brings, including with the new rule.

Accepting direct instructions

Barristers will need to ask themselves two questions before accepting direct instructions. The first is whether the instruction falls within an exception to the rule. If the answer to this is no, a solicitor will need to be instructed.

If the answer is that the instruction does some within an exception, a further question to be asked is whether direct instructions should be accepted? This is a more complex issue and involves a judgment call. This is discussed further below.

The new r 14.5.1 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 specifies that direct instructions can be accepted where the barrister is instructed or appointed by any of the following:

- (a) a person acting in a judicial or quasi-judicial capacity;
- (b) a person acting as an arbitrator, mediator, or in any similar capacity;
- (c) a court, [this includes tribunals under r 1.2]
- (d) the Law Society;
- (e) a registered patent attorney;
- (f) a member of the legal profession in an overseas country;
- (g) an Official Assignee;
- (h) a body, officer, or person approved by the Law Society under r 14.6, subject to restrictions and/or terms and conditions as the Law Society determines.

Some of the above exceptions reflect exceptions in current r 14.6. This part of the rule is principally focussed on *entities* that instruct directly¹.

The new r 14.5.2 sets out further circumstances in which a barrister can receive direct instructions. Here the focus is on the type of work. Again, some of these reflect existing exceptions but, in some cases there is further clarification. Rule 14.5.2 includes where a barrister is instructed to act in the following capacities:

- (a) in a judicial or quasi-judicial capacity or as counsel to assist any court;
- (b) as an arbitrator, mediator or in any similar capacity;
- (c) as a revising barrister pursuant to any enactment. This work will be rarely performed²;
- (d) – (h) – new categories (see below);
- (i) providing a legal opinion to a non-lawyer. Caution needs to be exercised as the duty to apply the interests of justice and best interest of the client test applies in this situation;
- (j) as a duty lawyer;
- (k) providing pro bono assistance to a non-profit legal advice service. An example of this would be assisting with Community Law Centres. It is important to note that the mere fact that work is undertaken on a pro bono basis will not exempt a barrister from the intervention rule. This category is limited to legal services operating on a non-profit basis;
- (l) as a specialist advisor for the Ministry of Justice;
- (m) in a refugee status matter under the United Nations Convention on the Status of Refugees. While this includes appeals from the Immigration and Protection Tribunal to the High Court, it is limited to refugee status matters. General immigration matters (for example, deportation) are subject to r 4.5.1(h);
- (n) representing a client under the Mental Health (Compulsory Assessment and Treatment) Act 1992;
- (o) representing a prisoner in an internal disciplinary hearing;
- (p) moving the admission of a person as a barrister and solicitor.

New categories for direct instructions

It is essentially r 14.5.2 that provides for new categories for direct instructions. These are defined by reference to the 'type of work' and 'forum'. There are, however, some important limitations, as identified in the adjacent table.

Direct Instructions categories	Limitations - when an instructing solicitor is required
Criminal - Representing a person charged with any offence – r 14.5.2(d)	<ul style="list-style-type: none"> • Prosecutions by the Serious Fraud Office, the Financial Markets Authority or the Commerce Commission
Legal Aid – representing any person who has been granted or has a pending application for civil and family legal aid under the Legal Services Act 2011 – r 14.5.2(e). This includes prosecutions by the Serious Fraud Office, the Financial Markets Authority or the Commerce Commission	
Family law matters that are capable or were initially capable of being brought within the Family Court jurisdiction – r 14.5.2(f)	<ul style="list-style-type: none"> • If the matter involves complex property issues. • Transfers or assignments of any interests in land cannot be carried out by a barrister sole (see r 14.2(b))
Employment law matters before the Employment Relations Authority (ERA) and matters that progress from the ERA to the Employment Court – see r 14.5.2(g)	<ul style="list-style-type: none"> • Matters that involve proceedings in the Employment Court in the first instance³ • Appeals to the higher courts
Civil matters (excluding family and employment matters) which are not proceeding before the, Supreme Court, the Court of Appeal, the High Court, or a District Court. The rule therefore now does not apply to proceedings before (for example) the Land Valuation Tribunal, Waitangi Tribunal, Accident Compensation Appeals Authority; examples of the latter include the Environment Court, Māori Land Court	<ul style="list-style-type: none"> • Proceedings in the District or High Courts, Court of Appeal or Supreme Court • Under r 14.5.2(h) while a barrister can act in civil matters up to the time they are filed in the District or High Courts, Court of Appeal or Supreme Court, an instructing solicitor is required from the point proceedings are initiated in those courts⁴

¹Refer to the "Tree Diagram" accompanying Dean, M. et al, "The New Intervention Rule – what you must know" NZLS CLE Ltd (2015) for help in deciding if a barrister is able to take instructions direct or not.

²Ibid p4.

³First instance proceedings include: tort proceedings including those in relation to lock outs and strikes (ss 99 and 187 of the Employment Relations Act 2000); judicial reviews (s 194 of the Employment Relations Act 2000); grant of an injunction under s 100 of the Employment Relations Act 2000); issuing of entry warrants (s 231 of the Employment Relations Act 2000); and offences against the Act such as obstructing a Labour Inspector (ss 187 and 235 of the Employment Relations Act 2000).

⁴Dean, M. "Civil Litigation" *LawTalk* no. 866 5 June 2015 p9

All of these requirements are overlaid by the fundamental obligation to decline, or discontinue acting if the barrister considers it would be in the best interests of the client or justice that an instructing solicitor be retained.⁵ This applies to some of the exceptions, not all.⁶

Qualification for direct instructions under r 14.5.2(d) to (h):

To qualify to take direct instructions under r 14.5.2(d) to (h), barristers must fulfil three conditions. They must:

- (i) be practising on own account as a barrister sole (r 14.7.1); and
- (ii) have completed the prescribed training requirements (r 14.7.2); and
- (iii) have satisfied the Law Society that he or she is a suitable person to accept direct instructions (r 14.7.2).

In addition, the barrister must inform clients in writing of:

- a) capacity and experience in performing the requested service; and
- b) advocacy experience as a barrister; and
- c) any disadvantage which the barrister believes may be suffered by the prospective client if no instructing lawyer is retained.

It is important that barristers do not oversell their expertise and experience and risk claims of misleading conduct.

Applying for Approval:

The forms for applying for approval can be found at <https://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/intervention-rule-changes/taking-direct-instructions>. The training requirement is satisfied by completing the NZLS CLE Ltd Intervention Rule Webinar or by having done the equivalent module in Stepping Up: Foundation for practising on own account (available post 1 July 2015). To satisfy the third condition, the Law Society requires the barrister to disclose upheld complaints and any disciplinary history and to advise the Law Society of arrangements that they have in place for running their practice if they become incapacitated or unable to run their practice. In determining applications, the Law Society will apply the LCA's purposes, namely protection of consumers of legal services and the maintenance of confidence in the provision of legal services.

Should direct instructions be accepted?

Even if a barrister can in theory take direct instructions, practical and ethical considerations might tell against doing so. A barrister will need to consider whether he or she has expertise and experience to act in a matter

without an instructing solicitor. As already noted, r 14.8 says that a barrister must not accept direct instructions if he or she considers that, in all the circumstances, it would be in the best interests of the client or in the interests of justice for an instructing lawyer to be retained. Clearly, it is not in the best interests of the client or justice if the barrister does not have the expertise or experience to act in a matter without an instructing solicitor. This decision needs to be made up front. It is a key caveat.

Other examples where it may be contrary to the interests of the client or justice include:

- Where there are onerous document management functions, including discovery;
- Where the size and scale of the case requires several lawyers acting concurrently. Rule 3, relating to diligence and timeliness might apply here;
- Where use of a solicitor would result in lower costs to the client (for example, where junior staff should be used to handle some tasks). In considering this aspect, barristers should remember their reasonable fees obligations under r 9;
- Whether there is a risk that the barrister's independence may be compromised, including where the barrister may be required to give evidence as a result of authoring correspondence of a contentious nature.

The interests of justice is a concept that reflects the tension between counsel's duty to the Court and the administration of justice, against his or her duty to follow a client's instructions and to "fearlessly raise every issue, advance every argument and ask every question, however distasteful"⁷ which the lawyer believes will help his or her client. Where, for example, a barrister's independence is being compromised, and a distance is required from the client, it may be necessary to have an instructing solicitor. Equally, if there is a danger of the barrister's obligations to the Court being compromised, this might well require consideration of an instructing solicitor.

If a barrister has accepted direct instructions, r 14.9 specifies that he or she must not continue to act if at any stage it is considered that, in all the circumstances, it would be in the best interests of the client or in the interests of justice, for an instructing lawyer to be retained, but the client is not prepared to retain one. This situation will constitute good cause for terminating the retainer under r 4.2(c).

Once an instructing solicitor has become involved, a barrister must comply with her/his obligations pursuant to r 14.11 to keep the instructing solicitor reasonably informed of the progress of the brief.

⁵r 14.8 discussed further below.

⁶Refer to the "Tree Diagram" referred to at n1 supra.

⁷*Rondel v Worsley* [1969] 1 AC 191, 231 (HL) per Lord Reid.

Client Care obligations

Some barristers may already be providing clients with detailed client care information. New r 3.4A, r 3.5A and r 3.6A set out the information that barristers must now provide prior to commencing work. This only applies if the barrister is acting on direct instructions. These include (r 3.4A):

- (a) The basis on which the fees will be charged, and when payment of fees is to be made.
- (b) The barrister's professional indemnity arrangements. This obligation is met if it is disclosed that the barrister holds indemnity insurance that meets or exceeds any minimum standards set by the Law Society. If a barrister sole is not indemnified, this must be disclosed in writing to the client.
- (c) The fact that the Lawyers' Fidelity Fund does not provide any cover in relation to a barrister as he or she does not hold client's funds.
- (d) The procedures in the barrister sole's practice for the handling of complaints by clients, and advice on the existence and availability of the Law Society's complaints service and how to contact the Law Society to make a complaint.

This applies only on the taking of direct instructions.

Prior to undertaking significant work under a retainer, the barrister must provide the client with a copy of the client care and service information set out in the rules, and any fair and reasonable provision in the retainer that limits the extent of the barrister sole's obligation to the client or limits or excludes liability (r 3.5A). If the information provided under r 3.4A or r 3.5A becomes inaccurate in a material respect, the barrister must update it "with due expedition" (r 3.6A).

Dealing with client money

Under r 14.2(e) a barrister cannot operate at trust account. Fees paid in advance must be held in trust (see r 9.3 and reg 9 and 10 Lawyers and Conveyancers Act (Trust Account) Regulations 2008). The position therefore remains that unlike solicitors, in general a barrister cannot take fees in advance of completion of work or hold sums as security for fees.

Rule 14.10 allows for money paid in advance to be held in a trust account of a fund holder who is either a practice (meaning a law practice) or a person approved for the purpose by the Law Society. Funds must be held and dealt with in accordance with terms prescribed by the Law Society.

However r 14.10 specifies that it applies to direct instructions under r 14.5.2(d) to (i). It does not clarify the position in respect of other direct instruction categories.

In these cases, funds will need to be held in a solicitor's trust account.

One consequential change is the effect on the liability for payment of fees in a direct instruction situations. The amended rules appear to contemplate a contractual relationship between the barrister and the client (see especially the reference in r 3.5A to "undertaking significant work under a retainer"). In turn, this may change the traditional position where a barrister could not sue for his or her fees.


Barristers should therefore ensure that the terms of engagement specify that their services are provided under a contract of retainer and that their fees are recoverable in law.

Other considerations

Where direct instructions are accepted, barristers will need to consider all aspects of their practice management such as:

Incapacitation or inability to run the practice: this may be for a limited period (such as during an illness) or on a permanent basis, and it covers suspension or striking off. A barrister will need to ensure that someone can take over (inter alia): ongoing instructions; disposing of open files; dealing with closed client files; notifying the Law Society where necessary; outstanding invoicing issues etc. Barristers should therefore consider appointing a colleague to deal with these issues⁸.

Client records: under direct instruction the responsibility for client records falls directly on the barrister. The client care information will need to specify which documents will be the client's property, which will be retained by the barrister, the client's ongoing rights to information held by the barrister and how documents will be held on the termination the retainer. There are also regulatory and statutory requirements as to how long records should be retained. The Law Society provides guidance on this at: www.lawsociety.org.nz/__data/assets/pdf_file/0003/69762/Ownership-and-retention-of-records-opinion-Apr-2014.pdf⁹.

Disaster recovery: Most businesses have a disaster recovery plan in place. This can include electronic storage of backup files, a record of passwords and IDs, through to checklists of who to contact for help in the event of a disaster¹⁰. A disaster may not be or an obvious kind, such as an earthquake. It could include a virus which destroys computer records and makes it impossible to practice for a period of time. Aside from insurance arrangements (including cyberinsurance) barristers should consider the need to have a plan in place to continue client work without significant interruption. 

⁸A good summary of considerations is available at <http://my.lawsociety.org.nz/in-practice/practice-management/practice-management-advice/what-to-keep-in-mind-when-selling-or-closing-a-law-practice>.

⁹Beck, Andrew "Ownership and retention of records on termination of retainer" *Opinion provided to the New Zealand Law Society April 2014*.

¹⁰For more information see <http://my.lawsociety.org.nz/in-practice/practice-management/practice-management-advice/disaster-recovery-plan-review>.