



Introduction

Strained economic resources have increasingly focused attention on the necessity for justice to be administered as efficiently as possible. The epithet adopted by the Supreme Court as its overriding purpose is the 'just, quick and cheap resolution of the real issues in civil proceedings.' This does not mean justice is to be sacrificed on the altar of expedience. While recognising the synergy between these concepts, the Bar Association regards 'just' as the primary operative adjective.

The amendments to the *New South Wales Barristers' Rules* are intended to underline counsel's responsibility in ensuring the expeditious conduct of their work. They also reinforce important ethical obligations both in pleading and running cases.

The amendments to the *New South Wales Barristers' Rules* have been commended and endorsed by the Australian Law Reform Commission in its Report No.89, *Managing Justice: A Review of the Federal Civil Justice System* (par.3.92). It has recommended that the Law Council of Australia should ensure that the New South Wales Bar's amended rules be adopted as part of national model professional practice rules. The Bar Association thoroughly endorses that recommendation.

Ruth McColl S.C.
President

The New South Wales Barristers' Rules

Amendments made under s.57A of *The Legal Profession Act 1987* by The Council of the New South Wales Bar Association

- 1 On 22 October 1998, the Bar Council resolved, pursuant to subsection 57A(1) of the *Legal Profession Act, 1987*, to amend New South Wales Barristers' Rule 66B and New South Wales Barristers' Rule 92 as follows:

Prosecutor's Duties

The word "and" appearing after "proceedings;" in Rule 66B(c) be deleted.

Briefs which may be refused

Rule 92 be amended by deleting the reference to "Rule 91 (b)" and substituting a reference to "Rule 91 (c)".

Reading

- 2 On 19 November 1998, the Bar Council resolved, pursuant to subsection 57A(1) of the *Legal Profession Act, 1987* that the words "pupil" and "pupillage", wherever occurring in the New South Wales Barristers' Rules be replaced by the word "reader" and "reading" respectively.
- 3 On 8 December 1999, Bar Council resolved, pursuant to subsection 57A(1) of the *Legal Profession Act, 1987* to amend New South Wales Barristers' Rule as set out in the following:

Introduction & Interpretation

Add to New South Wales Barristers' Rule 8:

The amendments to these Rules approved by Bar Council on 22 October 1998, 19 November 1998 and 8 December 1999, gazetted on 21 January 2000, are to take effect on 6 March 2000.

Add to New South Wales Barristers' Rule 15, by inserting in alphabetical order, the following two definitions:

15.

“allege” ‘includes conduct constituted by settling or opening on pleadings, affidavits or witness statements, and reading or tendering affidavits or witness statements filed or prepared for the client (whether or not they were drawn or settled by the barrister).’

“legislation” ‘includes all kinds of delegated legislation.’

Add a new New South Wales Barristers' Rule 17A and 17B:

Duty to client

17A. A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

17B. A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.

Frankness in court

Delete existing New South Wales Barristers' Rule 23 and insert in its stead:

23. A barrister must take all necessary steps to correct any express concession made to the court in civil proceedings by the opponent in relation to any material fact, case-law or legislation:
- (a) only if the barrister knows or believes on reasonable grounds that it was contrary to what should be regarded as the true facts or the correct state of the law;
 - (b) only if the barrister believes the concession was an error; and
 - (c) not (in the case of a concession of fact) if the client's instructions to the barrister support the concession.

Responsible use of court process and privilege

Delete existing New South Wales Barristers' Rules 36, 37, 38, 39, 40 and 41 and insert in their stead:

36. A barrister must not allege any matter of fact in:
- (a) any court document settled by the barrister;
 - (b) any submission during any hearing;
 - (c) the course of an opening address; or
 - (d) the course of a closing address or submission on the evidence;

unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.

37. A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
- (a) available material by which the allegation could be supported provides a proper basis for it; and
 - (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.
38. A barrister must not make a suggestion in cross-examination on credit unless the barrister believes on reasonable grounds that acceptance of the suggestion would diminish the witness's credibility.
39. A barrister may regard the opinion of the instructing solicitor that material which is available to the solicitor is credible, being material which appears to the barrister from its nature to support an allegation to which Rules 36 and 37 apply, as a reasonable ground for holding the belief required by those rules (except in the case of a closing address or submission on the evidence).

Re-number present New South Wales Barristers' Rule 42 as New South Wales Barristers' Rule 40.

Efficient administration of justice

41. A barrister must seek to ensure that:
- (a) the barrister does work which the barrister is briefed to do, whether expressly or impliedly, specifically or generally, in relation to steps to be taken by or on behalf of the client, in sufficient time to enable compliance with orders, directions, rules or practice notes of the court; and
 - (b) warning is given to the instructing solicitor or the client, and to the opponent, as soon as the barrister has reasonable grounds to believe that the barrister may not complete any such work on time.
42. A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to:
- (a) confine the case to identified issues which are genuinely in dispute;
 - (b) have the case ready to be heard as soon as practicable;
 - (c) present the identified issues in dispute clearly and succinctly;
 - (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case; and
 - (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.
- 42A. A barrister must take steps to inform the opponent as soon as possible after the barrister has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try with the opponent's consent to inform the court of that application promptly.

Note: This gazettal supersedes that made on 7 January 2000.

21 January 2000

Explanatory Notes

- 1 On 8 December 1999, important amendments were made to the Advocacy Rules. They are to take effect on 6 March 2000, having been gazetted on 21 January 2000 (see *New South Wales Government Gazette* No. 7 pp 348-350). As barristers rules within the meaning of sec. 57D of the *Legal Profession Act 1987*, they are binding on barristers whether or not the barristers are members of the Bar Association.
- 2 The following comments are only for preliminary guidance. They do not stand in the place of the text of the Rules, which are binding according to their terms. These comments are offered to provide some background, and also suggestions as to some practical consequences. Because the Rules, generally, are an attempt to cover a wide range of possible circumstances, these comments cannot be regarded as limiting the scope of the new Rules' application.
- 3 The new Rule 17A requires counsel to consider and advise on alternatives to fighting a case to the finish. Obviously, some clients and many instructing solicitors will need little or no advice from counsel on the possibilities of compromise, arbitration, mediation or other non-litigious techniques. However, counsel are obliged not to assume this level of appreciation, without material to justify it. No doubt familiarity with a particular client or solicitor, or indications in the brief of attempts to use such techniques or consideration of them, will be common ways in which counsel can properly decide not to spend time on unnecessary or condescending advice.
- 4 The new Rule 17B specifically requires counsel to advise criminal defendant clients on matters, including matters of practice, which might result in a reduced sentence if the client pleads or makes admissions, or the like. There will be some circumstances which justify counsel not specifically advising a client of these matters, although such cases are expected to be very rare and extreme. The policy behind the Rule is to ensure that clients in this position must not be deprived of choices which should be theirs, and which may turn out to be very important for their lives, by a simple lack of information.
- 5 Some clients, for example, might believe that there is no half-way position between a plea of guilty and a plea of not guilty with a full contest on every issue or piece of evidence. In such an example, if the defendant might attract some discount to reward steps by way of admissions or non-contest of certain facts, in assessing an eventual penalty or sentence, then such a client should be aware of that possibility.
- 6 One example of an extreme possibility where such advice may be counterproductive is a client so disturbed or a case so fraught that advice about the consequences of pleading guilty or conceding facts would only destroy the confidence essential to the retainer continuing. It is emphasised that such a case would be very rare. In most cases, notwithstanding that clients may often hope their counsel was confident or enthusiastic about their prospects, it will nevertheless be necessary for counsel to advise on the matters required by the new Rule 17B.
- 7 Together, the provisions of the new Rules 17A and 17B are designed to complement the provisions of Rule 17. The overall policy is to enable clients to exercise real autonomy in litigation.

- 8 The new Rule 23 is radically different from the old Rule 23 which has been deleted entirely. Counsel will be required not to take tactical advantage of errors of the kind described. The intention is that counsel not produce, by silence in the circumstances covered by the new Rule, an effective miscarriage of justice. So far as errors of fact are concerned, as is obvious from (c) in the new Rule, counsel cannot use its provisions to contradict the client's instructions.
- 9 The new Rules 36, 37, 38 and 39 are to some extent a re-work of old Rules 36-41. Importantly, the changes have broadened counsel's obligation to apply professional judgement to the adequacy of the available material to justify allegations made under privilege, such as in pleadings, suggestive cross-examination and addresses. The obligation now covers all matters of fact - it is no longer confined to matters amounting to allegations of disgraceful conduct.
- 10 It should be noted that a related amendment to Rule 15, viz. a definition of "*allege*", extends the obligation to include settling an affidavit or witness statement, and also reading such evidence in court whether or not counsel drew or settled it.
- 11 The policy behind these new Rules includes the intended enlistment of counsel, by their professional and ethical judgements, in the reduction of contested litigation which has been begun or fought without justification.
- 12 The new Rules 41, 42 and 42A are intended to advance what their new heading describes, i.e. the "*Efficient administration of justice*". The policy behind them includes the recognition that the work of a barrister in litigation affects the business of the court as well as opposing parties and practitioners. The timeliness of a barrister's work should not, therefore, be left solely to regulation by engagements between counsel and instructing solicitors and clients.
- 13 The new Rule 42 also relates to the existing Rule 19. Their combined effect makes even more clear the essential independence of counsel in the sense that barristers cannot justify dilatory or delinquent conduct with respect to the procedural rules or directions of a court by invoking the instructions or desires of the client. What has been called our "duty to the Court" prevails over our undoubted duties to our clients. These new Rules supply some specific content to that well-established paramount duty.
- 14 On 1 March 2000, very important changes to the *Supreme Court Rules* will come into effect (and see Bulletin No. 201 of *Ritchie*). In particular, the new provisions of *Part 1 rule 3*, *Part 26 rule 3*, *Part 26 rule 6AA* and *Part 52A rules 9, 35A and 43A* are vital for all barristers to read and consider. *Practice Note No. 108* must also be read as part of these reforms. The provisions of new Rules 17A, 41, 42 and 42A, together with existing Rules 18 and 19 (which remain fundamental), are intended to complement the Supreme Court's amended procedures, and to advance their obvious policy.

16 February 2000

JUST, QUICK AND CHEAP: A NEW STANDARD FOR CIVIL PROCEDURE

By The Honourable J.J. Spigelman, Chief Justice of New South Wales

Soon after my appointment as Chief Justice, I initiated a process of consultation with the Law Society and the Bar Association for the development of reforms directed to ensuring the efficient and expeditious conduct of civil cases in the Court. This has been a fruitful collaborative process, resulting in a series of interrelated reforms. New advocacy rules have been promulgated, including, for the first time, an express recognition in the professional rules of an obligation upon practitioners to conduct proceedings efficiently. Furthermore, the Court has amended a number of its Rules and issued Practice Notes directed to the same objective.

A new overriding purpose has been inserted at the commencement of the Supreme Court Rules which states that the objective of the Rules is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings. This plain- English statement of purpose will, I hope, focus the attention of all the participants in the administration of civil justice on the obligations which each has to ensure the effective operation of the system.

Specifically, the new Rules identify:

- An obligation on the Court to give effect to the overriding purpose when it exercises any of its powers.
- An obligation on a party to civil proceedings to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and comply with the directions and orders of the Court.
- An obligation on legal practitioners to refrain from engaging in conduct which causes his or her client to be put in breach of this duty.
- A power in the Court, when exercising the Court's discretion to award costs, to take into account any failure to comply with the duty of a party or a legal practitioner.

The recognition of this overriding purpose, and the imposition of the new duties, culminates the development within the practice of the Court over a period of about two decades, during which the Court has progressively assumed a more active role in controlling the conduct of litigation before it, primarily through the development of case management techniques. This development has occurred in recognition of the fact that parties or practitioners have no right to waste the limited resources available to the Court and that the Court has an obligation to use the resources entrusted to it as effectively and efficiently as possible. This development has also occurred against the background of increasing concern over delays in, and the costs of, legal proceedings with consequential adverse affects on access to justice.

The new Supreme Court Rules provide specification of existing powers to make directions and introduce new powers and procedures. They represent a further stage in the evolution of civil case management. The most significant changes, in addition to the new overriding purpose and its correlative duties, which are set out in full elsewhere in this publication, are:

- Identifying the range of specific directions which the Court may make in the course of managing cases before it.

- Empowering the Court to impose time limits, including limits on the number of witnesses and time limits on the evidence of witnesses, on submissions and on the whole or part of a case.
- Empowering the Court to direct a legal practitioner to give to a party a memorandum providing an estimate of the length of the trial, of the costs and disbursements of that practitioner and of the estimated costs that would be payable by the party to another party, if the party were unsuccessful.
- Empowering the Court to specify the maximum costs that may be recovered by one party from another.
- Imposing on all parties an obligation to refrain from making or maintaining issues unless it is reasonable to do so, and creating a new procedure for the payment of costs, on an indemnity basis, by parties who breach this obligation.
- Empowering the Court to order that costs, or a specified amount on account of costs, should be payable forthwith in any case in which a party has been subject to unreasonable delay or default, or the proceedings are unreasonably protracted or justice otherwise demands such an order.
- Empowering the Court to order a person to pay the costs occasioned by the failure of that person to comply with a direction of the Court.
- Amending the Rules which identify the circumstances in which a legal practitioner can be ordered to pay costs and creating a new procedure for the making of such orders.
- Promulgation of a Code of Conduct for expert witnesses which establishes that an expert witness has an overriding duty to assist the Court impartially and which specifies that an expert witness's paramount duty is to the Court, not as an advocate for a party to the proceedings.
- Establishing a system by which experts make full disclosure of relevant matters in their reports and, upon direction by the Court, confer with other expert witnesses and endeavour to reach agreement on material matters.

A minority of legal practitioners have on occasions failed to satisfactorily discharge their duty to the Court to ensure the efficient and expeditious conduct of proceedings. Such failure has imposed direct disadvantages on other parties, which are not always able to be remedied by orders for costs. Furthermore, such failure limits the ability of the Court to make full use of its resources and, accordingly, indirectly disadvantages the entire body of litigants by exacerbating delays in the system.

Minimising costs to parties and ensuring the effective use of limited judicial resources requires a change in the climate of complacency that has sometimes attended obedience to the rules and directions of the Court. In conjunction with the new Professional Rules, I hope and expect that the new obligations and powers in the Supreme Court Rules will enhance the ability of parties, practitioners and the Court itself, to serve the people of this State by the just, quick and cheap resolution of civil disputes.

Supreme Court Rules (Amendment No.337) 2000

1. These rules are made by the Rule Committee on 20 December 1999.
2. The Supreme Court Rules 1970 are amended as follows -

(a) Part 1 rule 8

In alphabetical order insert -

“expert” means a person who has specialised knowledge based on the person’s training, study or experience.

(b) Part 14 rule 9 and Part 14A rule 14

Omit the rules.

(c) Part 14C rule 1

Omit the definition of “expert”.

(d) Part 36

Omit rule 13C and insert instead -

Expert witnesses

13C(1) For the purposes of this rule and rule 13CA:

“expert witness” means an expert engaged for the purpose of:

- (a) providing a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or
 - (b) giving opinion evidence in proceedings or proposed proceedings;
- “the code” means the expert witness code of conduct in Schedule K.

(2) Unless the Court otherwise orders:

- (a) at or as soon as practicable after the engagement of an expert as a witness, whether to give oral evidence or to provide a report for use as evidence, the person engaging the expert shall provide the expert with a copy of the code;
- (b) unless an expert witness’s report contains an acknowledgment by the expert witness that he or she has read the code and agrees to be bound by it:
 - (i) service of the report by the party who engaged the expert witness shall not be valid service for the purposes of the rules or of any order or practice note; and
 - (ii) the report shall not be admitted into evidence;
- (c) oral evidence shall not be received from an expert witness unless:
 - (i) he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it; and
 - (ii) a copy of the acknowledgment has been served on all parties affected by the evidence.

(3) If an expert witness furnishes to the engaging party a supplementary report, including any report indicating that the expert witness has changed his or her opinion on a material matter expressed in an earlier report by the expert witness:

- (a) the engaging party must forthwith serve the supplementary report on all parties on whom the engaging party has served the earlier report; and
- (b) the earlier report must not be used in the proceedings by the engaging party, or by any party in the same interest as the engaging party on the question to which the earlier report relates, unless paragraph (a) is complied with.

(4) This rule shall not apply to an expert engaged before this rule commences.

Conference between experts

13CA (1) The Court may, on application by a party or of its own motion, direct expert witnesses to:

- (a) confer and may specify the matters on which they are to confer;
- (b) endeavour to reach agreement on outstanding matters; and
- (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.

(2) An expert so directed may apply to the Court for further directions.

(3) The Court may direct that such conference be held with or without the attendance of the legal representatives of the parties affected, or with or without the attendance of legal representatives at the option of the parties respectively.

(4) The content of the conference between the expert witnesses shall not be referred to at the hearing or trial unless the parties affected agree.

(5) An agreement reached during the conference shall not bind the parties affected except insofar as they expressly agree.

(e) Part 39

Omit the Part and insert instead -

PART 39—COURT APPOINTED EXPERT AND ASSISTANCE TO THE COURT

Division 1 – Court Appointed Expert

Selection and appointment

1. (1) Where a question for an expert witness arises in any proceedings the Court may, at any stage of the proceedings, on application by a party or of its own motion, after hearing any party affected who wishes to be heard:

- (a) appoint an expert (in this Division referred to as “the expert”) to inquire into and report upon the question;
- (b) authorise the expert to inquire into and report upon any facts relevant to the inquiry and report on the question;
- (c) direct the expert to make a further or supplemental report or inquiry and report; and
- (d) give such instructions (including provision concerning any examination, inspection, experiment or test) as the Court thinks fit relating to any inquiry or report of the expert.

(2) The Court may appoint as the expert a person selected by the parties affected or a person selected by the Court or selected in a manner directed by the Court.

Code of conduct

2.(1) A copy of the expert witness code of conduct in Schedule K (“the code”) shall be provided to the expert by the Registrar or as the Court may direct.

(2) A report by the expert shall not be admitted into evidence unless the report contains an acknowledgment by the expert that he or she has read the code and agrees to be bound by it.

(3) Oral evidence shall not be received from the expert unless the Court is satisfied that he or she has acknowledged in writing, whether in a report relating to the proposed evidence or otherwise in relation to the proceedings, that he or she has read the code and agrees to be bound by it.

Report

3.(1) The expert shall send his or her report to the Registrar.

(2) The Registrar shall send a copy of the report to each party affected.

(3) Subject to compliance with this rule, the report shall be deemed to have been admitted into evidence in the proceedings unless the Court otherwise orders.

Cross-examination

4. Any party affected may cross-examine the expert and the expert shall attend court for examination or cross-examination if so requested on reasonable notice by the Registrar or by a party affected.

Remuneration

5.(1) The remuneration of the expert shall be fixed by the Court.

(2) Subject to subrule (3), the parties specified by the Court shall be jointly and severally liable to the expert to pay the amount fixed by the Court for his remuneration.

(3) The Court may direct when and by whom the expert is to be paid.

(4) Subrules (2) and (3) do not affect the powers of the Court as to costs.

Other expert evidence

6. Where an expert has been appointed pursuant to this Part in relation to a question arising in the proceedings, the Court may limit the number of other experts whose evidence may be adduced on that question.

Division 2 - Assistance to the Court

Assistance to the Court

7. The Court may, in any proceedings other than proceedings entered in the Admiralty List or proceedings tried with a jury, obtain the assistance of any person specially qualified to advise on any matter arising in the proceedings, may act upon the adviser’s opinion, and may make orders for the adviser’s remuneration.

(f) After Schedule J insert -

SCHEDULE K

*P. 36, r. 13C(1),
P. 39, r. 2(1)*

EXPERT WITNESS CODE OF CONDUCT

Application of code

1. This code of conduct applies to any expert engaged to:
 - (a) provide a report as to his or her opinion for use as evidence in proceedings or proposed proceedings; or
 - (b) give opinion evidence in proceedings or proposed proceedings.

General Duty to the Court

2. An expert witness has an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise.
3. An expert witness's paramount duty is to the Court and not to the person retaining the expert.
4. An expert witness is not an advocate for a party.

The Form of Expert Reports

5. A report by an expert witness must (in the body of the report or in an annexure) specify:
 - (a) the person's qualifications as an expert;
 - (b) the facts, matters and assumptions on which the opinions in the report are based (a letter of instructions may be annexed);
 - (c) reasons for each opinion expressed;
 - (d) if applicable that a particular question or issue falls outside his or her field of expertise;
 - (e) any literature or other materials utilised in support of the opinions; and
 - (f) any examinations, tests or other investigations on which he or she has relied and identify, and give details of the qualifications of, the person who carried them out.
6. If an expert witness who prepares a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report.
7. If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
8. An expert witness who, after communicating an opinion to the party engaging him or her (or that party's legal representative), changes his or her opinion on a material matter shall forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect which shall contain such of the information referred to in 5(b), (c), (d), (e) and (f) as is appropriate.
9. Where an expert witness is appointed by the Court, the preceding paragraph applies as if the Court were the engaging party.

Experts' Conference

10. An expert witness must abide by any direction of the Court to:
 - (a) confer with any other expert witness;
 - (b) endeavour to reach agreement on material matters for expert opinion; and
 - (c) provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.
11. An expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement.
3. Subject to paragraphs 4 and 5, the amendments contained in paragraph 2 shall commence on 1 March 2000.
4. Part 36 rule 13C(2)(b) shall not apply to a report written before 1 March 2000.
5. The amendments contained in paragraph 2(e) shall apply to persons appointed on or after 1 March 2000 under Part 39. Part 39, as it is immediately before 1 March 2000, shall continue to apply to persons appointed under Part 39 before that date.
6. The Supreme Court Rules 1970 are further amended as follows -
 - (a) After Part 15 insert -

PART 15A - LIMITING ISSUES

Putting matters in issue unreasonably

- 1.(1) A party to proceedings must not in a pleading or at a trial or hearing make, or put in issue, an allegation of fact unless it is reasonable to do so.
- (2) A party to proceedings who has in a pleading or at a trial or hearing made, or put in issue, an allegation of fact must not maintain that allegation or its controversion unless it is reasonable to do so.

Reasonableness of issue

2. In determining whether it is reasonable for a party to make or put in issue an allegation of fact or to maintain such an allegation or its controversion, consideration must be given to the steps taken by the party to ascertain whether there is a reasonable basis for doing so.

Scope of Part

3. Nothing in this Part shall give rise to, or affect, any right to seek that proceedings or any claim for relief or any defence be stayed or dismissed or struck out.

Certifying as separate issues

- 4(1) During final submissions at any trial or hearing, a party may request the presiding Judge or Master to certify, at the time of delivering the final or a supplementary judgment, that:
 - (a) identified allegations of fact were made or put in issue; or
 - (b) identified allegations of fact, or their controversion, were maintained, by another party contrary to rule 1, either generally or from a specified time, and to further certify:

- (c) the party acting contrary to rule 1; and
 - (d) the party in whose favour the certificate is granted.
- (2) Where:
- (a) a request is made under subrule (1); and
 - (b) the presiding Judge or Master is satisfied that it is appropriate to do so, he or she may by order certify accordingly.
- (3) A certificate may be refused notwithstanding that non-compliance with rule 1 is shown.

(b) Part 52A

After rule 11 insert –

Costs of separate issues

11A(1) When making a costs order, the Court may take into account any non-compliance with Part 15A rule 1 insofar as it is relevant to the order.

(2) Where a certificate is granted under Part 15A rule 4, unless the Court otherwise orders, the party specified in the certificate as acting contrary to Part 15A rule 1 shall pay the costs of the issue to which the certificate relates, on an indemnity basis, of the party in whose favour the certificate is granted.

(3) An entitlement to costs under subrule (2) shall not be affected by any order as to costs unless that order refers to the certificate giving rise to the entitlement.

(4) Subrule (2) has effect notwithstanding rules 18, 21, 22, 23, 28, 29, and 30 (4) and (5).

(c) Part 52A rules 19(3) and 20(3)

After “rules”, wherever occurring, insert “11A, ”.

7. The amendments contained in paragraph 6 shall commence on 1 March 2000.

8. The Supreme Court Rules 1970 are further amended as follows -

(a) Part 1

After rule 2 insert -

Overriding Purpose

3(1) The overriding purpose of these rules, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in such proceedings.

(2) The Court must seek to give effect to the overriding purpose when it exercises any power given to it by the rules or when interpreting any rule.

(3) A party to civil proceedings is under a duty to assist the Court to further the overriding purpose and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

(4) A solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of the duty identified in (3).

(5) The Court may take into account any failure to comply with (3) or (4) in exercising a discretion with respect to costs.

(b) Part 26

After rule 2 insert-

Case management by the Court

3. Without limiting the generality of rule 1, orders and directions may relate to:
- (a) the filing of pleadings;
 - (b) the defining of issues, including requiring counsel or the parties to exchange memoranda in order to clarify issues;
 - (c) the provision of any essential particulars;
 - (d) the making of admissions;
 - (e) the filing of lists of documents, either generally or with respect to specific matters;
 - (f) the delivery or exchange of experts' reports and the holding of conferences of experts;
 - (g) the provision of copies of documents, including the provision in electronic form;
 - (h) the administration and answering of interrogatories, either generally or with respect to specific matters;
 - (i) the service and filing of affidavits or statements of evidence or documents to be relied on by a specified date or dates;
 - (j) the giving of evidence at the hearing, including whether evidence of witnesses in chief shall be given orally, or by affidavit or statement, or both;
 - (k) the use of telephone or video conference facilities, video tapes, film projection, computer and other equipment and technology;
 - (l) the provision of affidavit evidence by specified persons in support of an application for an adjournment;
 - (m) a timetable with respect to any matters to be dealt with.

(c) Part 34

After rule 6 insert -

6AA(1) At any time before or during a trial, the Court may by direction:

- (a) limit the time to be taken in examining, cross-examining or re-examining a witness;
 - (b) limit the number of witnesses (including expert witnesses) that a party may call;
 - (c) limit the time to be taken in making any oral submissions;
 - (d) limit the time to be taken by a party in presenting its case;
 - (e) limit the time to be taken by the trial;
 - (f) amend a direction made under this rule.
- (2) Any such direction must not detract from the principle that each party is entitled to a fair trial, and must be given a reasonable opportunity to lead evidence, cross-examine witnesses and make submissions.

(3) In deciding whether to make any such direction, the Court may have regard to the following matters in addition to any other matters that may be relevant:

- (a) the subject matter, complexity or simplicity of the case;
- (b) the number of witnesses to be called;
- (c) the volume and character of the evidence to be led;
- (d) the time expected to be taken for the trial;
- (e) the need to place a reasonable limit on the time allowed for the trial;
- (f) the efficient administration of the Court lists; and
- (g) the interests of parties to other proceedings before the Court.

(4) The Court may, at any time, direct a solicitor or barrister for a party to give to the party a memorandum stating:

- (a) the estimated length of the trial and the estimated costs and disbursements of the solicitor or barrister;
- (b) the estimated costs that would be payable by the party to another party if the party were unsuccessful at trial.

(d) Part 52A rule 9

At the end of the rule insert -

(3) Where in any proceedings:

- (a) it appears to the Court that:
 - (i) a party has been subject to unreasonable delay or default on the part of any other party;
 - (ii) the proceedings are unreasonably protracted; or
 - (iii) justice otherwise demands it, or
- (b) a costs order is made under rule 43 or rule 43A.

The Court may order that costs, or a specified amount on account of costs, be payable forthwith.

(e) Part 52A rule 25

Omit the rule and insert instead -

Disobedience to rule, judgment or order

25. Where any person fails to comply with any provision of the rules or any judgment or order or direction of the Court, the Court may order that person to pay the costs of any other person occasioned by the failure.

(f) Part 52A rules 43 and 43A

Omit the rules and insert instead -

Liability of solicitor

43. (1) Where costs are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court that a solicitor is responsible (whether personally or through a servant or agent), the Court may, after giving the solicitor a reasonable opportunity to be heard:

- (a) disallow the costs as between the solicitor and the solicitor's client, including disallowing the costs for any step in the proceedings;

- (b) direct the solicitor to repay to the client costs which the client has been ordered to pay to any other party; and
 - (c) direct the solicitor to indemnify any party other than the client against costs payable by the party indemnified.
- (2) Without limiting the generality of subrule (1), a solicitor is responsible for default for the purposes of that subrule where any proceedings cannot conveniently proceed, or can proceed only with the incurring of extra costs or with the inconvenience of the Court or another party to the proceedings, because of the failure of the solicitor:
- (a) to attend in person or by a proper representative;
 - (b) to file any document which ought to have been filed;
 - (c) to deliver any document which ought to have been delivered for the use of the Court;
 - (d) to be prepared with any proper evidence or account;
 - (e) to comply with any provision of the rules or any judgment or order or direction of the Court; or
 - (f) otherwise to proceed.
- (3) The Court may, before making an order under subrule (1), refer the matter to a Registrar for inquiry and report.
- (4) The Court may order that notice of any proceedings or order against a solicitor under this rule shall be given to the solicitor's client in such manner as may be specified in the order under this subrule.
- (5) The Court may give ancillary directions in order to give full effect to a costs order, including directing a solicitor to provide to the Court or a party to the proceedings a bill of costs in assessable form.
- (6) This rule is in addition to and is intended to operate independently of the provisions of section 76C of the Act and does not apply in circumstances where section 76C of the Act applies.

Liability of barrister

43A.(1) Where costs are incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default, and it appears to the Court that a barrister is responsible (whether personally or through a servant or agent), the Court may, after giving the barrister a reasonable opportunity to be heard:

- (a) disallow the costs as between the barrister and his or her instructing solicitor or as between the barrister and the client, including disallowing the costs for any step in the proceedings;
 - (b) direct the barrister to repay to the client costs which the client has been ordered to pay to any other party; and
 - (c) direct the barrister to indemnify any party other than the client against costs payable by the party indemnified.
- (2) Without limiting the generality of subrule (1), a barrister is responsible for default for the purposes of that subrule where any proceedings cannot conveniently proceed, or can proceed only with the incurring of extra costs or with the

inconvenience of the Court or another party to the proceedings, because of the failure of the barrister:

- (a) to attend in person or by a proper representative;
- (b) to file any document which ought to have been filed;
- (c) to deliver any document which ought to have been delivered for the use of the Court;
- (d) to be prepared with any proper evidence or account;
- (e) to comply with any provision of the rules or any judgment or order or direction of the Court; or
- (f) otherwise to proceed.

(3) The Court may, before making an order under subrule (1), refer the matter to a Registrar for enquiry and report.

(4) The Court may order that notice of any proceedings or order against a barrister under this rule shall be given to the barrister's instructing solicitor or client in such manner as may be specified in the order under this subrule.

(5) The Court may give ancillary directions in order to give full effect to a costs order, including directing a barrister to provide to the Court or a party to the proceedings a bill of costs in assessable form.

9. The amendments contained in paragraph 8 shall commence on 1 March 2000.

10. The Supreme Court Rules 1970 are further amended as follows -

Part 52A

After rule 35 insert -

Power to order maximum costs

35A(1). The Court may by order, of its own motion or on the application of a party, specify the maximum costs that may be recovered by one party from another.

(2) A maximum amount specified in an order under subrule (1) shall not include an amount that a party is ordered to pay because the party:

- (a) has failed to comply with an order or with any of these rules;
- (b) has sought leave to amend its pleadings or particulars;
- (c) has sought an extension of time for complying with an order or with any of these rules; or
- (d) has otherwise caused another party to incur costs that were not necessary for the just, quick and cheap:
 - (i) progress of the proceedings to trial or hearing; or
 - (ii) trial or hearing of the proceedings.

(3) An order under subrule (1) may include such directions as the Court considers necessary to effect the just, quick and cheap:

- (a) progress of the proceedings to trial or hearing; or
- (b) trial or hearing of the proceedings.

(4) If, in the Court's opinion, there are special reasons, and it is in the interests of justice to do so, the Court may vary the specification of maximum recoverable costs ordered under subrule (1).

EXPLANATORY NOTE

(This note does not form part of the rules).

1. The object of the amendment contained in paragraph 2 is to:
 - (a) ensure that an expert engaged to:
 - (i) provide a report as to his or her opinion for use as evidence; or
 - (ii) give opinion evidence, in proceedings or proposed proceedings;
 - (iii) observes an overriding duty to assist the Court impartially on matters relevant to the expert's area of expertise;
 - (iv) observes a paramount duty to the Court and not to the person retaining the expert;
 - (v) does not act as an advocate for a party;
 - (vi) makes full disclosure of all matters relevant to his or her report and evidence; and
 - (vii) cooperates with other expert witnesses;
 - (b) facilitate the appointment of expert witnesses by the Court; and
 - (c) extend the existing power of the Court to obtain assistance from an expert in proceedings in the Equity Division (other than in the Admiralty List) to proceedings in the Common Law Division (other than in proceedings tried with a jury).
2. The object of the amendments contained in paragraph 6 is to make it clear that parties have an obligation to avoid unreasonably making or disputing an allegation of fact and imposing a costs sanction.
3. The object of the amendments contained in paragraph 8 is to make it clear that the overriding purpose of the rules is to facilitate the just, quick and cheap resolution of the real issues in civil proceedings. This has been achieved by:
 - (a) stating the overriding purpose;
 - (b) imposing obligations on parties and their barristers and solicitors to assist the Court in achieving the overriding purpose;
 - (c) imposing wider costs sanctions on parties and their barristers and solicitors to enforce the overriding purpose; and
 - (d) specifying expanded case management powers of the Court designed to assist in achieving the overriding purpose.
4. The object of the amendments contained in paragraph 10 is to enable the Court to specify the maximum costs that may be recovered by one party from another, with certain necessary exceptions.

M. A Blay

The Secretary of the Rule Committee

Practice Note 108

Cost orders against practitioners

- 1 The purpose of this practice note is to ensure compliance with directions and the rules of the Court. The requirement that parties and practitioners comply with directions and rules will be confirmed by the use of costs sanctions in appropriate cases, including costs orders against practitioners personally and costs ordered on a *payable forthwith* basis. Attention is drawn to remarks in this respect in the judgment of the Court of Appeal in *Whyte v Brosch*.¹
- 2 Practitioners are reminded of their duty to the Court to ensure the efficient and expeditious conduct of proceedings. As Sir Anthony Mason expressed it, practitioners must have regard to “the speedy and efficient administration of justice”.²
- 3 Practitioners should facilitate the just, quick and cheap disposal of proceedings. Practitioners should identify the issues genuinely in dispute. Practitioners should be satisfied that there is a reasonable basis for alleging, denying or not admitting facts in pleadings. The Court relies on practitioners, either directly or by giving appropriate advice to a client, to observe listing procedures, rules and Court directions, to ensure readiness for trial, to provide reasonable estimates of the length of hearings, to present written submissions on time and to give the earliest practicable notice of an adjournment application. Failure in any of these respects may be taken into account in exercising the jurisdiction to order costs against practitioners personally.
- 4 The late amendment of pleadings may also attract a costs order against a practitioner. The considerations proposed by Justice Kirby in *State of Queensland v JL Holdings Pty Ltd*³ in relation to the granting of an indulgence with respect to a late amendment provide guidance, specifically in relation to late amendments but also generally in relation to procedural indulgences.
- 5 In appropriate cases, particularly those involving repeated defaults, the Court may refer an incident or incidents of default to the Law Society, Bar Association or Legal Services Commissioner.
- 6 The procedure to be followed where the Court is minded to make a costs order against a practitioner personally will be:
 - a. A practitioner will be given an opportunity to show cause why costs should not be ordered against him or her.
 - b. With the consent of the practitioner, the Court may take the show cause submission orally at the conclusion of any trial, application or other appearance before the Court.
 - c. If the matter of costs is not dealt with in accordance with para (b), the Court may adjourn the matter to another day or date to be fixed, and may direct the practitioner to provide written submissions to the Court within a period specified by the Court.
 - d. The Court may further direct that the matter proceed by written submission and by reference primarily to the materials which were before the Court during the proceedings to which the costs order relates.

¹ (1998) 45 NSWLR 354.

² *Giannarelli v Wraith* (1988) 165 CLR 543 at 556

³ (1996-97) 189 CLR 146 at 169-172.

- e. If it will assist the Court, the other parties to the proceedings may be directed or invited to make submissions in relation to the question of costs or any ancillary matter.
- f. If a practitioner informs the Court that he has requested his or her client to waive legal professional privilege in a respect which the practitioner asserts is relevant to the Court's consideration of the costs order, the Court will invite the client to make submissions on the matter and to indicate whether the client wishes an order to be made against the practitioner.
- g. Upon a determination by the Court that a practitioner shall be personally liable for the costs of a party to the proceedings or any part thereof and such costs are ordered to be *payable forthwith*, the Court may Order that a bill of costs relevant to the costs order be filed with the Court and served on the party liable to pay within such time as the Court orders and that such a bill of costs be in the form prescribed pursuant to section 193 of the *Legal Profession Act*.
- h. The Judge or Master may determine and order the amount of costs payable under the costs order.

31 January 2000

Chief Justice

This Practice Note is available on the Supreme Court's website: www.lawlink.nsw.gov.au/sc