

THE TASMANIAN BAR

DIRECT ACCESS GUIDANCE NOTE

1. This direct access guidance note has been developed by the Bar Council, in consultation with the Legal Profession Board of Tasmania and the Law Society of Tasmania. References to the Rules are to the *Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)* as adopted by Rule 5 of the *Legal Profession (Barristers) Rules 2016*.
2. The purpose of this guidance note is to assist barristers to understand their obligations and their limitations when they accept instructions from persons who are not solicitors. It is also to promote the orderly conduct of cases where a barrister accepts those instructions.
3. This guidance note is intended to apply to the circumstances where a barrister accepts instructions as an independent children's lawyer pursuant to an order made under section 68L of the *Family Law Act 1975 (Cth)* or as a separate legal representative pursuant to an order made under section 59 of the *Children, Young Persons and Their Families Act 1997*, but having regard to the local modification to rule 13 of the Rules.

Definitions

4.
 - 4.1 The term "direct access" means the obtaining by a barrister of instructions from a person who is not a solicitor, or an in-house lawyer holding a practising certificate.
 - 4.2 The term "barrister's work" as defined by rule 11 in the Rules means:
 - (a) appearing as an advocate;
 - (b) preparing to appear as an advocate;
 - (c) negotiating for a client with an opponent to compromise a case;
 - (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
 - (e) giving legal advice;
 - (f) preparing or advising on documents to be used by a client or others in relation to the client's case or other affairs;
 - (g) carrying out of work properly incidental to the kinds of work referred to in (a)-(f); and
 - (h) such other work as is from time to time commonly carried out by barristers.

Background

5. Rule 22 provides the requirements that must be complied with before a barrister accepts instructions by way of direct access.
6. Strictly speaking, a “brief” emanates from an instructing solicitor. When a barrister obtains instructions to act directly from a client, he or she is “instructed” directly, and this guidance note adopts that phrasing. This distinction is important because the cab rank rule, as explained in rule 17, requires that a barrister “must accept a brief from a solicitor to appear before a court...”.
7. Rule 21 provides that nothing in the rules shall be taken to oblige a barrister to accept instructions directly from a person who is not a solicitor.
8. A barrister, therefore, must accept a brief, but may accept instructions by direct access.
9. Direct access instructions may come from, for example, company secretaries, government departments and agencies, local government bodies, and other professions such as accountants, town planners and insolvency practitioners. For clients instructing in these examples, direct access provides benefits in reducing the time and cost in obtaining advice, and early identification of issues that will be relevant in any litigation arising from the instructions.
10. A barrister must not seek out direct access instructions. Barristers traditionally work on the basis of being “offered” a brief and “accepting” that brief. In the case of direct access instructions, the same principles of offer and acceptance should apply. The cab-rank rule strongly suggests that a barrister should wait until a brief or instructions are offered, so as to maintain the availability of access to advocacy and advice, and the disinterestedness of a barrister that underpins that rule.

Restrictions

11. A barrister who takes work on a direct access instruction basis must **not** act as a solicitor. The ability to take direct access instructions does not, for example, remove the prohibitions in rule 13 on barristers:
 - (a) conducting correspondence in the barrister’s name with anyone other than the opponent;
 - (b) placing herself or himself at risk of becoming a witness, by investigating facts for the purposes of appearing as an advocate or giving legal advice, otherwise than by:
 - (i) conferring with the client, the instructing solicitor, prospective witnesses or experts,
 - (ii) examining documents provided by the instructing solicitor or the client, as the case may be, or produced to the court,
 - (iii) viewing a place or things by arrangement with the instructing solicitor or the client, or
 - (iv) library research

- (c) being the address for service;
 - (d) commencing or filing any proceedings or serving any process.
12. Obviously, a barrister can correspond with the barrister's client, but barristers acting on direct access instructions must not, for example, correspond with potential witnesses or with government departments. Once there is an "opponent" identified in proceedings, whether in a court or a Tribunal, then correspondence may be undertaken with that opponent. "Opponent" is defined by rule 125 to mean the legal practitioner appearing for the party opposed to the client, or the party opposed to the client if that party is unrepresented, and any other practitioner appearing for another party in the matter or any other party if that party is unrepresented. Rules 13(b) and 125 mean that a barrister should not correspond directly with, for example, the Office of the Director of Public Prosecutions, Police Prosecutions or a firm of solicitors unless that correspondence is with the barrister's opponent as defined. Otherwise correspondence should be undertaken by the client in a direct access matter.
13. A barrister must not "go on the record" other than by way of physically appearing in court. In a direct access matter the client is acting in person with a directly instructed barrister. All documentation or proceedings necessary in any matter whether in a court of tribunal, should be filed by or served on the client. The barrister can settle documentation, but not file it.

Disclosure

14. Rule 22 provides that a barrister who proposes to accept instructions directly from a person who is not a solicitor must do certain things:
- (a) inform the prospective client in writing of:
 - (i) the effect of rules 11 and 13;
 - (ii) the fact that circumstances may require the client to retain an instructing solicitor at short notice, and possibly during the performance of the work;
 - (iii) any other disadvantage which the barrister believes on reasonable grounds may, as a real possibility, be suffered by the client if the client does not retain an instructing solicitor;
 - (iv) the relative capacity of the barrister in performing barristers' work to supply the requested facilities or services to the client compared to the capacity of the barrister together with an instructing solicitor to supply them; and
 - (v) a fair description of the advocacy experience of the barrister, and

- (b) obtain a written acknowledgement, signed by the prospective client, that he or she has been informed of and understands the matters in (a) above.

15. Attached to this guidance note is an example disclosure that circulates in Victoria, and which the Tasmanian Bar considers satisfies rule 22. Its terms could easily be incorporated into a more comprehensive fee disclosure document.
16. The rule 22 disclosure should be made before any work is done. That means that the person from whom the barrister is obtaining instructions directly must be spoken to and must provide the written acknowledgement.
17. In some exceptional cases, a barrister may find themselves in a position where they first obtain direct access instructions at court. No work should be undertaken in such circumstances unless the client providing the instructions has provided the written acknowledgement.

Third parties

18. Rule 22 does not contemplate the obtaining of instructions through third parties. That is inappropriate, because it is not “directly from a person”. The person being represented must have provided the written acknowledgement before work is undertaken and should provide the instructions.

Costs

19. In addition to making the disclosure required under rule 22, barristers are required to make the fee disclosures required under Division 3 of Part 3.3 of the *Legal Profession Act 2007*. The obligation to make that disclosure applies to a barrister because they are a person who is admitted to the legal profession, and who holds a current practising certificate granted under that Act.
20. This disclosure is very important in the case of direct access matters. Not only is it a conduct issue if not obtained, it evidences the fee agreement upon which any action could be taken to recover fees, and to respond to complaints about fees.

Holding of funds for fees

22. Section 240 of the *Legal Profession Act 2007* prohibits a barrister in the course of practising as a barrister from receiving trust money. Trust money is defined as including money received on account of legal costs in advance of providing services.

23. Arrangements where a solicitor, at the request of a barrister, holds funds in the solicitor's trust account which are funds obtained from direct access clients in anticipation of the barrister's fees are clearly in contravention of section 240.
24. Further, in such circumstances, the solicitor is not acting for the relevant individual client and is not instructing the barrister. There is no relevant trust relationship upon which the solicitor can hold the funds. The solicitor therefore has deposited money into their trust account which is not in fact the solicitor's trust money.
25. A solicitor can only disburse money out of a trust account in accordance with a direction given by the person on whose behalf it is received. In the circumstance described above, a solicitor may well be committing an offence under section 243 of the *Legal Profession Act 2007* when such funds are paid out.
26. Arrangements as described above are likely to be considered to be a sham to avoid the prohibition on barristers receiving trust money.

Written records

27. When a barrister obtains instructions by direct access, they do not have the benefit of a solicitor to keep a file and relevant and necessary records. Without the benefit of a solicitor to do it, the barrister must make detailed contemporaneous file notes of every single conference or conversation with the client. Signed instructions should be obtained.
28. If the matter involves a settlement of some sort, written advice about the likely outcomes in the matter must be first provided. The barrister should obtain written and signed instructions to reject or accept any offer.
29. A barrister undertaking work on direct access instructions may not have advocate's immunity. Detailed written advice confirming advice given, actions taken and instructions received should be provided promptly and preferably signed by the client in acknowledgement.
30. Upon the completion of a brief, barristers generally return the documents comprising the brief to the instructing solicitor. When instructions are obtained by direct access, this cannot be done. The barrister should retain all documents that an instructing solicitor would have kept, including:
 - (a) a record of the terms on which the instructions were accepted, including a copy of the disclosure statement and costs agreement;
 - (b) a record of attendances, whether in conference or by telephone;
 - (c) copies of all written instructions and documents received from the client, and notes of any oral instructions;
 - (d) copies of all written advices provided and notes of any oral advice provided;
 - (e) copies of all documents drafted and approved by the barrister;

- (f) copies of all correspondence between the barrister and the client;
 - (g) a record of any time limits within which the client requires work to be completed, and a record of any indications or undertakings given about the timing to complete work;
 - (h) file notes.
31. These documents should be kept for at least 7 years, because in direct access matters, the barrister is the target of any claims that may later be made. That may include missed time limit claims.

Monitoring suitability

32. A barrister should consider whether, having regard to the resources available to the barrister, including the barrister's experience, general competence, and familiarity with the areas of practice likely to be relevant to the matter the barrister is satisfied that:
- (a) the barrister will be able properly to prepare the case for hearing bearing in mind the requirements of rules 11 and 13; and
 - (b) the barrister will be able to take all appropriate action on the client's behalf, in a timely fashion, and in accordance with any rules of practice or procedure, practice directions, or other orders or directions made in respect of the conduct of the matter,
- and if not so satisfied the barrister must refuse to accept the instructions.
33. A barrister should monitor whether the matter remains one which is suitable for direct access instructions. If, for any number of reasons, it moves outside the scope of suitability, the provisions of rule 101(k) come into play. That is, a barrister must refuse to accept *or retain* instructions to appear if:
- ‘there are reasonable grounds for the barrister to believe that the failure of the client to retain an instructing solicitor would, as a real possibility, seriously prejudice the barrister's ability to advance and protect the client's interests in accordance with the law including these Rules’.

Legal Aid

34. Barristers should be very cautious accepting instructions directly from persons who are funded by or likely to be eligible for Legal Aid. Such matters will generally involve the risk of imprisonment and may be sufficiently serious to require an instructing solicitor to undertake the work that barristers are prohibited by rule 13 from undertaking.

Changing counsel

35. Barristers must comply with the requirements of the Rules concerning when a barrister who holds instructions on a matter requiring appearance may pass the instructions for that appearance to another barrister. Rule 108 provides that a barrister must not return a brief to appear (and in the case of direct

access the phrase “a brief” means instructions) in order to accept another brief to appear **unless** the client in the first brief has permitted the barrister to do so beforehand, after the barrister has clearly informed the client of the circumstances in which the barrister wishes to return the brief and the terms of rule 108 and rule 110.

36. Rule 110 provides that a barrister who wished to return a brief which the barrister is permitted to return must do so in enough time to give another legal practitioner a proper opportunity to take over the case.
37. Rule 111 provides that a barrister must promptly inform the client as soon as the barrister has reasonable grounds to believe that there is a real possibility that the barrister will be unable to appear.
38. Rule 112 provides that a barrister must not hand over a brief to another barrister to conduct the case, or any court appearance within the case, unless the instructing solicitor has consented to that course. In the case of direct access instructions, a barrister must not hand them over to another barrister, even with the consent of the client. It is the responsibility of the client to enter into a new direct access arrangement with the new barrister including the necessary disclosures.
39. These rules mean that a barrister who holds direct access instructions to appear must appear, unless these rules have been satisfied. For example, if a barrister holds direct access instructions to do a plea in the Magistrate’s Court, and is offered a 3 day trial in the Supreme Court including on the same day, he or she must refuse the Supreme Court trial unless the barrister has informed the client of the circumstances, and the client has permitted the return of the brief or consented to the handing over of that appearance to another barrister, and this has all occurred in enough time to give the other barrister a proper opportunity to take over the case.
40. The “flicking” of appearances on the day to undertake more remunerative work is unethical, is a breach of the cab-rank principle, and is a gross discourtesy to the Court.