



## GREENWAY CHAMBERS

### Briefing Barristers

#### **A Introduction**

1. This is a practical guide to briefing barristers.
2. The approach we take is that solicitors and barristers work together as a team to advance the client's interests.
3. Within that team, solicitors and barristers have specific roles. Broadly, the solicitor deals more intimately with the client and witnesses in the preparation of a matter for hearing; the barrister provides the solicitor with an independent assessment of that work and leadership in the conduct of the matter and represents the client at hearing.
4. However, barristers and solicitors are not interchangeable. Barristers are limited in the range of work they can do (Legal Profession Uniform Law Barristers' Conduct Rules 2015, Rule 11, 16). The requirement that barristers avoid the risk of becoming witnesses in proceedings (Legal Profession Uniform Law Barristers' Conduct Rules, Rule 13) may also be significant when it comes to preparing and settling witness evidence.
5. The law framing the practice of solicitors and barristers – legal professional regulation together with court and procedural rules – also frames the correct approach to briefing barristers.
6. The relationship between professional ethical obligations and the practice of briefing counsel was considered by Rares J in his recent decision in

*Armstrong Scalisi Holdings Pty Ltd v Piscopo (Trustee), in the matter of Collins* [2017] FCA 423 at [20] – [23] and [27], an application for security for costs. His Honour emphasised in that decision the centrality of costs in the discharge of our duties to the client and the due administration of justice.

7. However there is no prescription for when, who or how to brief barristers.

## **B What is a brief to counsel?**

8. The brief has been described by the Law Council of Australia as “[t]he authority and instruction provided by a solicitor to counsel to undertake specified work”.

## **C When do I brief counsel?**

9. Barristers say “brief early and often”. There is no doubt some attraction in this approach for both barristers and solicitors. Justice Rares described in *Armstrong* how this approach can help to control costs and how cost is central to access to justice.
10. Ultimately, however, the discharge of our duties under Part 6 Div 1 of the *Civil Procedure Act 2005* (together with the injunction to avoid additional costs in the LPUL s 173) will depend on who in your team has the skill and capacity to do the work required at the best price.
11. That in turn requires an analysis and understanding of what work is involved.
12. Some factors to consider include:
  - a. Value of matter:
    - i. Amount of money involved;

ii. Significance to client.

b. Complexity:

i. Do you need to brief at all or is this a matter that a solicitor can and should deal with, without the assistance of counsel?

ii. What do you need from counsel in the instant matter – if it is legally and factually straightforward and you only need someone to do the advocacy, it may not be so urgent to brief early (unless you want to secure counsel's time and loyalty);

iii. What will counsel cost compared with the solicitor doing the same work (bearing in mind the limitation on what constitutes barristers work);

c. Your capacity, and

d. Timing applicable to the matter.

#### **D Who do I brief?**

13. Your litigation team may comprise:

a. You and junior counsel

b. You and senior counsel

c. You, senior and junior counsel

d. You, several junior and one senior counsel

e. You, several junior and several senior counsel.

14. The question of value should be considered by comparing the cost of the solicitor or solicitors doing work that can be given to a barrister, compared with the cost of a barrister or barristers doing the work.
15. The practice of putting together a detailed costs estimate is useful for this purpose and facilitates a project management approach (ie who will be doing what and by when).
16. Briefing early will give you the advantage of counsel's approach (including the cost of that approach).

## **E How do I do a brief to counsel?**

### ***Paper or electronic?***

17. The days of paper briefs are probably numbered but the structure of a brief does not differ between paper and electronic briefs.
18. In any event paper briefs inevitably involve an electronic component, and electronic briefs may have a paper component, for example where the authenticity of a document or record is in issue it may be important to inspect the original document.
19. Ask counsel their preference. On the other hand, where a firm adopts a particular approach, counsel will follow.
20. The distinct requirements of electronic briefs are discussed further below.

### ***What goes in the brief?***

21. What goes in a brief depends on what you want from your barrister and what your barrister needs in order to give it to you.
22. Traditionally briefs are either or both to:

a. Advise, in relation to one or more of:

- i. liability;
- ii. evidence;
- iii. prospects, and
- iv. quantum.

A brief to advise will always require questions to be put to counsel and may also include instructions to draw and/or settle process and pleadings, affidavits, motions.

and

b. Appear

- i. In conjunction with brief to advise, or not;
- ii. Even if a brief to appear only, the barrister will still have to form a view on liability, evidence and prospects.

23. With your object and purposes in mind, any brief will include the following essentials:

- a. Index. Use headings. Split the brief into folders if necessary (if so, give each folder its own numbering system eg: pleadings, evidence [further divided into documents and testimony]).
- b. Observations. Includes: who's who, issues of fact and law, procedural history, settlement attempts, questions you want counsel to answer, critical dates and deadlines and any issues about costs that should be flagged up front. Be chronological. Don't be shy about expressing your view in relation to questions of law and fact, and include references to any cases or other material you have identified.

- c. Chronology. Four columns: date, description, source and comment.
- d. Pleadings (including requests for and responses to requests for particulars) or preliminary correspondence, interlocutory steps.
- e. Advices written by you or other counsel.
- f. Earlier or related decisions in the matter.
- g. Time including enough time to do what you want them to do and an indication of critical dates and deadlines.

### ***Electronic briefs***

24. Mirror the paper brief, but provided in electronic form (PDF, word or a combination). All documents must be in a format that is able to be marked up in Adobe.

25. Index is the key document:

- a. All documents in the brief should be identifiable by reference to the Index. For example, if documents provided individually, they should have the same name as in the index (date and name). If documents aggregated into PDF(s), they should be named by reference to the index (eg Brief Index No. 1-22).
- b. Where a document will be worked on by both you and counsel, provide it in word and PDF (for version control). Always include a version reference in the footer (v.1, v.2 etc) and heading (date).

26. Platform

- a. Does not have to be a specialist service. You can just provide the brief on a USB.
- b. If you want the facility to share instantaneously, you can opt for a general cloud-based service (eg drop box or others) or specialist

cloud-based service (eg Cloudbrief). This will minimise emails and maximize document sharing and phone calls.

27. Whatever platform you choose, the key is three levels or locations:

- i. Solicitor's private location;
- ii. Barrister's private location;
- iii. Shared location. Within this location I would have at least two folders: one for sharing, from which copies can be retrieved; and one in which a complete and current brief can be stored. The second folder should, again, be organized in accordance with the index and is the parking place for final documents like filed process, pleadings and evidence).

### ***Updating the brief***

28. Updates should be anticipated and done periodically, if not frequently.

29. It is in the context of updates that the index comes into its own. An index can be updated with additional documents together with the documents themselves (by whatever means, paper or electronic or both).

30. Updating is usually done by the solicitor so that there is process control and all members of the team are (literally) on the same page. This approach will enable solicitor and counsel to "travel together" in the conduct of the matter and preparation for hearing, and ensure that preparation for hearing is efficient. Have a version reference in the footer (eg index v1, index v2 etc).

## **F Email**

31. Unless organised and focused, the advantages of email in terms of immediacy may be outweighed by its volume. For example, 16 emails all

headed with the name of the matter and received on the same day are time consuming to comprehend and organise. This requires the barrister to open all of the emails, find any attached documents, distinguish pleadings from evidence from authorities from correspondence and chronologically arrange the material before focusing on what you want the barrister to actually do. This is particularly so if the documents are not in a form which may be electronically marked up.

32. Some suggestions to ensure that your emails are effective include:

- a. When the topic of the email changes, break the chain. Don't break the chain if you are truly replying. (Indeed, go back and find the email to which you are responding).
- b. Use subject lines: identify both the matter and topic for ease of reference and search-ability;
- c. Barristers and solicitors should compose emails that are:
  - i. short;
  - ii. specific;
  - iii. clear.
- d. Be judicious. Endless "FYI" (unless it is abundantly clear) simply beg the question of what you want the barrister to do with it (read it, include it in the brief, use it for a forthcoming purpose). Even an instruction as short as "for inclusion in your brief" assists.

33. Necessity will occasionally require resort to email storms. When the storm abates, update the index and brief.

## **G Tips for briefing counsel**

34. To make your briefs as effective as possible:

- a. Talk to counsel about the matter before preparing the brief;
- b. Be bold in your observations;
- c. Make your chronology detailed;
- d. Ensure your documents are chronologically arranged;
- e. Keep your index and brief up to date.

35. Communication is key. Keep talking to your barrister and keep them informed but don't overwhelm them with emails and documents that do not require the barrister's attention.

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