

Chapter 34. DOCUMENT MANAGEMENT

The Court Book The Tender Bundle e-Briefs

By Laura Colla

Good Document Management, like good Event Management in Family Law process is key to best practice. It reduces stress, assists tremendously in sound and efficient preparation by you and by counsel, and directly facilitates a better outcome for your client. It is also an integral part of your and your firm's general reputation in practice. Once you have your Document Management systems in place, and review them from time to time, with feedback from counsel, Document Management will be a breeze, and even a pleasure. It's about working smarter, not harder.

It is often a good idea to have a look at other Court Books, Tender Bundles and e-Briefs in other matters your firm has already created, to get a gist of what these are and how they work. There is of course always room for improvement. Do not simply repeat poor examples, on rote. Consider the purpose of the documents being managed, the purpose of the Court Book, Tender Bundle and e-Brief as well as how each person is going to use them in their professional role.

In practice, some firms and practitioners are much better at Document Management than others. You want to be in the category that manages documents, particularly for trials, very well. Lead by example. Part of the magic in good Document Management is turning your own mind to the topic and allowing enough time to attend to tasks in this aspect of your own practice.

The aim is to prepare the Court Book, Tender Bundle and e-Brief so the users, that is the Judge (if applicable), counsel and you can readily access, identify, retrieve, analyse and if necessary link the contents of the documents efficiently because as you know, we all typically work in high pressure contexts, where time is of the essence, detail matters and accuracy is an imperative.

The documents in your Court Book, Tender Bundle and e-Brief must be legible, translated as required, complete, accurate and fulsome. They need to be checked by you to ensure that they paint an accurate and fair picture of the evidence to be relied upon, so that material, if used or targeted can survive the furnace of cross examination.

This chapter sets out one way of attending to Document Management which usually works very well. You may care to refine the suggestions in this chapter to suit your style and counsel's style. I recommend you give the suggestions a good go for say, six months and tailor them to suit you as you need, after that.

Review of any Document Management systems in practice is imperative. You can get feedback and assistance with the documents from team members in your own firm, colleagues in other firms or counsel. In particular, you can get feedback and guidance as to your version of:-

- The **Court Book** from the relevant Associate cc: the other side always, making sure you have initially carefully checked the trial preparation orders made regarding the Court Book. Sometimes the trial direction orders made at a Compliance and Readiness Hearing are refined or changed by the allocated trial Judge, so look out for any such orders in a matter;
- the **Tender Bundle** from Law in Order or Office Works for printing and initially your supervising partner and then your counsel as to the contents of the Tender Bundle which is usually a work in progress, as issues are refined over the course of counsel's preparation for trial;
- the **e-Brief** from Stephen Foley ph (03) 9020 4456 as to set up and training and counsel before, during the case as to styling of the e-Brief and after by way of review and feedback, if you like.

The Court Book

What is the Court Book?

The Court Book is simply an electronic version of the filed material your client is relying upon at final (not interim) hearing. It was developed in response to the COVID-19 pandemic. Most final trial preparation orders still require a Court Book. Check the trial directions made at the Compliance and Readiness Hearing as well as any update trial orders made by the trial Judge hearing the trial.

How Do you Prepare the Court Book?

Please follow the orders and directions given at the Compliance and Readiness hearing as to who is to prepare what Court Book by when.

Whilst it would be ideal for such orders and directions to be standardised by now, by the Court, they are not. Different Judicial Officers make different orders and directions as to the preparation and contents of the Court Book. Some orders provide for each party to create their own with their own client's filed material relied upon for the final hearing. Some orders provide for the applicant to prepare each parties' Court Book by agreement with the other parties. Sometimes, the Independent Children's Lawyer is tasked with preparing one Court Book with each party's filed material to be relied upon at final hearing (in consultation with each of the other parties).

What is imperative is that your client's Court Book for Final Hearing is done on time and includes the filed material he or she is relying upon at Final Hearing.

The Court Book is paginated electronically. Those page references are important for counsel's preparation and for referencing material in open Court and/or in written submissions, if any are required.

Who Uses the Court Book?

The Trial Judge will likely read your client's trial material from your client's Court Book. The Trial Judge will also likely ask for page references from Counsel when Counsel is asking questions of any witness in open Court, based on your client's material. The Court Book therefore provides easy access and reference to a party's filed material for the hearing. It also ensures everyone is clear on the material relied upon at trial, no filed document relied upon is overlooked.

Sometimes if a matter is not reached at final hearing, as it is in competition with other matters, the allocated trial Judge may refer the matter to another Judge in the Melbourne Registry or even another Registry, so it is imperative that the Court Book is done and done properly. An interstate Judge will then reference the material via the Court Book you have prepared.

Counsel will also use the Court Book to access the parties' and witnesses' trial material and note up their cross examination using page references from the Court Book. They will also use that material to ensure they are reading and preparing from the correct version of the documents. Opposing counsel will do likewise.

When Should the Court Book be Done?

I encourage you to allow time in your diary to have each party's and the ICL's Court Book (if applicable) prepared within three business days of the last due date for the filing of the last affidavit due in the trial directions. Outlines of Case may then be added to the Court Book as they are filed and served to the end of the Court Book to not affect prior pagination.

The point is that the Court Book needs to be completed and shared with Counsel, so it is ready for Counsel to start preparing your client's case for trial. As well all know, that preparation involves more than simply reading the material. Counsel needs each party's and witnesses' affidavits to consider the matter as a whole and to then prepare.

There is no point in giving or sharing a Court Book with your client's counsel or other parties on the Friday before a Monday trial or just prior to the trial starting, as the page referencing will not have been done from that late Court Book. That will simply frustrate the trial Judge and cause embarrassment. The better way to do it, is to have all the Court Books for each party provided to Counsel in good time to let counsel prepare for the trial. There is generally one day's preparation for each day of listing. I suggest you add a day for good measure when trying to work out when to deliver the Court Books, Tender Bundle and e-Brief to counsel. Feel free to contact counsel to discuss when he or she would like to take delivery of the documents, remembering counsel will likely be working around other trial commitments also.

What Documents Go in the Court Book and Which Documents are Not Included?

Subject always to Court orders as to the Court Book and any other orders by the Trial Judge, the Court Book for a final hearing will likely simply comprise:-

- Your Client's Application for final hearing (setting out the final orders sought for trial. Sometimes they are set out in a client's Amended Application for Final Orders);
- Your client's Trial Affidavit and most recent Financial Statement, if relevant;
- Affidavits by witnesses lay and/or professional filed on behalf of your client upon which your client relies at final hearing.

NB.

- Deponents should be available for cross examination in person unless ordered otherwise, particularly lay witnesses or professional witnesses not known to the Court; it is not a matter of the parties deciding which witnesses may give their evidence via TEAMS, that is a matter for the trial Judge once submissions are heard on that point;
- The other side should have given you two weeks' notice from the date of the final hearing if any witnesses relied upon is required for cross examination. Even if you have not received that notice, you should probably arrange for witnesses in support of your client's case to be available for cross examination having some idea as to what notice they need to come into Court or to appear on TEAMS should a TEAMS appearance be allowed by the Court);
- Only filed material should be included in the Court Book, not drafts or material you think has been filed. The filing date should be very clear on the document (at the bottom of the page and front page);
- The filed affidavit should denote clearly on the front page, jurat and any annexure pages whether it is sworn or affirmed;
- If the affidavit has annexures, it should have an index of annexures in table format underneath the jurat or on a separate page denoting across the table:-

Paragraph number; Annexure Number; Annexure Description; Page Number using the affidavit page reference and then the Court Book page reference if possible

- Orders (and Reasons for Judgment) including Intervention Orders
- Case Outline

Please ensure that all material in the Court Book has been served and that your client has a copy of all material in each party's Court Book.

You should also have gotten instructions (typed and spell checked setting out what your client's reply instructions are to the material filed by the other party and professional witnesses. Those instructions do not go into the Court Book as they are privileged. They would however be included in the e-Brief for counsel's reference to assist in Counsel's preparation for cross examination.

The reply instructions simply need to set out what your client's factual instructions are as to the filed material, ie . what they have seen or heard directly or what they say by way of

helpful, relevant comment or reply which is not a repeat of their already filed material they rely upon at final hearing. Please vet those instructions before passing them on to counsel so counsel is reading reply instructions which are cogent and considered.

The Court Book does not generally include material filed for the purposes of interim hearings, mentions, mediations and the like. Your client's counsel may want to refer to such material in preparation or questioning. Counsel will have access to the interim material via the e-brief you prepare under the tab 'Interim Material' if you or counsel deem that category of documents relevant.

The Tender Bundle

What is the Tender Bundle?

The Tender Bundle is simply a bundle of relevant source documents (including subpoenaed documents) or documents which have been formally discovered or which the other side has had notice of on account of what they are, which in time, during a trial, may be put to a witness when they are in the witness box, for identification and then tendered by Counsel on behalf of a party, should Counsel seek to tender the document.

Annexures to Trial Affidavits Rule 8.15(3)(e) Federal Circuit and Family Court Rules 2021

Annexures to affidavits must be formally tendered by Counsel at trial in open Court, once the witness has confirmed the contents of their affidavit to be true and correct, to ensure that annexures are read into evidence, so they may be properly considered by the trial Judge. If they are not tendered, then they cannot properly be considered. Instructors are encouraged to remind Counsel to tender Annexures to affidavits. The annexures to trial affidavits may be shared with the other side upon filing of the affidavit so the annexures may be properly considered by all concerned. The annexures to affidavits relied upon at final hearing by your client should be included in your client's tender bundle for ease of reference in Court.

Do not however share the balance of the Tender Bundle with the other parties until your counsel says you can. The balance of the Tender Bundle documents is not normally shared until it is reasonably complete and until the other party is in the witness box and has started to give evidence. That is so to avoid the other party and their counsel or their solicitor conferring with the other party about the documents in the Tender Bundle, because those documents usually hint at what questions are likely to be asked in cross examination, to make the point arising from the contents of a given document in the Tender Bundle.

Documents in the Tender Bundle are simply serve to confirm, correct or challenge what is in affidavit material before the Court. So, for example, a school attendance record may be in the Tender Bundle (from subpoenaed documents) to show that the children attend school when they are with their father and they are not noted as late or absent, contrary to the mother's complaint in her trial material.

Remember documents in the Tender Bundles are simply documents. They are not in evidence until they are tendered by being shown to a witness in the witness box, read by

them, identified by them, then accepted as true and correct and then formally tendered by counsel who will say words to the effect of “Your Honour I tender that document”. The document will then be given an Exhibits List Number such as F1 or M1 or ICL 1. The Associate will keep a running list of Exhibit Records. You may ask the Associate for the Exhibits Record List at any time, as it is updated, each day as the trial proceeds.

Do ensure that any salient documents have however been previously discovered. One cannot rely upon a document in a trial unless it has been discovered previously. There is no need to discover letters passing between the parties for example, or subpoenaed documents which have been released for inspection, but there is a need to discover text messages your client relies upon for example, as the other party’s lawyers cannot be assumed to have seen those.

Just because a witness is asked to look at a document from the Tender Bundle in the witness box and then answers a question having perused the document, does not mean it must be tendered. That is a matter for Counsel. Counsel may want the witness to see the document and answer a question but may opt to not have the trial Judge see the document.

Who Uses the Tender Book and How?

The Tender Bundle Documents are paginated and usually indexed by Topic and then by Date order under each Topic. It is often in electronic format but also in hard copy if requested. The order simply needs to have some logic to it which everyone can follow easily enough.

When Counsel prepares a question, he or she will make note of the page number of the document in the Tender Bundle and will call for that document to be shown to the witness by the Associate who will share it on screen in the Court Room with the witness and everyone can see it. Alternatively, counsel and instructors can look at it on their laptops. The point is that the document referenced by its page number in the Tender Bundle needs to be accessible very easily. Everyone will have ready access to it and can consider it during the question and after as need be, including for closing addresses. The Tender Book is obviously very important and useful in remote TEAMS hearings.

How to Formulate the Tender Bundle?

Again, to assist with counsel’s preparation, it is imperative that the working draft of the Tender Bundle is prepared for counsel at the time of delivery of the brief.

The Tender Bundle will include all source documents which prove facts in issue between the parties. You will know what facts are in issue between the parties by comparing each party’s affidavit on factual matters. Hence the need to file trial documents on time. Late filing impacts on important trial preparation in this regard. Filing on time is what is expected by everyone, in line with best practice. Most firms are able to file documents on time, by allowing double the time you think it will take to prepare the material working with clients who are usually working full time, have childcare responsibilities, have a lot on, are stressed and find preparing material very stressful for obvious reasons. The framework of the affidavit material is provided by you and the detail as required, provided by the client with

instructions. This work is again, detailed, precise work which takes time. The affidavit must survive the furnace of cross examination.

It is quite common to have a document proving an assertion set out in affidavit material in the Tender Bundle by reference to paragraph number in the trial affidavit.

There is no need to address via the Tender Bundle, objectionable material or submissions in any affidavit material.

You and counsel may add to the Tender Bundle as you both see fit as preparation of the trial proceeds. The Tender Bundle contents often grow and shrink over time before it is finalised for use in Court. It is a work in progress.

When adding or subtracting from the Court Book is important to remember that page references will change. It is often better to simply add pages to the Tender Bundle as you go under Topic Headings and once it is finalised, well ahead of trial, to allow counsel access to the final version of it, so preparation with page references can be made.

The Tender Bundle will also include documents which may be tendered in Examination in Chief in answer to material filed by the other side or by the report writer or any other witness.

To this end, it is imperative that clients are given copies of the material filed by the other party including their witnesses and all filed reports relied upon at trial, so you can get your client's typed, factual instructions, paragraph by paragraph, on each affidavit or report so in turn, you can consider what, if anything, arises by way of relevant reply from your client. The client's instructions should be brief, factual and not repeat what your client has already deposed to in his or her affidavit material.

The reply instructions may form the basis of an Affidavit in Reply, if one is allowed for in the Trial Direction Orders and if you assess the material warrants a Reply Affidavit. Counsel may want to read the considered reply instructions from your client, in considering the development of cross examination of the other party. Before passing on such instructions to counsel you should read them and assess if they should be passed on to Counsel.

Given the usual process of preparation for trial, the writer prefers staggered filing as follows and suggests that wherever possible, the Court should be respectfully asked to consider making the trial preparation orders as follows, noting that different judicial officers have different orders and directions as to trial preparation. The point is that the staggered filing process allows for each party to be heard and for as much preparation to be done prior to Day 1 of trial as possible.

Suggested Submissions as to Trial Preparation Orders for a Compliance and Readiness Hearing or if the allocated Trial Judge (once known) will be making updated trial direction orders:-

- the applicant file within 35 days from the final hearing date;
- the respondent file within 28 days of the final hearing;
- the applicant having a right of reply within 14 days of the final hearing and
- outlines being done 10 days prior to final hearing.

This timetable allows solicitors and counsel time to:-

- read and consider the brief conceptually;
- confer meaningfully;
- enter negotiations with opposing counsel, with instructions;
- narrow issues;
- devise a reliable Trial Plan (the timetable for the trial days) and
- attend to objections as to evidence.

It is also the writer's preference to have any Court Report prepared after the filing of the parties' material, not prior.

If this is not possible, or not what the Compliance and Readiness orders allow for, then recall that there is provision for a report writer to be asked questions under Rule 7.26 Federal Circuit and Family Court Rules 2021 within 21 days of receipt of the report, with the party asking the questions (which go to clarification only) paying for the answer to the question. All questions and answers are shared with the other parties.

How to make the most of the Tender Bundle? Tips!

Most matters resolve prior to a listing for trial. The matters listed for trial usually actually proceed to a contested trial which means that findings of fact need to be made by the trial Judge based on the evidence, including evidence set out in affidavit material, some of which is challenged via the crafted process of cross examination.

That work is serious, considered and detailed. To be done well, counsel needs time to prepare cross examination and needs source documents to rise above the typical situation of he says/she says, to assist in the process of correction, clarification, confirmation, diluting exaggerations and/or to dismantle the foundation concepts in a party's case.

It is accordingly imperative that affidavit material is filed on time by your client (and the other side) and that subpoenaed material is inspected well prior to the actual drafting and settling of affidavit material (not after and most certainly not at trial).

It is a very serious error by any instructor, to not check subpoenaed and source documents, prior to the finalisation of a trial affidavit. Properly and accurately drawn affidavit material for final and interim hearings, involves solicitors checking the content of subpoenaed materials along the way during a case, refining interim advice in light of developments arising from subpoenaed documents.

If your client takes issue with the contents of a subpoenaed document, the author of that document may be called to give evidence under Subpoena to Give Evidence, about important content under cross examination. For example, a subpoenaed document may say

your client gave an undertaking when no such undertaking was given or that he or she made an admission when no such admission was made.

One should also be very clear on as and from when each party was getting legal advice.

Remember you may at a Compliance and Readiness Hearing or via mention to the Trial Judge (once known) ask for return dates of subpoenas to be extended for trial to ensure that material under subpoena is updated for trial and then inspected afresh. For example, you may seek that Victoria Police or Vic Roads or school records be updated via an extended subpoena before trial and well before the due date for the finalisation of your drafting of trial material.

The extension of a subpoena means there is no need to redraft, filed and serve the subpoena. You will likely have to pay further compliance costs for any office providing source documents which must always be sent to the Court not to your office by way of reply to any extended subpoenas and any communications in respect of same need to be copied into the other parties.

Instructors are expected to have inspected and accurately summarised subpoenaed documents throughout the common 12 – 18 months of the life of a matter in the Court process, noting any salient matters for trial and very importantly for advice along the way. A reliable summary of subpoenaed documents with page references is invaluable to counsel. Summaries and Aide Memoires do not go into a Tender Bundle. They go in the e-Brief.

Electronic Briefs - E- briefs

With the advent of COVID-19, E-briefs are now the way to go. Hard copy briefs are often also requested by counsel for a final hearing. Please check with your counsel what is required, when, as to the e-brief and hard copy brief. Hard copy briefs are also important for ease of reference and to simply have a second copy brief as a back up. Some counsel prefer a hard copy brief and work very adeptly with them indeed. Technology is not always quick or perfect!

Naming the e-Brief

The usual way to name the e-brief is by Client's Family Name and then First Name. For example, JACKSON Joshua Michael and JACKSON Tiffany Sarah and the ICL

Please do not put the e-brief under:-

- M for MLC file number
- M for Mr or
- F for From and your firm's details or
- The client's first name

Access to the e-Brief

If counsel is not briefed in the matter, you may consider turning off notifications as to add on material to that counsel, so they are not alarmed by receipt of documents in an e-Brief

which does not actually concern them for a return date. Also, counsel do not need a 'ding' on their phone or computer each time your office adds a document to the e-Brief. Counsel usually likes to add members to an e-Brief, for example, their clerk mailroom, for printing purposes, so please consider allowing this function on your e-Briefs.

Bookings for a e-Brief

When placing the booking with the clerk please make sure that you or your assistant can provide the clerk with the full names of all parties, as this information is required for the Fee Disclosure Document and to ensure there is no conflict. The clerk will also need to know what type of appearance the brief is for – a first return date, a mention, an interim defended hearing, a compliance and readiness hearing, a final hearing, a mediation or an arbitration.

Fee Disclosure Estimate

Remember that the Fee Disclosure Document, in whatever form it takes, is not a quote. It is a fee estimate which can vary depending on any number of variables. Your client should be advised in writing by you that the fee estimate is just that an estimate and not a quote. If you can have asked for additional work to be done then you can expect additional fees. Please check in with counsel regarding an update Fee Disclosure as and when you ask for additional work to be done, or you can see additional working being done, for example when mediations continue on after 5pm or when Court Days go longer than expected or if there are after hours discussions, additional conferences or if there are additional Court Days allocated to a case or written submissions are required.

Instruction to Brief Counsel

Please only brief counsel by way of booking when you have:-

- Instructions to brief counsel;
- Instructions to brief the counsel you are briefing, noting their fees (as to daily hearing fee and hourly preparation fee) as outlined by the clerk
The clerk does not mind you calling to get a list of counsel available for a particular date with counsel's general fees set out therein so you can choose counsel with your client ahead of booking counsel and
- Funds in your trust account or the clerk's trust account to cover the fee estimate appreciating that the fee may be more or less than the fee disclosure depending on what variables come to fruition. Trials will inevitably have many variables coming to fruition increasing fees such as more days in Court and/or closing submissions to be done in writing.

Delivery of the e-Brief

Please do not deliver any hard copy or e-Brief to counsel without fees being in trust. Your firm is directly liable for counsel's fees and it is therefore very important that they are held in trust to avoid any upset, embarrassment, tension or conflict of interest between you and the client. This aspect needs to work very smoothly. It does if you have been clear with your client regarding Counsel's daily hearing and daily preparation fee together with incidentals for counsel. The fee estimate should be one you and your client is familiar with if you have

given fee estimates for a trial in a Costs Letter at say the first return date or at a mediation or at the Compliance and Readiness Hearing. You are encouraged to up date your knowledge of Counsel's fees prior to attending a Mediation and Compliance and Readiness Hearing so you fee estimates are realistic and up to date with the passing of each year as fees usually increase.

Cancellation Fees on an E-brief or hard copy brief

If you cancel a brief booking, there is very likely to be a cancellation fee if the cancellation occurs too late for counsel to secure another booking for that working day or if the cancellation fee is said to operate within the timelines of the cancellation term set out in counsel's fee disclosure agreement or the Clerk's Booking Note.

It is no answer to a cancellation to say that counsel will be briefed on another day, if the scheduled appearance on Day X cannot be filed with another appearance on Day X. It is a whole day's pay lost for counsel.

A cancelled brief is counsel's day's pay. It is a serious and important matter to brief counsel and bookings should only be made once you have instructions to brief, to brief a particular counsel at his or her advised fee estimate rate. Your client may need to appreciate counsel's fees cover:-

- 10% GST
- 3% clerk commission
- 45% taxation at a personal rate of tax (not company rate of tax)
- 12% superannuation
- Professional Indemnity Insurance
- Professional Subscriptions and Practising Certificate Costs
- Victorian Bar Subscription Costs
- Chambers accommodation and expenses
- CPD costs
- Library subscriptions
- Annual Leave
- Long Service Leave
- Public Holiday leave
- Sick Leave
- Bereavement/Maternity/Family Leave

Counsel, like solicitors, often make time to do pro bono work, committee work, prepare and present CPDs and/or attend to other initiatives free of charge for the benefit of the profession and our family law community.

It is very important to respect counsel and counsel's diary commitments, particularly where the split profession in Victoria relies upon a respectful and collaborative approach between barristers and solicitors for their mutual client's benefit.

To ensure the smooth running of a respectful and collaborative rapport between solicitors and counsel, solicitors are encouraged to ensure:-

- their diaries are run say three weeks in advance;
- all appearance dates are confirmed by way of in-house reminder two – three weeks prior, to avoid cancellations and any applicable cancellation fees;
- other allied professionals have their reports and valuations ready in good time for a Court Event or client Mediation noting that such events can cost about \$30 000 by the time each professional is paid and clients take time off work. A due date needs to be stipulated in the letter of engagement calling for the report with a follow up reminder say 10 days before it is due and
- your client is practically and emotionally ready for the Court event or mediation to proceed in an orderly and effective manner. In-person meetings prior to such events are usually a good idea rather than simply relying upon zoom meetings only.

E-Brief Professional Development

Any questions you may have regarding the setting up and lay out of or training on an e-brief may be directed to Mr Stephen Foley of E-brief Ready on (03) 9020 4456.

Check the e-brief before it is delivered to Counsel

Instructing solicitors are expected to check the e-brief (and hard copy brief) prior to it leaving the office.

Please ensure that all annexures are in English, or translated, in colour, clearly legible, up the right way, able to be followed by the reader, accurate and complete.

Hard copy documents should be stapled and paginated. The index to the e-Brief should be easy to read, accurate, fulsome and flow logically.

Properly Timed Delivery of the e-brief

Please deliver the e-Brief and hard copy brief (for final hearings) to counsel so preparation work can be done in good time as well as conference or negotiation work. The general ratio is one day's preparation for each day of listing plus an extra day. Counsel will bill for work done only as out on their itemised invoice.

Please reach out to counsel well prior to the final hearing date to discuss when the e-Brief should be delivered in good time for meaningful conferencing and negotiations as well as proper preparation. Reading and preparation work often needs to be done around other professional and personal commitments so timing of the delivery of the brief is important.

Please do not expect counsel to work on weekends or public holidays on account of late delivery of an e-Brief, particularly for trials which start on a Monday. Counsel will normally have commitments on public holidays and weekends, like instructors. Communication is key. Counsel would like to take a well timed delivery of the brief to do the best work possible for your client, for you, for themselves and for the Court.

After Delivery of the e-Brief – Settlement Discussions

Once the e-brief has been delivered to counsel, the etiquette is for solicitors to then leave any further overall negotiations to counsel and opposing counsel. The parties should have attended a mediation and should have exchanged written offers.

It is often a good idea to say, three weeks prior to delivery of a e-Brief to counsel, to consider the matter overall and reach out to the other party's lawyer to explore the viability of any further settlement discussions between solicitors to save on the matter progressing into counsel's hands.

You may care to note in such discussions with the other party's lawyer that if the matter is not resolved by date X, then on date Y, the matter will be referred to Counsel Z and thereafter all overall discussions will only be had between counsel, if instructions for such discussions are given prior to trial.

That way, you are freed up to concentrate on the preparation of the e-Brief, the hard copy brief, the Court Book and the Tender Bundle, the Outline of Case as well as conferencing, to say nothing of the work required in your other matters.

If for any reason the matter resolves once counsel has the booking and/or the e-brief, then your client will very likely have to factor in a cancellation fee into the overall result, as well as any costs incurred in reading, preparation, attendances and conferencing arising on account of counsel's work. Please factor in such likely costs when considering the overall settlement if the brief has gone to Counsel.

E-Brief Final Hearing Roles and Responsibilities

It is the *solicitor's* responsibility to ensure that:-

- all timelines set out in orders are complied with;
- trial documents are prepared, filed and served on time, including professional reports and valuations which are not annexed to trial material but are annexed to an affidavit sworn or affirmed by the author of the report;
- clients are provided with the other side's applications, material, reports, outlines and subpoenaed documents (if allowed pursuant to orders) for their consideration and written instructions, if any, in reply for the instructor's and for counsel's consideration and
- proper notice of a request is given if an instructor would like counsel to settle an outline of case or balance sheet document or attend to objections to evidence with that work being billed by counsel at their usual hourly rate.

This invitation should be factored into the timelines of delivery of the brief and the fee disclosure to the client. A considered and timely request for counsel to attend to additional discrete work means counsel can devote time to important trial preparation for your client.

Please ensure that your *client* is aware of:-

- what is within the scope of counsel's brief and what is not;
- the applications before the Court and the orders sought in those applications;

- the Court's general over listing policy for final hearings which may result in the case not being reached, if it is in competition with other cases;
- what your client can expect of the trial Judge and the process;
- what is expected of them at final hearing by all concerned, if the matter proceeds to a contested trial, heard by the allocated trial Judge or another Judge, if the matter is adjourned or if negotiations are entered into and if the matters ultimately resolves n the running;
- what is expected of instructors and counsel at final hearing by all concerned;
- the fact that written submissions may be called for by the Judge rather than just oral ones, resulting in further costs billed at an hourly rate;
- the fact that a trial Judge's decision at the end of a final hearing is likely to be *reserved* so the parties will not likely be told what the outcome is on the last day of trial;
- s.117 Family Law Act as to costs considerations enlivened by offers and
- appeals may arise from a judicial determination within 28 days of the decision being made, should one party opt to appeal based on an error or law or a miscarriage of discretion.

How to Set Up the e-Brief or Hard Copy Brief

You may care to set out your family law e-Brief or hard copy brief as follows. It is a good idea for your firm to do them in a uniform manner which might evolve over time with you calling for feedback on your e-Briefs from Counsel and sharing that within your firm at practice meetings.

Folders or Tabs

All documents under every tab usually have the most recent document on top. For example, in the offers section, the most recent offer would be on top. If there is another document to be uploaded along the way, it is uploaded in date order with the most recent document on top. There is no magic to a way of completing a tab so long as it is consistent across all tabs with accurate descriptions and dates of documents within a tab. There needs to be a logic and flow to the tabs, as there would be in any hard copy brief.

Date Column

The date column in the e-brief must be completed in standard format for ease of reference and should denote the date of *filing* of the document which must be accurate. Trial Judges often want the date of filing of a document (not say the date of affirmation or swearing) as the date of filing is how their Court File Index is referenced.

Contents of the e-Brief

The e-brief may be set out as follows for ease of reference.

Back Sheet. See [Appendix A](#). The back sheet is an easy reference point for all the details of the parties and your contact details. It is used to create the Fee Disclosure Statement and counsel's invoice as well as to cross check for any conflicts of interest.

Memo

Please keep your memo as brief as possible and factual. There is no need to provide a very long and detailed history, if that information is in the filed material which counsel will read.

Please let counsel know what the background to the matter is, what the live issues are and what your advice is on those issues, noting relevant developments, considerations and exigencies. Avoid irrelevant general comments or value judgements.

Please note in the memo the following: -

- your client's best contact details;
- your best contact details;
- your admission to practice date and profile link;
- the name of your supervising partner;
- who the appearance is before;
- the name of opposing counsel
If you don't know it, it is often a good idea to place a call or email to the other party's lawyer to find out, if you can
- relevant contact numbers for lay and professional witnesses in list format with the hours of notice they require to attend at Court in a final hearing;
- if lay and professional witnesses have been put on notice as to the need to appear at the final hearing for cross examination;
- if the superannuation trustee has been afforded procedural fairness, when and their reply;
- what work needs to be done by when by counsel (by prior agreement with counsel) including say: -
 - objections to evidence
 - settling of an outline documentPlease allow enough time for counsel to undertake such tasks and not have same clash with Counsel's actual trial preparation time. The general ratio of preparation time is 1:1 one day's preparation for each day of listing plus an extra day, with counsel billing only for work that is done in that regard. That work also usually includes refining cross examination as a trial proceeds and a closing address referable to the tested evidence at trial, as opposed to just the filed material (which was untested as at Day 1 of trial).

Teams Link if Applicable

Most final hearings in the Melbourne and Dandenong Registries are heard in person. If the matter is going to be on a TEAMS link please insert it in the e-brief under this folder and make sure the link works.

Costs Letter for Final Hearing Pursuant to Rule 12.06

You should include all parties' costs letters in this folder for the appearance to which the brief pertains.

Working Exhibits List for Final Hearing

The Associate will prepare this and provide it to you on request as it is updated each day of trial. It should be included in the e-brief as it issues for ease of reference.

Offers

It is imperative that offers are easily found by counsel and considered. Please insert

- Offer by ** to ** dated ***
- Offer by ** to ** dated ***

Minute of Proposed Final Orders

- Applicant's Minute of Final Order in word
- Respondent's Minute of Final Order in word

Case Outline Documents

- Applicant's Outline
- Respondent's Outline
- Other party's Outline

Balance Sheets

- Applicant's Balance Sheet
- Respondent's Balance Sheet

Applications for Final Hearing

Counsel needs to easily identify which party is seeking what orders for the final hearing

- Application for Final Orders filed *** (most recent on top) (please make sure there is a head of power which allows the Court to make the orders sought)
- Response to Final Orders filed ** (most recent on top)(as above)

Financial Statements

- Applicant's Financial statement
- Respondent's Financial Statement

Applicant's Trial Material

- Applicant's Trial Affidavit
- Affidavits by Applicant's Witnesses professional
- Affidavits by Applicant's Witnesses lay
- Client's brief, factual written instructions to Affidavit by Witness X – typed ,spell checked and 1.5 line spacing
- Client's brief factual written instruction to Affidavit by Witness X typed, spell checked and 1.5 line spacing

Respondent's Trial Material

- Respondent's Trial affidavit
- Affidavit by Respondent's Witnesses Professional
- Affidavit by Respondent's Witnesses Lay

- Client's brief, factual written instructions to Affidavit by witness X – typed, spell checked and 1.5 line spacing (same as for all instructions from your client to each affidavit)

Orders (most recent on top)

- Orders by Judicial Officer X as to Y (with date completed in the date column)
Please also include Intervention Orders in this category in date order
Please also include Reasons for Judgment in this category in date order

Family Reports (most recent on top)

- Report by *** dated *** with interviews held on ***
- Instructions if any, from the client dated ** in respect of same (typed, spell checked and 1.5 line spacing)
- Questions put to the witness pursuant to rule 7.26 Federal Circuit and Family Court of Australia (Family Law) Rules 2021
- Answers to Questions put to the witness pursuant to rule 7.26

Parenting Matter Reports – Other (most recent on top)

- Supervision report by *** dated **
- Summary by X of salient matters in report by X
- Client's instructions as to report by X prepared by X dated ***

Business Valuation Reports (most recent on top)

- Report by *** as to *** dated ***
- Instructions by client in respect of same dated *** typed, spell checked and 1.5 line spacing
- Questions/Answers pursuant to Rule 7.26

Real Estate Valuation Reports (most recent on top)

- Report by *** as to *** dated ***
- Instructions from client as to valuation report, if any
- Questions and Answers pursuant to Rule 7.26

Subpoenas

- Subpoena dated *** by *** issued to *** returnable on **
- Inspection notes of Subpoena to *** (typed, spell checked and 1.5 line spacing authored by *** with any abbreviations summarised in the document)

Notices

- Notice to witnesses A B and C dated X Y Z to be on call for cross examination
- Procedural Fairness letter to Superannuation Fund X dated Y and reply dated Z
- Cost Notices for interim hearings
- Notices of Risk
 - Applicant's Notices
 - Respondent's Notices
- Notices of Ceasing to Act (if any)

- Notices of Address for Service (if any)
- Section 60i Certificate issued by *** dated **

Letters

As for correspondence, only relevant letters should go into the e-brief and only letters you want to have your client pay counsel by the hour to read. Please do not put in letters which are already annexed to affidavits or if you want to put those in for the flow of that folder, then please mark them as (annexure V to the affidavit of W filed X page Y of Z) so counsel knows it is an annexure. You do not want your counsel getting muddled as to which letters are annexed to an affidavit and which are just in the general correspondence tab, when recalling or trying to find letters. Counsel processes a lot of detailed information in a short time span, so you want to give them information in an ordered fashion and information which is relevant. If you are not sure whether a letter should go in the e-Brief, please check with your supervising partner and then with counsel, if need be.

Case Law

If you wish to include a tab for Case Law with relevant cases in it you may. Otherwise you and/or counsel may simply add to this tab as you go

Legislation

As above

Rules

As above

Client's Tender Bundle up to Date X – this might be a separate e-brief in the matter

Please discuss with counsel how they would like the Tender Bundle to be set up and whether it is better placed in another e-Brief under the same matter name

Instructor's Daily Court Notes – typed and spell checked – this might be a separate e-brief in the matter

Please remember the answer is the evidence not the question. Ask for feedback on your Day 1 notes from counsel to see if your style of notes is working well. It is meant to be more than just a transcript. It is very important to take notes whilst your client's counsel is cross examining a witness as counsel can't cross examine and take notes at the same time. Your notes will be as follows perhaps:-

Day 1 dated *** witness X noting

- the time for breaks in the day
- the time to come back to court from Court breaks
- any questions posited by the trial Judge and the answer
- the answer to questions (the answer ins the evidence not the question)
- your own mark ups as to salient matters
- notes of any conduct matters inside and outside of Court
- notes of any offers noting the time and content of the offers

Day 2 dated *** witness Y

Day 3 dated *** witness Z

Your Diary - You should allow say 20 minutes for a likely de-brief with counsel at the end of each Court Day to review the day's proceedings and consider developments and next steps

Communication with Witnesses in Cross Examination It is said that the witness box (not "the stand" is a lonely place). Once a witness has started cross examination, they cannot communicate with anyone about the evidence in the case and the usual etiquette is that your client witness or any witness in support of your client's case does not communicate with you save for cordial greetings at the beginning or end of the day.

Preparation for Cross Examination You would ordinarily make sure that the witness has received and re-read a clean copy of their affidavit of evidence in chief prior to going into the witness box. Please allow enough time in the notice period to get to Court to allow the witness to feel settled and composed before they enter the Court room. They should send you and counsel a text to say when they have arrived if Court is in progress. The Associate will call them into Court, calling their full name.

In trial preparation, there should have been time allowed for counsel to confer with your client about the Court process, etiquette, examination in chief, cross examination, re-examination (if any), their role and what is expected of them by all concerned in the process.

It should be obvious from the front page of their affidavit as to whether they will be giving an oath or taking an affirmation.

Once the witness has completed giving evidence, they should in the writer's view, leave the Court and precincts rather than take a seat in the body of the Court.

Lay and professional witnesses should be thanked for their participation in the Court process

Observation in Court – An instructor will generally take notes, check in with and provide any support needed by the client, witnesses and counsel. It is important to observe everyone in the Court room and keep a silent, discrete eye on people in the body of the Court room. Please let counsel know if anything untoward. Instructors should also check the 'whats app' chat with counsel and the client for any message if one is set up.

The Court's Exhibits List – this is the list of documents which have been tendered and grows as the Court days pass. The instructor will generally ask for the updated list from the Associate at the end of every day and the instructor will generally have another e-brief called Exhibits List which sets out the List of Exhibits and attaches each document for Counsel's reference (this is usually assessed prior to closing addresses)

Court Etiquette Please remember

- to avoid taking annual leave just before or just after a final hearing as often final hearings might spill into additional days or require written submissions a few days after the final day of hearing
 - to be available before and after court dates or week ends if that time is to be used to confer with counsel and any expert witness for the preparation of closing submissions
 - to get the link if you are the ICL or can only instruct from the office
 - it is expected that the instructing solicitor is at Court to support the client and counsel during the trial from 8.30am – 6pm (and often after that)
 - check your phone for messages/emails in the matter from counsel
-
- to be mindful of what is appropriately said in group cf in private to counsel
 - use humour appropriately
 - to speak up if you have any concerns, observations or issues
 - if you have a different view to counsel speak up with counsel well prior in private so you can determine your united front with the client as a team of two
 - to bring paper and pen even in these modern days!
 - be well on time for Court
 - arrive in time to be settled for Court and to secure a conference room for privacy
 - everyone is watching everyone
 - discussions about the matter and people in it do not occur in the Court room as the transcript recording is always on
 - Associates do not wish to hear or see anything which may cause embarrassment
 - the only thing on the bar table are materials relating to the matter and devices required to assist
 - include everyone in communications with the Court even on administrative matters
 - if something needs to be done then please do it asap
 - make yourself available to counsel before and after Court as sometimes jobs need doing after hours during trials
 - use your initiative
 - think ahead
 - plan for increased stress levels
 - plan your diary so you are not tired before you begin
 - check in with the client along the way
 - let counsel know of anything which you think is important
 - allow counsel to have their 10 minutes before starting Court to ready themselves
 - bow on the way in and out of Court as a mark of respect to the position the Judge or Justice holds
 - Remember the reference Judge is for a Division 2 Judge and Justice is a reference to a Division 1 Justice
 - remember to stay still and silent as anyone is taking an oath or making an affirmation whilst a Judge or Justice is pronouncing an Order or speaking

- remember the Bar Table when Court is in session is only for belongings which pertain to the running of the case
- remember everyone is doing their best
- at the end of every day and at the end of the trial think about – *the learnings* for your practice which you can take into your future practice and share with your peers
- Consider what went well and why and what went not so well, why and what can be done to improve for next time
- Consider joining
 - The family section of the Law Institute of Victoria
 - The Family Law Section of the Law Council of Australia
 - Local practice groups or set one up
- Consider
 - Which case law research resources you find most useful
 - Working towards your family law specialisation (joining a study group!) and if at first you don't succeed, just try again
- Work out your five-year plan
- Remember
 - it's a hard job – if it weren't, anyone could do it and that's not the case
 - it's a calling, a profession and you're an important part of it
 - the reasons you chose to practise in family law
 - know your strengths and weaknesses as a practitioner and improve on them
 - know the legislation, rules, regulations, practice notes and case law
 - practise in a way that is meaningful to you
 - be supportive of others in practice
 - remember practise make progress
 - to take your planned annual leave and mini breaks
 - your weekday practice rules – mine is no work on Saturdays
 - remember if family law is not for you, that's OK as there are many other areas of law to practise in

LAURA COLLA
August 2024

FAMILY LAW ACT 1975
IN THE FEDERAL CIRCUIT AND FAMILY
COURT OF AUSTRALIA AT XXX
Division XXX
No. MLC XXX of XXX

IN THE MARRIAGE / IN THE MATTER OF

XXX - Applicant

and (*not v in family law matters*)

XXX – Respondent

BRIEF TO COUNSEL TO APPEAR

at XXX am on XXX date

before XXX insert Judicial Officer

\$XXX appearance per day

\$XXX per hour conference and
preparation

Ms Laura Colla

Foley's List Pty Ltd

205 William Street

MELBOURNE VIC 3000

Instructor and Firm Name

Firm Address XXX

phone/mobile/email

Firm Reference: XXX