

Application of Rule 13(b) of the Legal Profession Uniform Conduct (Barristers)
Rules 2015 in Direct Access Matters

Rule 13(b) provides that:

‘A barrister must not, subject to rules 14 and 15:

.....

(b) conduct correspondence in the barrister’s name on behalf of any person otherwise than with the opponent.’

‘Opponent’ is defined in Rule 125 as follows:

‘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 legal practitioner appearing for another party in the matter or any other party if that party is unrepresented.’

The Bar Council sought Senior Counsel’s advice as to the extent (if any) to which a barrister retained on a direct access basis is prevented by Rule 13(b) from engaging in correspondence with solicitors retained by other parties to the relevant dispute.

The advice (which has been accepted by the Bar Council) favoured a wide interpretation of the term ‘opponent’ for practical considerations. Consequently, a barrister retained on a direct access basis is not precluded by Rule 13(b) from corresponding with the solicitor retained by any other party to the dispute in relation to which they had been engaged whether or not that solicitor physically appears and speaks on behalf of the client in court. It also follows that more than one person involved in a party’s representation in proceedings might simultaneously satisfy the definition of ‘opponent’; for example, the solicitor and any barristers who they retain from time-to-time may fall within the definition.

In the majority of cases in which a party opposed to a direct access barrister’s client is represented by a solicitor and counsel, the most sensible and courteous way for a direct access barrister to ensure compliance with the Rules will be for them to proceed on the basis that it is the barrister physically appearing for that other party (if the identity of that person is known) who is their ‘opponent’ and, where practical, confine their communications about the case to that person.

Senior Counsel noted however, that in any particular case, a barrister will need to consider whether the nature and content of the correspondence falls within the conceptual limits of ‘barristers work’ imposed by Rule 11 and is not otherwise precluded by any one or more of the other subsections of Rule 13; if either requirement is not satisfied, the correspondence will be prohibited by the Rules, even it is being engaged in with the direct access barrister’s ‘opponent’.

For any enquiries, please contact the Professional Conduct Department of the NSW Bar Association via email: pcd@nswbar.asn.au