'Preparing expert witnesses – a (continuing) search for ethical boundaries'

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'Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated. Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guidelines, and scholarship has created significant uncertainty about the permissible types and methods of witness preparation.[1]'

That was the opening paragraph of my article published in Bar News 10 years ago.[2] This present article reviews the developments since then, with respect to case-law, professional rules, academic writing, and practice.[3] Not much has changed.

Expert witness preparation remains a source of ethical angst for many lawyers. The exhortation to act ethically with respect to witness preparation merely begs the question as to the nature of the ethical duty. This article does not purport to provide an authoritative statement of the ethical boundaries of expert witness preparation. Like its predecessor, the ambitions of this article are limited to highlighting issues, and raising tentative suggestions, most of which remain the same 10 years later. Those suggestions are offered with an acknowledgment that they are unquestionably contestable, and with a (continuing) hope of triggering further debate. That debate is (still) needed. As noted in the original article, there is a stunning divergence in both practice and attitudes with respect to the limits of lawyer involvement in the preparation of expert evidence. This subject matter remains too important to be left in its state of ethical uncertainty.

For the purpose of this article, 'witness preparation' is used neutrally to mean 'any communication between a lawyer and a prospective witness - … that is intended to

improve the substance or presentation of testimony to be offered at a trial or other hearing.[4]'

Inherent importance of witness preparation

Under Regulation 35 of the Uniform Conduct (Barristers) Rules: 'A barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests to the best of the barrister's skill and diligence'.

Consultation with (and preparation of) experts is an important part of the discharge of that ethical duty. It may be necessary to test whether the expert has appropriate expertise; to ensure that any expressed opinion is within the scope of that expertise; to ensure that the assumptions upon which any opinion is based are appropriate; to exclude irrelevant material from a report; to ensure that the opinion is expressed in admissible form; to test the soundness of the reasoning process upon which an opinion is based; to test whether any unfavourable expressions of opinion are reasonably grounded; to facilitate the persuasive articulation and presentation of opinion evidence in support of a party's case; to understand fully the expert issues, for the purpose of cross-examination of opponents' experts, re-examination the party's expert, and submission; to limit the likelihood that cross-examination will unfairly diminish the probative force of the expert testimony; to assess the court's likely perception of the strength of the expert evidence, in light of the personal presentation and demeanour of the witness; and to assess the prospects of success in light of the strength of the expert evidence.

The ethical importance of witness preparation is reinforced by a consideration of the adversarial nature of our justice system. In an adversarial system it is presupposed 'that the truth will best be found by the clash of two or more versions of reality before a neutral tribunal'.[5] 'The very foundation of the adversarial process is the belief that the presence of partisan lawyers will sharpen the presentation of the issues for judicial resolution.'[6] Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is 'essential to a coherent and reasonably accurate factual presentation'.[7] The modern embrace of concurrent expert evidence does not change that.

Barristers should not be shy about their potential significance in facilitating the formulation of sound expert opinion, even with respect to the substance of that opinion. While barristers my lack subject matter expertise, they potentially bring to the preparation of expert evidence both analytical rigour and experience in the efficient absorption and application of complex information. In the preparation of a party's expert evidence, barristers potentially have the capacity greatly to assist in the development and testing of lines of expert inquiry, and the identification of error. The question is: should they be ethically permitted to exercise that capacity.

Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is "essential to a coherent and reasonably accurate factual presentation".

Inherent dangers of witness preparation

'For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend … to espouse the cause of those instructing them to a greater or lesser extent'.[8]

That is a reflection of 'adversarial bias': ie, a 'bias that stems from the fact that the expert is giving evidence for one party to the litigation'.[9] That bias may arise from 'selection bias' (being the phenomenon that a party will only present an expert whose opinions are advantageous to the party's case), 'deliberate partisanship' (where an expert deliberately tailors evidence to support the client), or 'unconscious partisanship' (where an expert unintentionally moulds his or her opinion to fit the case). The NSW Law Reform Commission recently observed that: 'Although it is not possible to quantify the extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem'.[10]

There is a fundamental ethical tension in this area. Witness preparation is both an essential tool for the elucidation of truth in an adversarial system, but also a possible tool of truth's distortion.

Aspects of witness preparation unquestionably have the capacity to facilitate 'deliberate partisanship' and exacerbate the insidious process of 'unconscious partisanship'. Signals as to what opinion would assist the case will be communicated by the barrister, will be absorbed by the expert, and may influence the expert's stated opinion. Those processes of communication, absorption and influence may be entirely unintended on both sides. Regardless of intention, the signals may generate 'subtle pressures to join the team – to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster'.[11] The difficulty of detection of adversarial bias exacerbates the insidious nature of the problem.

However, there are a number of considerations which limit the likely extent that witness preparation of experts will contribute to adversarial bias. *Firstly*, pursuant to the *Makita* rules for the admissibility of expert evidence[12], an expert is required to set out the assumptions and reasoning process upon which the opinion is based. Consequently, an expert cannot be swayed by suggestion beyond a position which can be coherently justified. *Secondly*, the introduction of the expert codes into court rules unquestionably counteracts the process of adversarial bias, by emphasising the expert's duty of neutrality. For example, section 2 of the Supreme Court expert code mandates: 'an expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness'. *Thirdly*, the detachment of experts from the potentially corrupting partisan clutches of their instructing lawyers is reinforced by the exclusion of lawyers from the conclave and joint report process. *Fourthly*, the inevitability of cross-examination, the possibility of adverse judicial comment, and (perhaps most significantly) collegiate judgment in the context of conclaves and concurrent evidence all further constrain an expert from deviating beyond that which can be reasonably justified. There is a general recognition that the prevalence of partisanship has substantially reduced in the era of conclaves and concurrent evidence

Tension between conflicting policy objectives

There is a fundamental ethical tension in this area. Witness preparation is both an essential tool for the elucidation of truth in an adversarial system, but also a possible tool of truth's distortion. 'Witness preparation presents lawyers with difficult ethical problems because it straddles the deeper tension within the adversary system between truth seeking and partisan representation'[13]. It is an acute example of the fundamental tension generally underlying professional regulation of barristers: 'barristers owe their paramount duty to the administration of justice';[14] but a barrister must also 'promote and protect

fearlessly and by all proper and lawful means the client's best interests'.[15]

Ideally, any framework for defining the ethical boundaries in expert witness preparation should:

- reflect (and balance) the tension between the possibly conflicting objectives of facilitating the presentation of advantageous opinion evidence, and preventing the corruption of opinion evidence through adversarial bias; and
- embody sufficient certainty to provide practical guidance; and
- retain sufficient flexibility to reflect the reality that the 'ethical balance' in this area will be crucially context-sensitive.

Legal Profession Uniform Conduct (Barristers) Rules 2015

Regulation 69 now provides: 'A barrister must not: (a) *advise or suggest* to a witness that *false or misleading evidence* should be given nor condone another person doing so, or (b) *coach* a witness *by advising* what answers the *witness should give* to questions which might be asked'.

Regulation 70 provides: 'A barrister does not breach rule 69 by expressing a general admonition to tell the truth, or by *questioning and testing* in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to *inconsistencies or other difficulties with the evidence*, but must *not encourage* the witness to give evidence *different from the evidence which the witness believes to be true*.

The regulations appear (on first blush) to create substantial latitude in witness preparation, in that there is a 'safe harbour' for witness preparation in relation to 'questioning and testing' a version of evidence in conference (including drawing witness's attention to 'inconsistencies or other difficulties'), subject only to the proviso that the barrister does not 'encourage the witness to give evidence different from the evidence which the witness believes to be true'.

But the rules are somewhat confusingly structured, providing a general prohibition in Regulation 69, a safe harbour from that prohibition in Regulation 70 ('questioning and testing'), and a qualification to the safe harbour (but 'must not encourage' etc); and the regulations use a series of ambiguous expressions ('suggest', 'coach', 'test', 'encourage') without articulating overarching principles which facilitate the resolution of those ambiguities. Some of uncertainties are:

- What is meant by 'coach a witness by advising what answers the witness should give' under Regulation 70? Is 'advising' limited to explicit communication, or does it extend to the implicit and indirect message that is thereby conveyed?
- What constitutes 'questioning and testing' under Regulation 70. 'Testing' semantically covers a vast spectrum of conduct, from gentle and open-ended queries, to aggressive challenge, to raising and advocating contrary propositions;
- What is meant by 'encourage' the witness 'to give evidence *different from* the evidence the witness believes to be true' under Regulation 70. Is 'encouragement' assessed by reference to the objective meaning of the words, the barrister's subjective intention, or the objective effect on the witness? If the barrister successfully 'encourages' the expert to change their genuine view, does it follow that the barrister's conduct logically falls outside the prohibition of encouraging the witness to give evidence 'different from the evidence which the witness believes to be true'?

These uncertainties reflect a failing of the rules effectively to grapple with the insidious risk of unconscious adversarial bias (through which conduct might cause the expert unwittingly to mould the expert's opinion to a party's partisan cause, without intention on either side); and to balance that risk against the legitimate interest in witness preparation. Although a large range of meaning is open on the wording of the regulations, it is possibly to construe them in a manner which prohibits conduct which creates an undue risk of adversarial bias.

I suggest that the words in Regulation 69 'coach a witness by advising what answers the witness should give to questions which might be asked', should be construed as conduct which (expressly or by implication) conveys the 'answers the witness should give' in a manner which creates an undue risk that evidence will be corrupted by adversarial bias. The following considerations support that construction. 'Advise' is sufficiently broad to be construed as communications which convey (both expressly but also by implication) the 'answers the witness should give'. 'Coach' is sufficiently broad to be construed as conduct which objectively creates an undue risk that evidence will be corrupted by adversarial bias, regardless of whether there was a deliberate intention to suggest to the expert 'what answers the witness should give'. That construction is supported by the following considerations. *Firstly*, the expression 'coaching' is used to describe conduct which causes the risk of deliberate or unwitting contamination of evidence such that the evidence of the witness 'may no longer be their own';[16] and is assessed by reference to the impact on the witness and not merely by the subjective intention of the 'coach';[17] and is recognised as being 'inevitably a matter of degree, and is dependent on the facts'.[18] *Secondly*, that construction facilitates the explicit articulation and balancing of the competing policy considerations underlying witness preparation, which is inherent in the notion of *'undue risk'*. On that construction, the safe harbour of 'testing' in Regulation 70 should be construed so as not to permit conduct which would constitute 'coaching' under Regulation 69.

The advantage of that construction is that it permits flexibility, and an explicit consideration of policy considerations relevant to the proscription of conduct. The disadvantage is that it reduces the capacity of the rules to provide firm guidance.

I suggest that the assessment of 'undue risk' requires a balance between the conflicting policy objectives referred to above. Factors relevant to that balance might include:

1. The inherent capacity of the conduct to facilitate the formulation and presentation of expert opinion advantageous to the party's case;
2. The inherent capacity of the conduct to corrupt expert opinion through the operation of adversarial bias;
3. The extent to which the legitimate objectives of facilitating the formulation and presentation of advantageous opinion can be achieved through strategies with less inherent capacity to corrupt expert opinion;
4. Specific contextual considerations relevant to the extent of the risk of corruption of opinion through adversarial bias. These may include:
    - The experience and stature of the expert, within the expert's discipline and relative to the barrister;[19]
    - Whether the course of dealing with the expert has demonstrated a willingness or tendency of the expert to be unduly swayed by suggestion;
    - Whether the subject matter of the opinion is one in which there is significant scope for open-textured 'judgment calls', such that modified opinions can be plausibly rationalised;
    - The nature and extent of any incentives for the expert positively to assist the instructing party.[20]

The caselaw.

A 2013 article in Bar News by Garth Blake SC and Phillippe Doyle Gray provided a comprehensive and valuable summary of caselaw relating to the ethical limits of

witness preparation.[21] The learned authors perform a heroic task of seeking to extract a coherent body of principles from the caselaw. However, there are starkly inconsistent lines of authority (as the authors identify), there is no Supreme Court of NSW authority providing comprehensive binding guidance,[22] the only High Court authority comprises an obiter dicta by a single justice (Callinan J), and there is no other judicial statement which purports to provide a comprehensive statement of the principles regulating the ethical limits preparation of expert reports. The authors of that article provide the following summary of what they endorse and justify as the preferred 'Federal line of authority':[23]

(a) Counsel may and should identify and direct the expert witness to the real issues.

(b) Counsel may and should suggest to the expert witness that an opinion does not address the real issues when counsel holds that view.

(c) Counsel may and should, when counsel holds the view, suggest to the expert witness that an opinion does not adequately: (1) illuminate the reasoning leading to the opinion arrived at, or (2) distinguish between the assumed facts on which an opinion is based and the opinion itself, or (3) explain how the opinion proffered is one substantially based on his specialised knowledge.

(d) Counsel may suggest to the witness that his opinion is either wrong or deficient in some way, with a view to the witness changing his opinion, provided that such suggestion stems from counsel's view after an analysis of the facts and law and is in furtherance of counsel's duty to the proper administration of justice, and not merely a desire to change an unfavourable opinion into a favourable opinion.

(e) Counsel may alter the format of an expert report so as to make it comprehensible, legible, and so as to comply with UCPR 4.3 and 4.7.

I respectfully agree with that crisp summary, except for paragraph (d). As to paragraph (d):

- the first decision cited in support of that principle is the judgment of *Callinan J Boland v Yates Property Corporation*,[24] in which His Honour stated: 'I do not doubt that counsel and solicitors have a proper role to perform in advising or suggesting, not only which legal principles apply, but also that a different form of expression might appropriately or more accurately state the propositions that the expert would advance, and *which particular method of valuation might be more likely to appeal to a tribunal or court*, so long as no attempt is made to invite the expert to distort or misstate facts or give other than honest opinions': [279]. The context of that observation was proceedings in which a barrister was accused of negligence, with respect to the alleged failure to advance a particular valuation methodology on behalf of the party in a resumption compensation case, in circumstances where the party's own valuers had not advanced that methodology. The High Court unanimously upheld the appeal, thereby dismissing the negligence claim. Callinan J held that the Full Federal Court had 'failed to recognise the different roles of the valuers and [counsel] and treated [counsel] as if they were almost exclusively or exclusively the final arbiters of the way in which the property should be valued': [279]. Callinan J noted that 'valuation practice…cannot be an exact science' [277] and 'questions of law, fact and opinion do not always readily and neatly divide themselves into discrete matters in valuation cases and practice': [276]. Notwithstanding His Honour's finding that 'the lawyers are not a valuer's or indeed any experts' keepers' [279], and that counsel were not responsible for the valuation methodology adopted in the case, Callinan J nonetheless did observe that counsel has a 'proper role to perform' in suggesting 'which particular method of valuation might be more likely to appeal to a tribunal'.

- His Honour was there dealing with a particular issue (valuation methodology) in respect of which His Honour observed that 'questions of law, fact and opinion' do not neatly divide themselves, implying that the subject matter in question was possibly properly characterised as a matter of law. In those circumstances, it is not clear that Callinan J's statement can be generalised into a broad principle that counsel can make suggestions as to the substance of any expert opinion, subject only to the proviso that 'no attempt is made to invite the expert to….give other than honest opinion'. In any event, this was an obiter judgment by a single judge;

- I respectfully suggest that the other authorities apparently relied upon in support of the broad principle in paragraph (d) authorising 'suggestion' as to the substance of expert opinion, in fact weigh against the principle. In *Harrington-Smith*,[25] Lindgren J held 'Lawyers should be involved in the writing of reports by experts: *not, of course, in relation to the substances of the reports*' [19], and referred to the distinction between 'permissible guidance as to form and as to the requirements of ss 56 and 79 of the Evidence Act on the one hand, and *impermissible influence as to the content of a report* on the other hand': [27]. In *Doogan*,[26] the Full Court of the ACT held that 'the mere fact that some editing' of the expert reports 'does not demonstrate any impropriety' because legal representatives had 'the duty to ensure that the reports conveyed the author's opinions in a comprehensible manner, that the basis for those opinions was properly disclosed and that irrelevant matters were excluded': [119]. However, in finding no impropriety, the Court noted that 'It has not been established that any of the lawyers… *sought to change passages in the reports* conveying relevant opinions or information': [119]. The other cases merely affirmed *Harrington-Smith*.[27]

- since the 2013 article, a Full Court of the Industrial Court of NSW noted with approval the article and its summary of principles,[28] but the ultimate statements of principle endorsed in that case did not expressly endorse a general liberty to make suggestions as to the substance of expert opinion.[29] Justice Davies has also provided obiter support for the article and its summary.[30] Justice Ball has also recognised that 'advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion'.[31] However, the limited judicial commentary on expert witness preparation is typically hostile to any influence by counsel in relation to the substance of expert opinion.[32]

In the absence of a settled position in the caselaw concerning the ethical involvement of counsel in relation to the substance (as opposed to the form and articulation of reasoning) of expert opinion, we are thrown back to the (uncertain) Uniform Conduct (Barristers) Rules, and left to ponder what the rules should be.

In the circumstances, I respectfully submit that the case-law does not support the broad principle that it is ethically permissible for barristers to suggest to the expert that 'his opinion is either wrong or deficient', merely

because that view stems from the barrister's genuine view. In the absence of a settled position in the caselaw concerning the ethical involvement of counsel in relation to the substance (as opposed to the form and articulation of reasoning) of expert opinion, we are thrown back to the (uncertain) Uniform Conduct (Barristers) Rules, and left to ponder what the rules should be.

The strategic dimension

Strategic considerations may overlay ethical considerations when considering the appropriate limits of expert witness preparation.

Notwithstanding that particular strategies of witness preparation might satisfy a theoretical test for ethical propriety, the strategies may be strategically imprudent if they *appear* to compromise impartiality.

Three considerations provide particular reason to give careful consideration to the prudent strategic limits of witness preparation (in addition to ethical limits). *Firstly*, there is a significant risk of privilege being impliedly waived in relation to all dealings with an expert: ie, a significant risk that the details of witness preparation will be exposed.[33] *Secondly*, cross-examination and submissions by a skilful opponent may cause even ethically legitimate witness preparation strategies to be (unfairly) ethically tainted, and the perceived impartiality and credit of the expert to be (unfairly) compromised. *Thirdly*, there is significant judicial sensitivity about the appearance and substance of expert partisanship, and an expert report may be excluded (or the weight attached to it severely diminished) if witness preparation is deemed to 'cross' the sometimes blurry line.[34]

Consequently, there is a strategic advantage in minimising the role of lawyers in the process of witness preparation (and thereby protecting the appearance of impartiality). This needs to be balanced against the countervailing strategic advantage that may be generated by implementing various witness preparation strategies. That balance will be context-specific. Before implementing any strategy of witness preparation, a barrister should ask: *'Firstly*, is it ethically appropriate? *Secondly*, does the potential strategic advantage of the strategy outweigh any risk of strategic disadvantage that might arise if the conduct is disclosed and becomes the subject of cross-examination?'

Practical questions

Set out below is a consideration of some ethical and strategic considerations relevant to some selected aspects of witness preparation.

'Expert assistance' v 'Expert evidence'

'A practice has grown up, certainly in Sydney, perhaps elsewhere, in commercial matters, for each party to arm itself with what might be described as litigation support expert evidence' to provide assistance in 'analysing and preparing the case and in marshalling and formulating arguments'.[35] 'That is the legitimate, accepted and well known role of expert *assistance* for a party preparing and running a case'.[36]

By contrast, 'expert *evidence* in which a relevant opinion is given to the Court drawing on a witness' relevant expertise is quite another thing'.[37]

The better view is that there is no ethical problem in using the same expert to provide both 'assistance' and 'advice', 'as long as that person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate'.[38] However, there are significant strategic considerations which militate against using the same expert for both roles.

Firstly, the nature and extent of involvement by the expert in the partisan process of case formulation and development might be the subject of cross-examination,[39] and may tend to diminish the expert's apparent impartiality. While an inference of partiality should not render the opinion inadmissible on the grounds of bias,[40] the 'bias, actual, potential or perceived, of any witness is undoubtedly a factor which the Court must take into account when deciding issues between the parties'.[41] The degree to which perceptions of partiality affect the weight of an opinion 'must, however, depend on the force of the evidence which the expert has given to the effect that, by applying a certain process of reasoning to certain specific facts, a particular conclusion should be drawn'.[42]

Secondly, there remains a risk that the evidence of the expert will be excluded in the exercise of the court's discretion, if the court considers that the probative force of the opinion has been sufficiently weakened by reason of the expert being exposed to (and unconsciously influenced by) inadmissible evidence in the course of the expert's immersed involvement in case preparation.[43]

Thirdly, 'expert assistance' may lead to an unpleasant operation of waiver of privilege. The process of expert assistance may involve the expert being privy to many sensitive and privileged communications. It is appropriate to assume that there is a very significant risk that waiver may extend to all such communications.

In light of the strategic dangers associated with using an expert for both 'assistance' and 'evidence', a well-funded litigant in a complex case will frequently engage different experts to provide the 'assistance' and the 'evidence', respectively.

Briefing the expert

Assistance in the formulation of instructions. There is no ethical difficulty in consulting with the expert in relation to the formulation of instructions. However, such consultation is in the nature of 'expert assistance', and is subject to the strategic dangers described above.

Preparation without formal instructions. Occasionally experts are not formally instructed until the report is being finalised. This creates no ethical difficulty. However, the deferral of formal instructions will increase the prospect of privilege being waived in relation to communications between the lawyers and the expert. This is because the absence of instructions during the period of preparation of the report raises the question as to the basis upon which the report was prepared, and supports a waiver of privilege in relation to associated materials to facilitate that question being answered.

False or incomplete instructions. It would be unethical to present a case on the basis of an expert report, when the expert was briefed on assumptions which contradict material facts known by the party (or where facts known to be material have been omitted from the instructions).[44]

Preliminary conferences. There is no ethical problem with extensive conferring to discuss and test the preliminary opinions of experts, prior to the preparation of a first draft. Some practitioners recommend this, to prevent the generation of a paper trail of draft reports which disclose the meandering evolution of the final opinion. I suggest that any conferring should be consistent with the guidelines suggested below under the heading 'Substance of the expert opinion'.

Minimising the prospects (and prejudice) of waiver

In the article in this edition titled 'Expert reports – waiver of privilege revisted', there are outlined some suggested strategies to minimise the prospects (and prejudice) of a waiver of privilege in relation to materials associated with the preparation of the expert report.

There is no ethical impropriety in such a strategy. The objective of protecting privilege requires no significant justification. Briefly, however, the justification includes promoting 'free exchange of views between lawyers and experts';[45] preventing experts being inhibited from changing their minds by fear of exposure of working papers and drafts; preventing the integrity and strength of an expert's final opinion being attacked through cross-examination on an expert's working notes and drafts (which have potentially been taken out of context); and avoiding the hearing being distracted and lengthened by 'what is usually a marginally relevant issue';[46] ie, the nature of (and reasons for) the evolution of the expert's opinion.

If a barrister proposes to raise matters for consideration by the expert in relation to

the substance of the expert opinion, an issue arises as to whether the communications should be made (or recorded) in writing. The creation of a paper trail has both advantages and disadvantages. The ostensible advantage of avoiding a written record is that any waiver of privilege will not generate a paper trail which records the lawyer's role in the evolution of the opinion, which might be manipulated by skilful cross-examination to compromise the credit of the expert and the weight of the expert's opinion. However, I suggest that the following circumstances support the prudence and propriety of maintaining a paper trail:

- if there is a waiver of privilege, the waiver extends to oral communications between the barrister and the expert. A skilful cross-examination of an expert about extensive oral dealings with lawyers is dangerously unpredictable. On the other hand, a paper trail can provide a crisp and clean demonstration of the propriety of the dealings;
- there is a significant risk that a court (consciously or unconsciously) might draw an adverse inference as to the propriety of dealings with an expert, if there were found to be a deliberate strategy of avoiding a paper trail;
- the recording of communications, combined with the ever-present risk of waiver, imposes a valuable chastening discipline on dealings between lawyers and experts. A lawyer will be forced always to ask: 'How will this communication be viewed by the court?'

The form of the expert report

As noted under the heading 'Caselaw' above, there is strong judicial support in Australia for the ethical propriety (and professional duty) of lawyers being involved in ensuring the clear and admissible expression of expert opinion. 'The court depends heavily on the parties' legal advisors to assist experts to address properly the questions asked of them and to present their opinions in an admissible form and in a form which will be readily understood by the court. Equally, the court depends heavily on the parties' legal advisors to ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct'.[47]

This is consistent with practice in Sydney.

This position is to be contrasted to the position in the United Kingdom. In what remains a leading UK case on the ethical limits of lawyer's involvement in the preparation of expert reports, Lord Wilberforce held: 'Expert evidence presented to court should be, and should be seen to be, the independent product of the expert, *uninfluenced as to form* or content by the exigencies of litigation'.[48] In a subsequent case, Lord Denning relied upon that statement to conclude that lawyers must not 'settle' the evidence of medical reports.[49]

However, as a matter of principle and strategic prudence, the appropriate scope of the role of barristers in drafting expert reports is contestable.

The general considerations in favour of a barrister being involved in the actual drafting are as follows. *Firstly*, compliance with the demanding requirements of form and structure under the *Makita* rules may necessitate a lawyer's substantial involvement in the drafting, as a matter of professional responsibility. *Secondly*, as with any form of communication, the persuasiveness of an expert report will depend not just upon the substantive content of the opinion, but also the method of its presentation. The expertise of many experts may not extend to the skills of persuasive written communication. Lawyers may be able to provide valuable assistance in the persuasive presentation of the expert's substantive opinion, both in relation to structure and verbal expression. *Thirdly*, if the lawyer is participating in the drafting process, the lawyer is able to test any tentative opinions expressed by the expert, before that opinion is incorporated into the draft report. This is likely to prevent the creation of any documentary record of ill-considered opinion, which might damage credit if it is later the subject of waiver.

The general considerations in favour of a barrister being involved in the actual drafting are as follows. Firstly, compliance with the demanding requirements of form and structure under the Makita rules may necessitate a lawyer's substantial involvement in the drafting, as a matter of professional responsibility.

The ethical considerations weighing against a barrister personally drafting a report on instructions are as follows. *Firstly*, there is significant scope for a draft prepared by a barrister to diverge from instructions provided by the expert. This may be a product of carelessness in the recording or reproduction of instructions, the influence of unconscious adversarial bias on the barrister, or the simple fact that within the framework of an expert's instructions there will remain scope for significant nuance in the final expression of written opinion. *Secondly*, to the extent that the draft diverges from (or embellishes) the expert's instructions, the draft has a substantial capacity to corrupt the substance and expression of the expert's actual opinion. A draft report will have a powerfully suggestive effect on an expert, if it is persuasively expressed, well structured, and crafted by a respected authority figure (such as a barrister). Further, there is a significant risk that a busy expert will simply adopt a draft for expedience, without proper consideration.

There are also weighty strategic considerations against the substantial involvement of the lawyers in the drafting process. *Firstly*, irrespective of the integrity of a barrister's involvement in the preparation of a draft, and the coherence of the finally expressed opinion, the mere fact that a lawyer has crafted the words of the report may stain the credit of the expert in the eyes of a judge. *Secondly*, as Justice McDougall has observed extra-judicially: 'it is not desirable to fiddle too much with the actual phraseology of the expert. For better or worse, we all have our own individual modes of expression. Evidence – whether lay or expert – speaks most directly when it speaks in the language of the witness and not in the language of the lawyer who has converted it from oral into written form'.[50] *Thirdly*, the possibility of ill-considered adoption by an expert of a lawyer's terminology creates the risk of the expert stumbling over or disowning the wording of a report during cross-examination. *Fourthly*, requiring the expert to prepare the draft will likely increase the expert's engagement with the issues on which the expert is briefed.

Set out below is my personal suggestion as to where the line should be drawn in relation to various aspects and stages of drafting.

Template for report. An effective (and ethically sound) strategy is to provide to the expert a detailed template to assist the preparation of the first draft. The template might set out the structure of the report, the assumptions the expert is instructed to make, and detailed instructions as to what must be addressed in which section of the report. The template should be accompanied by detailed instructions as to the requirements of form and structure of an expert report under the *Makita* rules.

Preparing first draft. The better view is that there is no ethical impropriety under the present rules in the barrister preparing the first draft (in conference or alone), based on instructions received from the expert. However, the considerations of strategic prudence referred to above strongly dictates that the expert should typically prepare the

first draft.[51] This may properly occur after extensive conferring with the expert, in which the expert's preliminary opinion is discussed and tested.

Comments on first draft. It is common and acceptable for barristers to submit to experts a 'marked up' version of the first draft, which contains queries of the type described in the section below ('Substance of the expert opinion – Testing an unfavourable opinion'), and requests for the elaboration of reasoning in the draft, and which invites the expert to prepare a further draft in light of those queries and requests.[52]

Preparing subsequent drafts. I suggest that the ethical and strategic balance swings in favour of active participation of the barrister in the drafting process, when the substance of the opinion is effectively settled and recorded in a draft, and the focus is on the refinement of form and expression. As a proposed balance between facilitating the presentation of advantageous opinion, and avoiding the reality and perception of adversarial bias, I suggest the following guidelines:

- If the barrister is to be involved, it is desirable to undertake the drafting in conference with the expert (rather than for the barrister to produce a further draft independently following conference). This allows the expert to take immediate ownership of the formulation of words. If the redrafting is done by the barrister following conference, then enclose the draft under an email saying something to this effect: '…I have endeavoured to ensure that the amendments are consistent with your instructions in conference. However, please check the amendments very carefully, and ensure they accord precisely with the substance of your opinion and your preferred form of expression, and make all necessary amendments to ensure that is the case';

- It is appropriate for the redrafting to address the clarification of ambiguous expression, the comprehensive and coherent articulation of the reasoning process, and the amendment of wording which significantly detracts from the persuasive communication of the substantive opinion.[53] It is otherwise strategically imprudent to seek to refine or otherwise amend the expert's own words. Maintaining the authenticity of the expert's voice may be more advantageous then crafting perfect expression;

- Unless clearly obvious or inconsequential, any amendment of expression should generally be on the basis of specific and detailed instructions from the expert, and should reflect the expert's own words. The barrister should only suggest a mode of expression when open-ended questioning of the expert has failed to elicit wording which communicates with reasonable clarity the substance of relevant opinion;

- To the extent that the drafting process traverses substantive amendment to a previous draft, it may be strategically prudent for the drafting not to be done in conference with the barrister. Rather, the matter requiring substantive redrafting should be identified (possibly by some notation in the draft being worked on), and the expert should be invited to attend to the redrafting independently in a further draft (to avoid the appearance of undue involvement in the substance of opinion).

I suggest that this testing may relate to the appropriateness of assumptions, and the soundness of the reasoning, and the correctness of the conclusion

Notwithstanding the ethical propriety of involvement by lawyers in the process of preparing subsequent drafts, there will remain significant strategic advantage in avoiding or minimising a barrister's involvement. The appropriate role of a lawyer may depend upon the lawyers' assessment of the capacity of the expert to craft an opinion in admissible and persuasive form without assistance from lawyers.

Substance of the expert opinion

Exclusion of irrelevant opinion. It is ethically permissible for a lawyer to propose substantive amendments to a draft report, which relate to deletion of evidence which is irrelevant, or beyond the expertise of the expert. Beyond that point, the ethical consensus and clarity breaks down.

Testing an unfavourable opinion. Regulation 70 of the Uniform Conduct (Barristers) Rules expressly authorises 'testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies and other difficulties with the evidence'. I suggest that this testing may relate to the appropriateness of assumptions, and the soundness of the reasoning, and the correctness of the conclusion.[54] However, consistent with the prohibition on 'advising [directly or indirectly] what answers the witness should give' in Regulation 69, and the general ethical proviso that witness preparation strategy should minimise the risk of opinion corruption, the process of testing should only proceed by way of open ended questions, which simply direct attention to an issue, and which avoid (as much as possible) suggestion that the opinion is wrong and should be changed: eg, 'What are the assumptions for that proposition?' 'What is the basis for those assumptions?' 'Do you consider those assumptions consistent with A, B, C? How?' 'What reasoning supports the drawing of that conclusion from those assumptions?' 'Does it take account of D, E, F? How?' It should not proceed by way of closed questions which explicitly or implicitly suggest that the expert should change his opinion: 'I suggest that the reasoning is wrong, because of A, B, C. Do you agree?'

The practice of open-ended questions is not only ethically appropriate, but also strategically prudent for the following reasons. *Firstly*, in view of the (proper) sensitivity of experts to maintaining an independent and impartial stance, there may be a natural defensiveness to modifying an opinion in response to direct suggestion. *Secondly*, all communications with experts should be conducted on the basis that privilege in the conversation may be waived. The more suggestive and leading is the question which preceded a modification of opinion, the greater the risk that the final opinion will be discounted by reason of perceived adversarial bias (if the question is exposed following the waiver of privilege).

Testing a 'Joint Report'. It is now standard practice for conclaves of experts and joint reports to be ordered in cases involving expert evidence. A question arises as to whether it is permissible for any concession by a party's expert in the joint report to be 'tested' in private conference, and subsequently challenged during concurrent evidence. There is no prohibition on doing so in the court rules, or practice notes. I suggest that a party should be entitled to test in private conference a concession made by an expert in the joint report, in precisely the same manner as set out above. There is significantly less cause for concern about adversarial bias in relation to the testing of concessions in the joint report, because the expert's sense of independence has been sharpened through collegiate co-operation in the lawyer-free conclave, and substantial inertia inevitably attaches to a

concession recorded in the joint report.

Raising contrary propositions for consideration. This is moving into even murkier ethical waters. I suggest that this practice should be regarded as ethically permissible (and strategically prudent), if the following procedure is followed:

1. The barrister has first undertaken the open-ended 'testing' of the expert's opinion described above, and the expert has not independently expressed an opinion consistent with the contrary proposition;

2. Before engaging in the practice, the barrister exhorts the expert to abide by the spirit of the expert codes: 'Remember your duty is to assist the court impartially, and not to advance my client's case. I want to raise some propositions for your consideration and comment. I don't suggest that they are right or that you should adopt them. You should only do so if you genuinely consider the proposition to be correct';

3. Open style questioning is adopted: eg, 'What is your opinion about [proposition X]? What is the basis for that opinion?', and then 'test' in the manner described above;

4. The barrister does not engage in conduct which has the intention or consequence of pressuring the expert to adopt the proposition;

5. If the expert purports to adopt the proposition, the barrister rigorously tests the basis for it, to ensure that the expert is capable of reasonably justifying the proposition.

The conclusion that this practice should be regarded as ethically permissible is supported by the following considerations. *Firstly*, it may facilitate the articulation by the expert of opinion favourable to the client's case, which supports the legitimacy of the practice unless it gives rise to an undue risk that the expert's opinion will be corrupted through adversarial bias; *Secondly*, the mere fact that a change in an expert's opinion was triggered by a proposition raised by a barrister does not reflect that the modified view is not genuine or not reasonable. Barristers will often acquire substantial expertise in a field relevant to a case. In light of that expertise, the barrister's familiarity with the case, and the analytical capacities barristers will (hopefully) bring to bear on the matter, it is unsurprising that barristers might be able to raise valid propositions for consideration which an expert might reasonably and genuinely adopt. It has been judicially acknowledged that 'testing' may lead to a change in expert opinion.[55] *Thirdly*, the better view is that putting alternative propositions to the expert (in accordance with the guidelines proposed) falls within the safe harbour of 'testing' within Regulation 70. There is a profound ethical distinction between raising a proposition for consideration, and either 'advising what answers the witness should give' (Regulation 69) or 'encouraging the witness to give evidence different from the evidence the witness believes to be true' (Regulation 70).[56]

All that said, it is obvious that the mere fact of a barrister raising a proposition for consideration has inherent suggestive capacity, which generates the possibility of the corruption of opinion through adversarial bias. It is therefore obvious that there is scope for divergent views about the ethical propriety of such a practice.

'Crossing the Line': unethical practices. When then does witness preparation cross the line and become unethical?

In the USA, there is no prohibition on rehearsal.

Firstly, there are prohibitions on particular categories of conduct in Regulation 69 and 70, which are described above (advising 'what answers the witness should give', and encouraging evidence 'different from the evidence with the witness believes to be true').

Secondly, I suggested above that an appropriate ethical limit on 'raising propositions for consideration by an expert', is the proviso that the barrister must not seek to 'pressure' the expert to adopt the proposition (or engage in conduct which might have that consequence). This is admittedly a frustratingly question-begging limitation, but it is difficult to draw a brighter line. By way of (some) elaboration, factors which may be relevant to determine whether there is 'pressure' include the extent to which any question is expressed in a leading manner; the extent to which the question is repeated; the extent to which the barrister personally advocates the merits of the proposition; the extent to which the barrister highlights the strategic importance of the proposition to the case; the extent to which the barrister seeks to argue with the expert about the proposition (as distinct from testing the expert's opinion by open-ended questioning); and the relative stature of the expert and barrister (which may affect the power dynamic between the two).

General advice about the process of evidence

It is standard practice for barristers to give witnesses general advice as to court room procedure, courtroom demeanour, and methods for the presentation of testimony (in examination in chief, and cross-examination).[57]

There is generally no controversy as to the ethical propriety of such conduct.[58] This is because it relates to procedure and the form of evidence, rather than substance. It is therefore relatively innocuous in terms of distorting testimony.

Rehearsal of cross-examination

Rehearsal relates to the process of practising the presentation of testimony to be given in court. In light of general requirement that expert evidence 'in chief' be provided by way of written report, the issue of the 'rehearsal' of experts only arises in relation to cross-examination.

In the USA, there is no prohibition on rehearsal, and among witness preparation techniques it is described as 'the most strongly advised among trial lawyers' [59]. In the UK, barristers 'must not rehearse practise or coach a witness in relation to his evidence'.[60] In Australia there are some strong authorities against the practice. Justice Young referred to the 'very severe limits, in the interests of justice, in preparing a witness to give evidence…. we do not in Australia do what apparently happens in some parts of the United States, rehearse the witness before a team of lawyers, psychologists and public relations people to maximise the impact of the evidence'.[61] However, the practice is apparently widespread in Sydney.

The question of rehearsal raises particularly difficult ethical issues.

Arguments for rehearsal of cross-examination. A compelling case can be made for the propriety of a rehearsal of the cross-examination of experts. *Firstly*, for a number of reasons, the practice has the capacity to facilitate the presentation of testimony that does justice to the inherit merits of the opinion. The mere experience of formulating and articulating opinion under the pressure of cross-examination will likely improve the general quality of the presentation of testimony during cross examination at trial. More specifically, it will facilitate the development of strategies to combat the following techniques of cross-examination, which might otherwise cause the testimony of an expert to appear weaker than is warranted by the inherent merits of the expert's opinion:

- Techniques of cross-examination might be employed to engender a tendency of acquiescence, which leads to concessions contrary to an expert's genuine considered opinion. These techniques may include: inducing confusion through complex and rapid fire questioning; inducing submission through aggression or overbearing demeanour; provoking the witness to anger, in a way which compromises the ex-

pert's rational deliberations; encouraging a co-operative and trusting relationship with the expert through flattery and respect; creating a habit of acquiescence through a pattern of 'Dorothy Dixers'; weakening confidence by embarrassing the expert on collateral matters; trapping the expert in a logical corner which demands a concession, when the trap has been created by extracting the expert's agreement to flawed assumptions (which the expert might carelessly have provided, oblivious to the logical consequences of his concession).

- The cross-examination might damage the credibility of the expert by creating the impression that the expert is unduly defensive and evasive, by a conscious strategy of provocation;

Testing and probing the expert report can be readily undertaken in conference. General advice as to the techniques and traps of cross-examination can also be provided in conference. The experience of the actual rigours of cross-examination can be created by a mock examination on a subject matter unrelated to the proceedings.

- The cross-examination might probe the expert opinion to expose flaws and inconsistencies (real or imagined). If confronted with those contended flaws for the first time in cross-examination, the expert may be unable properly to address them (and the expert's testimony might be correspondingly weakened). However, the expert might have been able readily to explain them away (on reasonable grounds), had the expert had adequate time to reflect upon them.

The strategy of mock cross-examination has the capacity to alert the witness to the strategies that might be used to attack him or her, to alert the witness to his or her vulnerability to those techniques, and to facilitate the witness developing defences against them. By educating the barrister as to how the witness responds under cross-examination, a rehearsal of cross-examination also produces the advantages of facilitating preparation of re-examination and an informed assessment of the strength of the case.

Secondly, rehearsal of the cross-examination of experts does not have the same inherent distorting tendencies as rehearsal of lay witnesses. The susceptibility of lay evidence to suggestion is exacerbated by the inherent vulnerability of memory to unconscious reconstruction.[62] The extent to which expert opinion can be distorted by the rehearsal of answers in a mock cross-examination is (or can be) limited by a number of considerations. *Firstly*, an opinion is substantially anchored by the necessity to justify the opinion by reference to assumptions and a coherent process of reasoning. This constrains the extent to which the expert's opinion can be swayed by possible suggestion. *Secondly*, the pre-trial mock cross-examination will be conducted after the final report and joint report has been served. Any tendency to be swayed by suggestion will be counterbalanced by the fact that the expert is already 'locked in' to a publicly communicated position. *Thirdly*, the scope for distortion through suggestion can be further reduced if the cross-examination rehearsal is conducted on the proposed basis set out below.

Arguments against rehearsal of cross-examination. There are a number of considerations weighing against the ethical propriety of cross-examination rehearsals. *Firstly*, notwithstanding that mock cross-examination is aimed at 'challenging' the expert's evidence, the reality is that discussion and rehearsal of answers to cross-examination are integral aspects of the process. *Secondly*, the inherent vulnerability of witnesses to suggestion during the rehearsal of evidence on the eve of trial: 'rehearsal has a greater potential for suggestiveness than other preparation techniques. A witness naturally feels apprehensive about an upcoming appearance. The inclination to welcome a script is strong. Furthermore, repetition of a story is extremely suggestive.'[63] With respect to lay evidence, 'the danger in discussing with a witness his evidence prior to trial is that the witness's recollection of events will either consciously or unconsciously alter so as to accommodate what the witness perceives as a better, for whatever reason, version of events. Obviously this is a matter of degree'.[64] Different but analogous problems can occur with expert opinion. *Thirdly*, the legitimate objectives of mock cross-examination can be substantially achieved without the risks associated with that process. Testing and probing the expert report can be readily undertaken in conference. General advice as to the techniques and traps of cross-examination can also be provided in conference. The experience of the actual rigours of cross-examination can be created by a mock examination on a subject matter unrelated to the proceedings.[65]

Rehearsal: conclusion. It is a finely balanced and controversial question. As a purely ethical matter, I tentatively suggest that cross-examination rehearsal on the actual case should generally be ethically permissible, subject to the following parameters:

- The barrister should emphatically exhort the expert to abide by the witness codes;
- On no occasion should the barrister during the session give any direction or suggestion as to the substance of any answer which the expert should provide to any question;
- It is reasonable to discuss answers given in the mock cross-examination, for the purpose of: (i) exploring and testing the basis for any stated answer; (ii) exploring whether any answer (on further reflection) truly accords with the considered opinion of the expert; (iii) if not, exploring why the expert gave the answer in the mock cross-examination; (iv) discussing strategies to facilitate the expert responding to questions in a manner which accords with the expert's considered opinion;
- There should be no more than limited repetition of cross-examination on each subject matter.

Expert testimony plays a critical role in litigation. Witness preparation plays a critical role in the presentation of expert. testimony. A framework of rules and principles to provide effective ethical guidance in the area is needed. That framework does not presently exist

However, reasonable minds will differ as to the strategic prudence of the practice of mock cross-examination. Because there does not appear to be universal support for the ethical propriety of the practice, some judges might perceive the rehearsal of cross-examination as tainting the credit of the expert.

Reform in regulation?

I respectfully repeat my suggestion from 10 years ago that it may be useful to consider whether amendments to the Uniform Conduct Rules might provide more practical and clear guidance on witness preparation. Any such consideration might address the following issues:

- the general question of the appropriate nature of ethical regulation in this area.

There is often contrasted two types of ethical regulation: 'codes of ethics' (which prescribe high level principles to provide loose general guidance), and 'codes of conduct' (which prescribe specific binding rules consistent with the high level principles). Those different forms reflect the often conflicting goals of regulation: the retention of sufficient flexibility to permit ethical discretion which is sensitive to individual circumstance; and the provision of sufficient certainty to give firm practical guidance (and to facilitate enforcement);

- the relative priority of the conflicting policy objectives in this area;
- whether conduct should be proscribed merely because it creates an appearance of expert partiality.

Conclusion

Expert testimony plays a critical role in litigation. Witness preparation plays a critical role in the presentation of expert testimony. A framework of rules and principles to provide effective ethical guidance in the area is needed. That framework does not presently exist.

To facilitate the development of such a framework, I affirm my suggestion that it might be helpful to undertake the following steps:

- organise a working party through the Bar Council to address the issue. It would be desirable that the Law Society and the judiciary also be represented;
- survey existing practice in relation to expert witness preparation, across the Bar and within law firms;
- survey judicial attitudes as to the impact on expert credibility of various methods of expert witness preparation;
- survey practice in different legal cultures;
- circulate a discussion paper through the working party, setting out proposed guidelines;
- in light of responses to the discussion paper, produce guidelines for practice for approval by Bar Council.

I am interested in exploring this topic further, and welcome comments.[66]

END NOTES

1 Applegate, 'Witness Preparation' (1989) 277 *Texas Law Review* 277, at 279
2 Stowe, 'Preparing expert witnesses: A search for ethical boundaries', Bar New, Summer 2006/7, at page 44
3 For convenience and completeness, this article incorporates analysis from the previous article where it continues to be relevant. This article supercedes the earlier article referred to in footnote 1.
4 Applegate, supra fn 1, 278.
5 Applegate, supra fn 1, 327
6 Zacharis and Martin, 'Coaching Witnesses' (1998-98) 87 *Kentucky Law Journal* 1001, at 1006.
7 Applegate, supra fn 1, 352
8 *Abbey National Mortgages Plc v Key Surveyors Nationwide Limited and Others* [1996] 3 All ER 184; see also Fox v Percy (2003) 214 CLR 118, per Callinan J at [151]
9 NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70
10 NSWLRC, Report 109, supra fn 8, page 74
11 Quoted in J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, at 835; quoted in NSWLRC Report 109, supra fn 8, page 73
12 *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705
13 Applegate, supra fn 1, at 350
14 Regulation 4
15 Regulation 35
16 *R v Momodou (Henry)* [2005] EWCA Crim 177; [2005] 1 WLR 3442, 587h-j and 588a-c.
17 *HKSAR v Tse Tat Fung* [2010] HKCA 156, at [79]
18 *Majinski v the State of Western Australia* [2013] WASCA 10, [30]
19 Suggestibility will be influenced by the 'power dynamic' between expert and the barrister.
20 Eg, contingency fee
21 Garth Blake SC and Phillippe Doyle Gray, 'Can counsel settle expert reports?', Bar News, Summer 2012-2013. The learned authors summary was approved in *Hunter Quarries Pty Ltd v Morrison* [2013] NSWIRComm 49, at [86]-[97]; and approved in obiter by Davies J to *Cassie Masters by her tutor William Masters v Sydney West Area Health Service* [2013] NSWSC 228, at [33] where His Honour 'commended' the summary to counsel before him.
22 although see *Cassie Masters*, ibid, at [33] for an obiter approval of the summary by Blake SC and Gray.
23 The authorities supporting those principles were identified as *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893, per Lindgren J at [19], [27]; which was approved by Sackville J in *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, at [10]-[18]; *R v Doogan* [2005] ACTSC 74, at [119]; *Boland v Yates Property Corporation* (1999) 167 ALR 575
24 (1999) 167 ALR 575
25 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893;
26 *R v Doogan* [2005] ACTSC 74, at [119]
27 *Jango v Northern Territory of Australia (No 2)* [2004] FCA 1004, at [10]-[18]; *Risk v Northern Territory of Australia* [2006] FCA 404, at [456]
28 *Hunter Quarries Pty Ltd v Morrison* [2013] NSWIRComm 49, at [86]-[97]
29 see [94],[95]
30 *Cassie Masters by her tutor William Masters v Sydney West Area Health Service* [2013] NSWSC 228, at [33]
31 *Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd* (No 14) [2013] NSWSC 211, at [23]
32 eg, *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 893, at [19]; *R v Doogan* [2005] ACTSC 74, at [119]
33 See my other article in this edition: 'Expert reports and waiver of privilege'
34 eg, *R v Doogan* [2005] ACTSC 74, at [117]; *Phosphate Cooperative Co of Australia Pty Ltd v Shears* [1989] VR 665; *Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd* [2011] VSC 581, [101]-[111]; *Universal Music Australia Pty Ltd & Ors v Sharman Licence Holdings Pty Ltd & ors* (2005) 220 ALR 1, at [227]ff; *Hardy v Your Tabs Pty Ltd* [2000] NSWCA 150, at [133]
35 *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171, per Allsop J at [676], [678]
36 ibid
37 ibid
38 Ibid, [678]
39 *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454, per Pagone J at [9]; *Aitchison v Leichhardt Municipal Council* [2002] NSWLEC 226, per Talbot J at [21]; ASIC v Rich [2005] NSWCA 152 (CA) [167]
40 *Fagenblat*, supra fn 22, [7]
41 *Fagenblat*, supra fn 22, [7]
42 *ASIC v Rich* [2005] NSWCA 152 (CA) [167]
43 *ASIC v Rich* [2005] NSWSC 650, per Austin J at [40]
44 see Bar Rule 36; *Bush* (1993) 69A Crim R 416 at 431,
45 NSW Bar Association Response to the NSW Law Reform Commission Issues Paper 25 – Expert Witnesses, [33]
46 ibid
47 *Traderight (NSW) Pty Ltd (ACN 108 880 968) and Ors v Bank of Queensland Ltd (ACN 009 656 740) (No 14)* [2013] NSWSC 211, per Ball J at [23]; see also *Harrington-Smith v Western Australia (No 7)* [2003] FCA 893, at [19]; quoted with approval in *Jango v Norther Territory (No 2)* [2004] FCA 1004, per Sackville J at [9], and *R v Coroner Maria Doogan* [2005] ACTSC 74 (Full Court, ACTSC), at [118]
48 *Whitehouse v Jordan* [1981] 1 WLR 246, per Lord Wilberforce at 256-257
49 *Kelly v London Transport Executive* [1982] 1 WLR 1055, per Lord Denning at 1064-1065. However, Callinan J has pointed out Whitehouse v Jordan does not support 'as far reaching a proposition as that propounded by Lord Denning': *Boland v Yates Property Corporation Pty Ltd (1999)* 167 ALR 575, at [279]
50 Justice McDougall, 'Commercial List Practice: Expert Evidence', College of LAW CPED Seminar, 28 July 2004
51 Urgency might create a necessary exception to this guideline
52 Some practitioners would prefer to organise a conference to discuss the matters raised, before a further draft was prepared
53 Eg, the amendment of wording which is convoluted.
54 This is consistent with the decision of Ball J in *Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd (No 14)* [2013] NSWSC 211, at [23]
55 *Traderight (NSW) Pty Ltd and ors vBank of Queensland Ltd (No 14)* [2013] NSWSC 211, at [23]
56 However, it could be contended that merely raising the proposition is indirectly suggestive of what the witness 'should say' in proceedings
57 For a good example of such guidelines, see Freckleton & Selby, 'Expert Evidence: Law, Practice, Procedure and Advocacy' (2nd Edn, 2002), at 706-713
58 See *Re Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395; *R v Momodou* [2005] 2 All ER 571, at 588 (CA); *HKSAR v Tse Tat Fung* [2010] HKCA 156, [68]-[82]
59 G. Bellow & B. Moulton, 'The Lawyering Process: Preparing and Presenting the Case' (1981), at 357-8; see Applegate, supra fn 1, at 281 fn 13
60 Code of Conduct of the Bar of England and Wales, Rule 705(a); see also *R v Momodou* [2005] 2 All ER 571, at 588; *HKSAR v Tse Tat Fung* [2010] HKCA 156, [68]-[82]
61 *Re Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395.
62 *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187, per Ipp JA at [19]
63 Applegate, supra fn 1, 323
64 *HKSAR v Tse Tat Fung* [2010] HKCA 156, [73]
65 This was endorsed by the Court of Appeal in *R v Momodou* [2005] 2 All ER 571, at 588
66 hugh.stowe@5wentworth.com