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Ethical and Effective Witness Preparation

Michael Legg*

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Why prepare a witness?

To ascertain rights, obligations, contraventions or liabilities lawyers need the facts. The law is applied to the facts to ascertain legal ramifications, including remedies. A witness is a potential source of facts, and as a result evidence, for establishing or defending a party's claims. The evidence may be helpful or unhelpful to a client's case. However, knowledge of the available evidence is central to ascertaining the prospects of success and advising on how to proceed, including the need for further evidence or settlement.

Talking to a witness allows the lawyer to evaluate what evidence, if any, the witness can provide. If a person is to be a witness for Australian legal proceedings it is common for a witness proof, statement or affidavit to be prepared.[1] The witness may also be required to testify in court or before a tribunal. Interviewing a witness, including the preparation of a written record, and calling a witness to testify, requires a preparation process. This process assists the lawyer to ascertain if the evidence is relevant and reliable. Only relevant evidence is admissible.[2] For a witness's evidence to be useful and believed it needs to be reliable.[3]

Courts, parties, and legal practitioners are required to conduct themselves in a manner that furthers the efficient resolution of disputes.[4] Witness preparation aids in efficiency. The witness that is called "cold", and with the lawyers not having notice of the substance of her evidence, may be irrelevant or disrupt and prolong the trial. Lawyers should seek to present the evidence in support of their client's case in as efficient manner as possible.

The aim of witness preparation is to efficiently adduce relevant and reliable evidence. However, while witness preparation is a necessity, as it is a key ingredient to effective representation, it may also involve ethical dilemmas. While the lawyer has a duty to act in the client's best interests,[5] they are also an officer of the court and have a paramount duty to the court and the administration of

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[1] JP Bryson QC, 'How to draft an affidavit' (1985) 1 *Australian Bar Review* 250 at 251; AR Emmett QC, 'Examination in Chief and Re-examination' (1987) 3 *Australian Bar Review* 93 at 93.

[2] *Evidence Act 1995* (Cth) ss 55-56.

[3] G T Pagone, 'Centipedes, liars and unconscious bias' (2009) 83 *Australian Law Journal* 255 at 256.

[4] See eg *Federal Court of Australia Act 1976* (Cth) ss 37M-37N; *Civil Procedure Act 2005* (NSW) s 56; *Uniform Civil Procedure Rules 1999* (Qld) r 5; *Civil Procedure Act 2010* (Vic) ss 7-14.

[5] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.1 (A solicitor must '*act in the best interests of a client in any matter in which the solicitor represents the client*'.); *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 35 ('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, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.').

justice.[6] The concern over the role of the lawyer in witness preparation and the need for truthful testimony, while evergreen, has come to the fore in recent cases,[7] which are discussed below.

This article seeks to provide practical and ethical guidance as to witness preparation through ten key lessons or steps. The focus here is concerned with the lay or fact witness. However, much of what is said also applies to expert witnesses, but additional rules and approaches need to be considered in relation to an expert witness.

1. Truth.

Telling the truth is the beginning and end of witness preparation - "*The primary duty of a witness is one of honesty. The oath or affirmation binds the witness to tell the truth, the whole truth and nothing but the truth*".[8] This duty of the witness can be reinforced through explaining the ramifications of not fulfilling the obligation.

First, lying can result in criminal sanctions. Making a false statement on oath in a judicial proceeding gives rise to the offence of perjury.[9] A false affidavit is also perjury.[10]

Second, when a witness is found to be deceptive, the court may discount or disregard their evidence, or even find that it supports an adverse inference. The High Court in *Edwards v R* (1993) 178 CLR 193 accepted that the telling of a lie will affect the credit of the witness who tells it. In the high-profile Corporal Ben Roberts-Smith VC defamation case, dealing with media reports of misconduct by Mr Roberts-Smith while a member of the Australian military in Afghanistan, Justice Besanko observed "*Lies are clearly relevant to credit*".[11]

The effect of a lying witness upon the trier of fact may be illustrated by *Li v The Herald and Weekly Times Pty Ltd* [2007] VSC 109, a case in which the media reported that Ms Li was using her herbal medicine practice to provide sexual services to clients who then sought reimbursement from Medicare, resulting in Ms Li commencing proceedings for defamation. Here, Justice Gillard observed:

> *Making all due allowances for Ms Li, she is one of those witnesses who falls into the category of a witness who should not be believed unless the evidence concerns non-contentious*

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[6] *Giannarelli v Wraith* (1988) 165 CLR 543 at 555 – 56 (Mason CJ); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 3 ('*A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.*'); *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 23 ('A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice.').

[7] *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381; *New Aim Pty Ltd v Leung* [2023] FCAFC 67; *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555.

[8] *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 at [126] (Jackman J). See also *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 at 386 [64] (Heydon, Crennan and Bell JJ) ("*A litigant who enters the witness box, … , is under a positive duty to tell the whole truth in answer to the questions asked.*").

[9] See *Crimes Act 1914* (Cth), s 35(1); *Criminal Code 2002* (ACT), Pt 3.4; *Crimes Act 1900* (NSW), s 327; *Criminal Code Act 1983* (NT), s 96; *Criminal Code Qld*, ss 123 – 125 (found in *Criminal Code Act 1899* (Qld), Sch 1); *Criminal Law Consolidation Act 1935* (SA), s 242; *Criminal Code Tas*, s 94 (found in *Criminal Code Act 1924* (Tas), Sch 1); *Crimes Act 1958* (Vic), ss 314 – 315; *Criminal Code WA*, s 124 (found in *Criminal Code Act Compilation Act 1913* (WA), App B Schedule).

[10] *Crimes Act 1914* (Cth), s 35(1), (4); *Criminal Code 2002* (ACT), s 704(1); *Crimes Act 1900* (NSW), s 327; *Oaths Act 1900* (NSW) ss 29, 33; *Criminal Code Act 1983* (NT), s 96; *Criminal Code Qld*, s 123; *Criminal Law Consolidation Act 1935* (SA), s 242; *Criminal Code Tas*, s 94(1); *Crimes Act 1958* (Vic) s 314; *Oaths and Affirmations Act 2018* (Vic) s 50; *Criminal Code WA*, s 124.

[11] *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555 at [196] (Besanko J).

matters, is corroborated by some other credible evidence or is admitted by the defendants. I am satisfied that the affirmation she made meant nothing to her. ... On three occasions, it was necessary for the Court to remind her that she had made an affirmation to tell the truth and that if she did not tell the truth, she could be prosecuted for perjury. She was warned on the third day of evidence early in her cross-examination, once in the following day, and also on the fifth day. The Court warned her because, in my opinion, she was making up the evidence as she was speaking. It was very apparent to the Court that she was lying in respect to the particular matters which were the subject of cross-examination. In addition, she was cross-examined about an affidavit which she swore on 17 October 2006. The trial of the proceeding commenced in February last year and was aborted. She was ordered to pay costs. Application was made later that year by the defendants to stay the proceeding until the costs were paid. She swore an affidavit on 17 October 2006. The thrust of her response to the application was that she was not in a position to pay the costs and it would be unjust if she was not permitted to continue the proceeding. Her affidavit failed to reveal that she owned a piece of real estate. She deposed to the fact that she did own one property, which was in the name of Abbie Li, but failed to disclose an East Melbourne property in the name of Cui Li, which is her Chinese name. She was asked about this omission and her evidence was far from satisfactory. The Court again had to remind her that when she swore an affidavit, she was bound to tell the truth. Again, she appeared to the Court to have some difficulty with this concept. In my view, the omission in that affidavit reflects upon her credibility.[12]

Justice Gillard further opined more generally that "*[w]hen an affidavit or a statutory declaration is prepared, the focus of the document is on a particular subject. If the document omitted a matter of substantial importance which was the subject of evidence given much later, then a doubt would be raised with respect to the honesty and accuracy of the witness*".[13]

In *Kuhl v Zurich Financial Services Australia Ltd*, Heydon, Crennan and Bell JJ held that where there is a failure of a party-witness to comply with the duty of a witness to tell the whole truth, it may support an inference that the party suppressed evidence which would have been damaging to the party-witness.[14] However, two conditions must be satisfied:[15]

1) Reasons must be given for concluding that the truth has been deliberately withheld; and
2) The party-witness must have been given an opportunity to deal with the criticism.

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[12] *Li v The Herald and Weekly Times Pty Ltd* [2007] VSC 109 at [238] (Gillard J).
[13] Ibid at [246].
[14] *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 at 386 [64] (Heydon, Crennan and Bell JJ). The finding of a positive inference that damaging evidence was suppressed may be seen as arising from the second consequence of the rule in *Jones v Dunkel* (1959) 101 CLR 298. *Jones v Dunkel* is authority for the proposition that two possible consequences may follow from a party's failure to call a witness whom they might be expected to call. The first is that the Court may infer that the evidence of the witness who was not called would not have assisted that party's case. The second is that the Court may have greater confidence in drawing an inference unfavourable to that party: *Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt* [2022] NSWCA 151 at [46] (Beech-Jones JA).
[15] *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11; (2011) 243 CLR 361 at 387-388, 390, [67]-[69], [75] (Heydon, Crennan and Bell JJ).

The solicitor must also be cognisant of their responsibilities if they learn that a witness has lied to the court. The Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (ASCR) sets out the solicitors' responsibilities as follows:[16]

> 20.1 A solicitor who, as a result of information provided by the client or a witness called on behalf of the client, learns during a hearing or after judgment or the decision is reserved and while it remains pending, that the client or a witness called on behalf of the client—
>
> 20.1.1 has lied in a material particular to the court or has procured another person to lie to the court,
>
> 20.1.2 has falsified or procured another person to falsify in any way a document which has been tendered, or
>
> 20.1.3 has suppressed or procured another person to suppress material evidence upon a topic where there was a positive duty to make disclosure to the court,
>
> must—
>
> 20.1.4 (Repealed)
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> 20.1.5 refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie, falsification or suppression and must promptly inform the court of the lie, falsification or suppression upon the client authorising the solicitor to do so but otherwise may not inform the court of the lie, falsification or suppression.

In short, the client must authorise the solicitor to inform the court of a witness's lie or the solicitor must cease to act for the client. By way of example, in *Wavetrain Systems As v Next Generation Rail Technologies SL*, the solicitors advised the court that an affidavit contained parts which were not truthful. Justice Robertson referred the untrue affidavit to the Commonwealth Attorney-General to determine if criminal proceedings should be brought and observed "*It should go without saying that false testimony is not to be tolerated and is viewed most seriously by the Court: it goes to the heart of the fair and just exercise of judicial power*".[17]

2. Question and Test the Witness's Evidence.

A five member Full Court of the Federal Court has observed that at the core of a lawyer's ethical obligations is "*not to influence a witness's evidence*".[18]

To ensure ethical practice lawyers should be aware of rule 24 of the ASCR:[19]

> 24.1 A solicitor must not—
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> 24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so, or

[16] See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 79.
[17] *Wavetrain Systems As v Next Generation Rail Technologies SL* [2019] FCA 350; (2019) 369 ALR 120 at 124 [24] (Robertson J).
[18] *New Aim Pty Ltd v Leung* [2023] FCAFC 67 at [119] (Kenny, Moshinsky, Banks-Smith, Thawley and Cheeseman JJ). See also *Kennedy v The Council of The Incorporated Law Institute of New South Wales* (1939) 13 ALJR 563, 564 (Rich J) (solicitor engaged in misconduct when he "*strove to influence a witness in what she would say and did so in an improper manner*").
[19] See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 69-70.

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by—

24.2.1 expressing a general admonition to tell the truth,

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness, or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

There are some clear examples of conduct that breaches the ASCR, such as overtly encouraging a witness to testify falsely, and instructing the witness to say they do not know or cannot recall when they do. Fabricating evidence, which applies to a witness and their lawyer, is a criminal offence.[20] In *Majinski v State of Western Australia*, Chief Justice Martin explained:

> *Questioning of the witness moves beyond "proofing" to impermissible "coaching" when the witness' true recollection of events is supplanted by another version suggested by the interviewer or other party*[21]

Coaching of the witness would obstruct the administration of justice and be contrary to the lawyer's paramount duty to the court.[22]

However, it is ethical to obtain, test and organise information from a witness.[23] Indeed, trying to ascertain what happened usually means getting the witness's initial version and probing it. The aim is not to change the witness's story but instead to test the story. Testing the witness's testimony will mean getting the witness to fill the gaps in their story, to explain inconsistencies in their story or with other evidence, and to provide explanations as to why certain actions were or were not taken. For example, a witness recalls events in one sequence but that does not accord with the dates on letters exchanged between the parties. Does this mean that the witness is mistaken or are the letters incorrectly dated? Here, an explanation is necessary. Organising the testimony means lawyers should give a witness the context of the case so that they understand where their testimony fits in and its relevance. It also allows a witness to appreciate why various parts of their testimony are more or less important. Context can also mean explaining how the law applies to the facts and what other evidence (including documents) will be put forward to prove the case. An understanding of the context also allows a witness to better deal with unanticipated lines of questioning because they have the bigger picture. Justice Sheppard has observed that:

> *In many cases there will have been lengthy correspondence extending over a long period; as well there may have been internal memoranda, diary entries and telexes; and there may be complex contractual documents which the witness must have considered at the time they came into existence. The witness's understanding of all these documents and their*

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[20] *Crimes Act 1914* (Cth) s 36; *Criminal Code 2002* (ACT), Pt 3.4; *Crimes Act 1900* (NSW) s 317; *Criminal Code Qld*, s 126; *Criminal Law Consolidation Act 1935* (SA), s 243; *Criminal Code Act 1983* (NT), s 99; *Criminal Code Tas*, s 97; *Crimes Act 1958* (Vic) s 314; *Criminal Code WA*, s 129.
[21] *Majinski v State of Western Australia* [2013] WASCA 10 at [32].
[22] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1, 41 [112] (McHugh J).
[23] D A Ipp, 'Reforms to the adversarial process in civil litigation – Part II' (1995) 69 *Australian Law Journal* 790, 799 citing *Craig v Troy* (unreported, Supreme Court, WA, 24 February 1995).

> *consistency, or otherwise, with his oral evidence will be matters which counsel will need to discuss fully with him. A witness who is not familiar with the documents and the problems that they may create for him may do himself grave injustice notwithstanding that he may be a most honest and reliable person.*[24]

Testing a witness's evidence does have some difficult grey areas that practitioners need to be aware of. The fact that a witness's lawyer is challenging their evidence as part of the testing process may convey the impression to the witness that they are somehow wrong as to their recollection or that it is in their best interests to modify their testimony. Lawyers need to guard against this impression. It therefore behoves a lawyer to be very clear about the first principle – tell the truth. If complying with ethical requirements is not enough, the vigorous lawyer should remember that a witness that changes their story to please their lawyer may create fertile ground for the cross-examiner who finds inconsistencies in the witness's testimony.

It is advisable to exhaust the witness's recollection of events first, before seeking to test them. This way the lawyer does not inadvertently alter the recollection. Exhausting the witness's recollection involves using a couple of simple techniques – ask open-ended questions that do not suggest a particular answer and begin with broad general questions; and then narrow down to particular issues. For example, in a negligence or product liability case, it is better to ask the witness what did they see while handling the product at issue, and then whether they saw any writing or notices on the product, before explaining that the existence of a warning may mean that a defendant has discharged their duty of care and there would be no liability. If the witness is asked about the presence of a warning or instructed upon the law at the very beginning, it may colour their response. If the warning was present, it is better to know that and to focus on its adequacy than to divert time and money to develop a case around a false fact.

A witness's evidence may also be influenced by other witnesses. Rule 25 of the ASCR therefore provides:[25]

> 25.1 A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time—
>
> 25.1.1 about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing, and
>
> 25.1.2 where such conferral could affect evidence to be given by any of those witnesses,
>
> unless the solicitor believes on reasonable grounds that special circumstances require such a conference.
>
> 25.2 A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise

In short, the rules prohibit a practitioner from interviewing lay witnesses together where the issue under discussion is contentious or the discussion of the issue could affect the evidence to be given by either of the witnesses.

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[24] Ian Sheppard, "Communications with Witnesses Before and During their Evidence" (1987) 3(1) *Australian Bar Review* 28, 29-42.
[25] See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 71-72.

In *Day v Perisher Blue*, a personal injury case arising from an accident at a ski resort, it emerged in cross-examination that the following had taken place:

- one witness had discussed his evidence with four other witnesses, and they had told him "what they were likely to say";
- a teleconference took place between the defendant's solicitor and witnesses for the defendant to give the witnesses an opportunity "to understand better the court process and what will be expected of them";
- the witnesses "went through" their statements during this teleconference;
- a follow-up letter had been sent in which the solicitor provided one particular witness with some possible areas of questioning (to be passed on to the other witnesses); and
- a document of unknown provenance called "Witness Protocols for Court Cases and Arbitration Hearings", which was in at least one witness' possession, warned that cases are "Not about facts about credibility", "Lawyers lead you up the garden path then shut the gate behind you" and "Lawyers are there to destroy your credibility not establish the facts".[26]

The Court of Appeal ordered that there be a new trial, on the basis that the trial judge, insofar as he had relied on the evidence of the respondent's witnesses, erred given the improper coaching of the witnesses.[27] The papers were sent to the Legal Services Commissioner.[28] Justice Sheller also commented as follows:

> *It has long been regarded as proper practice for legal practitioners to take proofs of evidence from lay witnesses separately and to encourage such witnesses not to discuss their evidence with others and particularly not with other potential witnesses. For various reasons, witnesses do not always abide by those instructions and their credibility suffers accordingly. In the present case, it is hard to see that the intention of the teleconference with witnesses discussing amongst themselves the evidence that they would give was for any reason other than to ensure, so far as possible, that in giving evidence the defendant's witnesses would all speak with one voice about the events that occurred. Thus, the evidence of one about a particular matter which was in fact true might be overborne by what that witness heard several others say which, as it happened, was not true. This seriously undermines the process by which evidence is taken. What was done was improper*. [29]

In the Ben Roberts-Smith defamation case where the media stated that he had engaged in misconduct, including that he committed murder and broke the rules of military engagement, allegations were made of witness collusion so as to present a consistent version of events in relation to a number of missions.[30] Justice Besanko cited *Day v Perisher Blue* in relation to collusion between witnesses or inappropriate pressure being placed on witnesses. His Honour stated that "*If witnesses collude in order to present a consistent, albeit false, account of events or conversations, that will be a basis to reject their account…*".[31] Further, contact between witnesses may lead to a conclusion that

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[26] *Day v Perisher Blue* (2005) 62 NSWLR 731 at 737 [19] – 746 [27] (Sheller JA).
[27] Ibid at 750 [35].
[28] Ibid.
[29] Ibid at 746 [30].
[30] *Roberts-Smith v Fairfax Media Publications Pty Limited (No 41)* [2023] FCA 555 at [2363] (Besanko J).
[31] Ibid at [2364].

the evidence of one witness has been contaminated by the evidence of another such that it cannot provide corroboration of the other witness's evidence.[32]

After reviewing the evidence, Justice Besanko stated "*I am satisfied that the applicant and Persons 5, 11, 29 and 35 discussed their respective recollections of the missions in which they were involved, … and that they discussed their recollections in detail*".[33] His Honour went on to find that "*The fact is these witnesses were talking in detail about relevant missions and events and their respective recollections of the same and even if they were not trying to "line-up" their stories, there is a significant risk that that would be the result of the process*". These discussions were "*to be borne in mind when assessing the evidence of the relevant witnesses*".[34]

It has also been stated that where witnesses have read each other's affidavits in draft, it may be doubtful whether their evidence remains uninfluenced by the evidence of others and their credibility may suffer accordingly.[35] Further, affidavit evidence which is in the same words is suggestive of collusion[36] and, potentially, professional conduct issues.[37]

3. Listening.

Almost everyone has failed to listen in a day-to-day conversation and appreciates that if they don't pay attention or think they are being asked about one thing when another is intended, matters can become confused and misleading impressions given.

In court that confusion can be even more costly. The first piece of advice to give a witness is simple - listen to the question. Next a witness should be told to make sure they understand the question. If they don't understand the question, then they should say so and ask the questioner to explain, repeat or rephrase the question. Witnesses need to understand that lawyers sometimes ask convoluted, compound, vague or ambiguous questions, and it is not the job of the witness to untangle them but instead for the lawyer to ask a clear question.

Witnesses should also be wary of certain types of questions that a lawyer may ask deliberately, such as questions that purport to summarise earlier testimony, which include imprecise language such as 'regular', 'common', 'average', 'frequent', 'normal' or 'substantial'. The witness does not need to be argumentative but should make sure that their understanding of a word or concept is the same as the lawyers. For example, while a witness may think regular church attendance is every Christmas and Easter, the questioner may think it means every Sunday. Imprecise terms such as 'regular' are to be avoided unless the witness or examining lawyer has defined them.

4. Answering.

After listening the witness must then answer. A few tips can assist here as well. Witnesses should be told:

(1) answer clearly and succinctly;

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[32] Ibid at [2366] citing *Victory Projects Pty Ltd v AAA Self Storage Pty Ltd* [2016] NSWSC 1758 at [6]–[7] (Black J).
[33] Ibid at [2466]
[34] Ibid at [2467]. See also [344]-[349].
[35] *Bassett v Cameron* [2021] NSWSC 207 at [303] (Ward CJ in Eq).
[36] *Macquarie Developments Pty Ltd v Forrester* [2005] NSWSC 674 at [90] (Palmer J); *No 1 Victoria Dragons Pty Ltd v AEN Developments Pty Ltd* [2022] NSWSC 1345 at [125] (Black J).
[37] *Girchow Enterprises Pty Ltd v Ultimate Franchising Group Pty Ltd (Final Hearing)* [2023] FCA 420 at [67] (Thawley J).

(2) if you don't know the answer, say "I don't know," or if you don't remember the answer, say "I don't remember" but don't confuse the two as not remembering implies that you did know the answer at some point in the past;
(3) don't speculate, guess or assume which links back to the need to listen and comprehend;
(4) do not volunteer information, answer only the question asked; and
(5) correct mistakes, and if you realize you have been inaccurate or incomplete then say so.

These tips also come with a couple of provisos. As most cross-examination uses leading questions, which leaves little room to expand upon answers, witness's answers may become forcibly reduced to being succinct. If a witness is asked a question that they feel cannot be answered with a 'yes' or a 'no', they should understand that they can convey the difficulty to the Court by saying it is a not a yes or no, black and white answer. If forced to answer in that fashion, their difficulty will at least let the lawyer know that there may be a need for re-examination to clarify that point. In addition, the advice not to assume may be overridden if the witness is specifically asked to do so by the barristers or Court, although this is more likely with an expert witness than a lay witness. Lastly, witnesses should not be allowed to develop a mind-set that they will only answer a question if it is phrased exactly as they understand the facts to be as this can result in misleading testimony. For example, a witness is asked "Was the car that you saw at the accident blue?" The witness honestly believes it was turquoise. To answer 'No' without elaboration may be misleading or at least unnecessarily time-consuming. The use of commonsense is invaluable.

5. Documents.

The importance of documentary evidence has increased over time. Letters and agreements have been part of commerce for a long period. However, communications between people that may have been carried on through a conversation or telephone call are now being carried on through email, SMS, social media and audio-visual applications such as Zoom or Microsoft Teams where video may be recorded or transcripts created.[38]

Judges are likely to give far greater weight to a document created contemporaneously with an event the subject of litigation, than to witnesses' recollections. For example, in *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*, Justice Goldberg stated:

> *The evidence in the affidavits is variously five to seven years and nine to 11 years after the events they record and in the ordinary course of human experience recall after such a period is imperfect; all the more so is such recall subject to unreliability when the recall is for the purpose of rebutting allegations against the witnesses. The documentary evidence which came into existence contemporaneously with events and the reasonable inferences which may be drawn from the contents of those documents are more likely to be an accurate record of the authors' views than recall between five and 11 years later*.[39]

Other examples abound.[40] The former Chief Justice of Western Australia, Wayne Martin has observed:

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[38] Michael Legg, 'Electronically Stored Information and Social Media: Implications for Discovery and Evidence' in Michael Legg (ed), *The Future of Dispute Resolution* (LexisNexis, 2013) 61.
[39] *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 at 221.
[40] See *Lloyd's Ships Holdings Pty Ltd v Davros Pty Ltd* (1987) 72 ALR 643 at 654 (Evatt J) ("No confidence can be reposed in the worth of his testimony. I much prefer to rely on the evidence of the contemporaneous documents"); *Ron Hodgson (Holdings) Ply Ltd v Westco Motors (Distributors) Pty Ltd* (1980) 29 ALR 307 at 310 (Franki J) ("in general, I consider the documentary evidence more reliable than much of the oral evidence which has been given"); *Commonwealth of Australia v Sanofi*

> [in commercial cases] *the documents tell the story and if they are contemporaneous, are generally much more likely to be reliable than a witness with an interest in the case orally putting his or her slant upon the events some years after they occurred. Enthusiasm for communication by email often means that there is an indelible contemporaneous record of communications between the parties, which gives a clear guide to the likely events. That guidance is often more reliable than the later oral testimony of witnesses* [41]

It is therefore prudent to ensure that a witness reviews relevant documents, from all of the above-mentioned sources, and reads them thoroughly. If a document contains an error, then the witness should be told to point it out so that an explanation can be sought. Documents will frequently be used to refresh a witness's memory due to the passage of time. Although this is proper, the lawyer must be careful to ensure they are refreshing and not 'reconstructing' memory so that the concerns raised above in relation to testing a witness's evidence are equally applicable here. Exhaust the witness's memory before testing it.

Lawyers also need to be careful to only use documents that are or will be part of discovery, and not lawyer-created diagrams or summaries, as opposing lawyers are entitled to call for their production if the witness has used them to refresh their memory out of court. Lawyers should be familiar with section 34(1) of the *Evidence Act 1995* (Cth) which provides that:

> *The court may, on the request of a party, give such directions as are appropriate to ensure that specified documents and things used by a witness otherwise than while giving evidence to try to revive his or her memory are produced to the party for the purposes of the proceeding.* [42]

The production of documents can extend to those that are subject to client legal privilege. Pursuant to section 122(6) of the *Evidence Act 1995* (NSW) and (Cth) client legal privilege is lost in respect "*of a document that a witness has used to try to revive the witness's memory about a fact or opinion*".[43]

6. Mock Examinations.

A controversial practice for witness preparation is the mock examination - rehearsals. This technique does not appear to be very prominent in Australia but is a standard approach to witness preparation in the United States.[44] Witnesses may be prepared for trial by having them engage in mock examinations-in-chief (direct examination in the US) and cross-examinations. In the US a witness will be examined by the attorney who will conduct the direct examination at trial and then be crossed by another attorney working on the case while video is recorded, and trial consultants make notes. The mock examination aims to improve witness performance in a context where a witness is subject to

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(formerly Sanofi-Aventis) [2023] FCAFC 97 at [131], [383]-[386] (Besanko, Perram and Yates JJ) ("it is a case where the trial judge has explained precisely why he found the response given orally to be unsatisfactory and why he preferred the contemporaneous written record"); *White Pointer Investments Pty Ltd v Creative Academy Group Pty Ltd* [2023] NSWSC 817 at [208] (Rees J).

[41] Wayne Martin, Improving Access to Justice through the Procedures, Structures & Administration of the Courts, Australian Lawyers Alliance Western Australian State Conference, 21 August 2009.

[42] See also *Evidence Act 1995* (NSW) s 34(1); *Evidence Act 2008* (Vic) s 34(1). See also *Lowe v Lang* [2000] NSWSC 309, (Unreported, Hamilton J., 30 March 2000); *MGICA (1992) Limited v Kenny and Good Pty Ltd* (1996) 135 ALR 743; Andrew Ligertwood and Gary Edmond, *Australian Evidence* (LexisNexis, 6th ed 2017) at [7.84].

[43] See also *Evidence Act 1996* (NSW) s 122(6); *Evidence Act 2008* (Vic) s 122(6).

[44] See *Re Equiticorp Finance Ltd; Ex parte Brock (No 2)* (1992) 27 NSWLR 391 at 395 (Young J) ("*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.*").

an adversarial deposition pre-trial and their evidence at trial is usually before a jury. The deposition performs a number of roles, including discovering what a witness will say at trial, making a witness commit to their testimony prior to trial (if testimony changes at trial then the deposition will be a prior inconsistent statement), assessing the credibility of the witness, and providing a window into the strengths or weaknesses of a party's case.[45] The presence of a jury may mean that testimony needs to be comprehensible and, if possible, engaging as the jurors' expectations of witnesses may be coloured by Hollywood and television.

The lack of mock examinations in Australia may be traced to the use of written evidence[46] for examination-in-chief in many jurisdictions (see issue 8 below) and that traditionally barristers would not meet with witnesses before trial as it was thought unnecessary. However, when mock examinations are considered in light of ASCR r 24, it is clear that they are not forbidden from use. Mock examinations can be used to familiarise a witness with the process, put them at ease with testifying, and test how they respond to cross-examination. The manner in which evidence is conveyed can be improved through a number of techniques, some as simple as just letting a witness see how they look on video and letting them respond to potential questions. However, care must be taken to not alter the witness's evidence. This is illustrated by a review of two techniques: suggesting word choice, and moulding witness demeanour.

Word choice can be as innocent as advising a witness not to use jargon, slang or colloquial expressions, and getting a witness to clarify their answers. For example, a witness that insists on describing someone under the influence of alcohol as "stoned" or "plastered" might be told that it is better not to use slang and to refer to them as "having been drinking alcohol". Similarly, someone who describes the same person as "inebriated" might be advised to use simpler language. However, the connotation that is conveyed changes because of the shades of meaning inherent in language – "stoned" may mean using drugs to some people, while "plastered" may connote excessive drinking rather than just drinking. Justice Young, in *Re Equiticorp Finance Ltd; Ex parte Brock,* noted that advising the witness as to the manner of answering questions was appropriate, but a solicitor or counsel should not advise a witness as to how to answer a question.[47]

Equally, instructing a witness to be confident, friendly, or contrite, alters the impression that they convey which may also affect the credibility that their evidence is accorded.[48] Ideally, a lawyer

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[45] Michael Legg, "The United States Deposition - Time for Adoption in Australian Civil Procedure?" (2007) 31(1) *Melbourne University Law Review* 146; Australian Law Reform Commission, *Managing Discovery: Discovery of Documents in Federal Courts* (Report No 115, 2011) [10.5].

[46] While the mock examination has attracted derision from some Australian lawyers, it is notable that American lawyers look askance at the Australia and English practice of affidavits and witness statements that are drafted by the lawyers (compared to the US practice of depositions) because of the risk of evidence being crafted to support the case being advanced. A concern recognised in Australia as shown by the citations at footnote 68 below.

[47] *Re Equiticorp Finance Ltd; Ex parte Brock (No 2)* (1992) 27 NSWLR 391, 395 (Young J). See also *Majinski v The State of Western Australia* [2013] WASCA 10; (2013) 226 A Crim R 552, 560 [32] (Martin CJ); *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd* [2014] VSC 567 at [167] (Dixon J) ("*Counsel must never cross the line between taking instructions and improper assistance to a witness by coaching, or pressuring, a witness to particular evidence favourable to the client*.").

[48] See D A Ipp, 'Reforms to the adversarial process in civil litigation – Part II' (1995) 69 *Australian Law Journal* 790, 799 (observing that "*very often, witness preparation will involve suggestions for improving demeanour … Accordingly, the impression as to the credibility of a witness gained from evidence in chief may depend substantially on the degree and effectiveness of witness preparation and the witness's ability to respond to that preparation. All these factors tend significantly to devalue oral evidence in chief as a reliable tool for the purposes of drawing credibility inferences.*").

should only need to advise a witness to be themselves and use words they feel comfortable with. However, a nervous and imprecise witness can harm a case and use up valuable court time if not given assistance.

Another advantage of mock examinations is for the lawyers – it makes them become familiar with the case, view the case from their opponent's perspective, and lets them develop their examination skills.

7. Confidentiality and Privilege.

The preparation of a witness may attract client legal privilege pursuant to s 119 of the *Evidence Act 1995* (Cth)[49] or the litigation privilege limb of legal professional privilege at common law.[50] The manner in which this occurs involves some complexities.

Section 119 provides:

> *Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:*
>
> *(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or*
>
> *(b) the contents of a confidential document (whether delivered or not) that was prepared;*
>
> *for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.*

Although expressed as applying to the adducing of evidence, the protection also extends to pre-trial disclosure in NSW, Victoria, ACT and the Northern Territory.[51] However, there is no such extension in in the Federal Court, where the common law would apply.[52]

Stephen Odgers in *Uniform Evidence Law* takes the view that a confidential communication between a lawyer acting for the client and another person may be read so that the "*another person*" may be the client, and so s 119 applies to a lawyer preparing a client-witness, as well as a third-party witness.[53] Alternatively it might be said that a communication between the client and another person may be read so that the "*another person*" may be the lawyer. However, it is more likely that in seeking protection of communications between a lawyer and client resort will be made to s 118 of the *Evidence Act 1995* (Cth) which clearly protects "a confidential communication made between the

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[49] See also *Evidence Act 1995* (NSW) s 119; *Evidence Act 2008* (Vic) s 119; *Evidence Act 2001* (Tas) s 119; *Evidence Act 2011* (ACT) s 119; *Evidence (National Uniform Legislation) Act 2011* (NT) s 119.
[50] *Edwards v Nine Network Australia Pty Limited (No 4)* [2022] FCA 1496 at [10] (Katzmann J). For a comparison between the Evidence Act and the common law on the issue of witness communications see *Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 2)* [2011] FCA 1057 at [14]-[17] (Perram J).
[51] *Evidence Act 1995* (NSW) s 131A; *Evidence Act 2008* (Vic) s 131A; *Evidence Act 2011* (ACT) s 131A; *Evidence (National Uniform Legislation) Act 2011* (NT) s 131A.
[52] *Edwards v Nine Network Australia Pty Limited (No 4)* [2022] FCA 1496 at [6] (Katzmann J).
[53] Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 17th ed 2022) at [EA119.150]. Odgers notes that a contrary view has been expressed in Suzanne McNicol, 'Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted' (1999) 18 *Australian Bar Review* 189 at 197.

client and a lawyer … for the dominant purpose of the lawyer … providing legal advice to the client". Preparing the client to give evidence being equated with legal advice.

Central to client legal privilege is confidentiality.[54] Confidentiality arises from an express or implied obligation owed to another person as a result of agreement, relationship or circumstances.[55] For a communication with a witness to be protected by client legal privilege an obligation of confidentiality must exist.

The litigation privilege limb of legal professional privilege is very similar to s 119, namely 'communications which "at their inception [came] into existence", at the instigation of either the lawyer or the client, "for the dominant purpose of being used in aid of pending or contemplated litigation'.[56] However, it has been suggested that the existence of litigation privilege does not turn on confidentiality. Rather, communications with a potential witness should not be accessible as a matter of policy, namely, to support the freedom of the lawyer and client to make inquiries and engage in preparation to further their case in an adversarial system of litigation.[57] This reasoning would mean that privilege may be found and as a result confidentiality arises, rather than confidentiality needing to pre-exist for privilege to exist. However, the position has been doubted.[58]

Moreover, in relation to common law legal professional privilege, Justice McLelland in *Ritz Hotel Ltd v Charles of the Ritz Ltd* observed:

> *in the case of an independent witness to some event who is interviewed by a party or his solicitor or representative with a view to his making an affidavit or giving evidence in anticipated or pending proceedings, the details of that interview would not in my view be confidential so far as the potential witness is concerned in the absence of special circumstances, because the potential witness in that situation is not a person owing any duty of confidentiality to the party or to the party's solicitor or representative.*[59]

For all witnesses, but particularly a third-party witness, the obligation of confidence and the existence of client legal privilege and legal professional privilege must be considered in conjunction with the rule that there is no property in a witness. Rule 23 of the ASCR provides:[60]

> 23.1 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with an opponent or being interviewed by or on behalf of any other person involved in the proceedings.
>
> 23.2 A solicitor does not breach Rule 23.1 simply by—

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[54] *Edwards v Nine Network Australia Pty Limited (No 4)* [2022] FCA 1496 at [13] (Katzmann J).
[55] *State of New South Wales v Jackson* [2007] NSWCA 279 at [41]-[60] (Giles JA).
[56] *Edwards v Nine Network Australia Pty Limited (No 4)* [2022] FCA 1496 at [8] (Katzmann J) citing *Buttes Gas and Oil Co. v Hammer (No. 3)* [1981] QB 223 at 243 (Lord Denning MR).
[57] See also *Southern Equities Corporation Ltd v West Australian Government Holdings Ltd* (1993) 10 WAR 1; *Mann v Carnell* (1999) 201 CLR 1, 35-36 [112], [114] (McHugh J); *State of New South Wales v Jackson* [2007] NSWCA 279 at [37], [56]-[57] (Giles JA).
[58] *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232 at [46] (Wigney J); *Edwards v Nine Network Australia Pty Limited (No 4)* [2022] FCA 1496 at [13]-[27] (Katzmann J); JD Heydon, *Cross on Evidence* (LexisNexis Online, August 2022) at [25225] ("*that the preponderance of authority requires that the document be confidential in the sense that it is brought into existence with the expectation that it will not be circulated beyond the camp of the party in whose cause it was prepared, at least for a time.*").
[59] *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 22)* (1988) 14 NSWLR 132 at 133-4.
[60] See also *Legal Profession Uniform Conduct (Barristers) Rules 2015* rr 74-75.

23.2.1 telling a prospective witness or a witness that he or she need not agree to confer or to be interviewed, or

23.2.2 advising the prospective witness or the witness about relevant obligations of confidentiality.

In *Fagan v State of New South Wales*, it was said that the principle that there was no property in a witness had to operate in conjunction with other principles, including that of legal professional privilege.[61] In that case, a prospective witness's freedom to disclose the contents of a witness statement was regarded as restricted by the latter principle.[62] However, *Fagan* proceeded on the basis that legal professional privilege existed. It may be that the circumstances are such that privilege never arises, including because there is no obligation of confidentiality, as discussed in the *Ritz Hotel* above. In *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd*, it was suggested that even if privilege existed, that did not stop the solicitor for an opponent in the litigation meeting with the witness separately and asking their own questions. The privilege would only prevent the witness disclosing what the first lawyer asked the witness and what the witness said to the first lawyer.[63]

The lawyer needs to be certain to distinguish between a client-witness for whom legal professional privilege/client-lawyer privilege is more likely to apply as confidentiality is inherent in the solicitor-client relationship and an unrelated third-party witness to whom privilege may not apply where confidentiality must be established, but due to the context may not exist.

When dealing with third-party witnesses, it is also important to keep in mind that they are not bound to testify unless subpoenaed. If there is ever a doubt that a witness may not voluntarily attend court, then it is prudent to obtain and serve a subpoena on them.

8. Affidavits and the Witness Preparation Process

The evidence of a witness at trial was historically given orally. Indeed, in many Australian courts, rules remain that the evidence of any witness on any issue at a trial of a cause is to be given orally in court.[64] However, written evidence in the form of an affidavit or witness statement may be preferred as a replacement for examination-in-chief so as to save time.[65] Indeed, in some jurisdictions, written evidence has become the default procedure.[66] However, where there are

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[61] *Fagan v State of New South Wales* [2004] NSWCA 182 at [70] (Beazley JA).
[62] Ibid at [69]-[84]. See also *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 487 (Mason and Brennan JJ).
[63] *Public Transport Authority of Western Australia v Leighton Contractors Pty Ltd* [2007] WASCA 151; (2007) 34 WAR 279 at [31]–[32] (McLure JA). See also *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88; (2008) 246 ALR 137, 146 [31] (Gordon J).
[64] See eg *Federal Court of Australia Act 1976* (Cth) s 47(6); *Uniform Civil Procedure Rules 2005* (NSW) r 31.1; *West Australian Supreme Court Rules,* 0.36R.1; *Victorian Supreme Court (General Civil Procedures) Rules* 2005, R.40.02. See also *Evidence Act* 1995 (Cth) s 28; *Evidence Act 1995* (NSW) s 28; *Evidence Act 2008* (Vic) s 28.
[65] Arthur Emmett, 'Practical Litigation in the Federal Court of Australia: Affidavits' (2000) 20 *Australian Bar Review* 28 at 28.
[66] For example, in NSW, where the proceedings are not commenced by Statement of Claim (e.g. as in most Equity cases) or the evidence is not to be adduced at a "trial" (an interlocutory proceeding), then the evidence is to be by affidavit unless otherwise ordered. See *Uniform Civil Procedure Rules 2005* (NSW) r 31.2; *Ritchie's Uniform Civil Procedure NSW* (LexisNexis, Online) [31.1.10], [31.2.5]. In commercial cases commenced in the Supreme Court, there is a presumption that evidence-in-chief will be given by way of witness statement: Supreme Court Equity Division - Commercial List and Technology and Construction List, Practice Note SC Eq 3, 22 March 2023.

disputed issues of fact in relation to oral representations or conversations, then oral evidence may be preferred.[67]

Where an affidavit is to be utilised, care needs to be taken in the process of converting the witness's recollections into written form. A number of judges have raised concerns about the drafting process resulting in evidence that is shaped by the lawyer to fit the case, both deliberately and inadvertently.[68] The above concerns about a lawyer's questioning and testing of a witness impacting the witness's recollection also apply to the preparation of affidavits.

In *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd*, Justice Jackman addressed the form of the evidence of conversations.[69] His Honour was presented with affidavits for the applicant that expressed conversations in direct speech (ie I said …. She said …) compared to the respondents who gave evidence of memories of the substance or gist of conversations in indirect speech. These two approaches reflect the customary approach to drafting affidavits in New South Wales and Victoria, respectively.[70] His Honour explained that the use of direct speech was problematic as the use of direct speech (including quotation marks) suggested a degree of precision of recollection that did not actually exist. The approach was said to be "*ethically wrong because the evidence given as a result of that process conceals the true nature and quality of the witness's memory, and conveys a false impression of that memory*".[71] It also results in the witness being "*compelled or encouraged into uttering untruths on oath by giving a form of words in direct speech with which they are not happy and which they cannot actually recollect in preference to their own words in indirect speech*".[72]

Justice Jackman set out the following general principles applicable to the form of evidence of conversations:[73]

(1) The form of the evidence should correspond to the nature of the actual memory the witness has of the conversation.

(2) If the witness remembers only the gist or substance of what was said, and not the precise words, then the evidence should be given in indirect speech (also known as reported speech), in terms which reflect the witness's actual memory

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[67] See Arthur Emmett, 'Practical Litigation in the Federal Court of Australia: Affidavits' (2000) 20 *Australian Bar Review* 28 at 28.

[68] See eg *Girchow Enterprises Pty Ltd v Ultimate Franchising Group Pty Ltd (Final Hearing)* [2023] FCA 420 at [65] (Thawley J) ("*an affidavit must reflect a witness's evidence, not the evidence which the legal practitioner would prefer to see in light of the case which the legal practitioner has pleaded or wishes to run. A legal practitioner must not suggest to a witness what the witness's evidence should be.*"); *Concrete Pty Ltd v Parramatta Design & Developments Pty Ltd* (2006) 229 CLR 577 at [175] (Callinan J) ("*statements on all sides are frequently the product of much refinement and polishing in the offices and chambers of the lawyers representing the parties, rather than of the unassisted recollection and expression of them and their witnesses.*"); Justice W H Nicholas and A J Meagher SC, 'Cross-Examination: Art, Science or a Waste of Time', *Conference of the Supreme Courts and Federal Court*, Auckland, 29 January 2004, 16 ("*Statements are prepared for witnesses, almost always by the lawyers, which often adopt legalese and use expressions and language which bear little resemblance to that of the witness.*").

[69] *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381. See also *Hamilton-Smith v George* [2006] FCA 1551 at [81] (Besanko J).

[70] See *Commonwealth v Riley* (1984) 5 FCR 8.

[71] *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381 at [127] (Jackman J).

[72] Ibid at [126].

[73] Ibid at [129]. See also *Gan v Xie* [2023] NSWCA 163 at [119] White JA (Simpson AJA and Basten AJA agreeing); *The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq)* [2023] NSWCA 291 at [183]-[184] (Griffiths AJA).

(3) If the witness claims to remember particular words or phrases being used, then those words or phrases should be put in quotation marks to indicate that they are verbatim quotations, even if the evidence is otherwise given in indirect speech.

(4) If the witness genuinely claims to recall the actual words used in a conversation, then the evidence should be given in direct speech; that is, quoting the words as actually spoken. Apart from rare cases of photographic memory, this may well be the case where the witness has made a detailed contemporaneous note of the conversation, and has refreshed his or her memory from the note (in which case this should be expressly stated along with the tender of the note).

(5) Evidence given in direct speech should not be prefaced by the phrase that the conversation occurred "in words to the following effect". That expression blurs the important distinction between verbatim memory and gist memory, and leaves the Court unable to ascertain which kind of recollection is being claimed by the witness.

(6) Evidence of a witness who claims to remember the exact words of a conversation, but who is found after cross-examination to have exaggerated the nature and quality of his or her memory, may well suffer an adverse effect on his or her credibility (the weight of which will depend on all the circumstances). However, the inability to cross-examine in that manner a witness who gives evidence in indirect speech is not unfairly prejudicial within the meaning of s 135 of the *Evidence Act 1995* (Cth).

His Honour's observations put lawyers on notice as to how affidavit drafting practices may alter a witness's recollection and evidence. Further, such an approach may mislead the court.

As the focus of this article is witness preparation, rather than affidavits, it does not address other aspects of drafting affidavits. However, a number of useful sources exist such as JP Bryson QC, "How to draft an affidavit" (1985) 1 *Australian Bar Review* 250; Justice Bryson, "Affidavits" (1999) 18 *Australian Bar Review* 166; Justice Arthur Emmett, "Practical litigation in the Federal Court of Australia: Affidavits" (2000) 20 *Australian Bar Review* 28; John Levingston, *The Law of Affidavits* (Federation Press, 2013); Justice Alan Robertson, Affidavit Evidence, College of Law 2014 Judges' Series, 26 February 2014.

9. Evaluate the Witness.

The experience of appearing in court and giving testimony is not something that the general populous has had. As a result, the lawyer should cover the practicalities of the day in court. This means advising the witness of basic matters such as what to wear, the location of the court, and the time to attend. In addition, it is advisable to go through the general procedure that will take place in the court. This includes being called to testify, being sworn, the sequence of examination, cross-examination and re-examination, as well as objections and the need for the judge to make rulings. If a witness knows what to expect and their experience corresponds with those expectations, they will be comfortable with the process which can relieve anxiety and lead to a better performance on the stand.

After going through the above witness preparation techniques, it is useful to assess the witness's readiness to testify. The lawyer should attempt to gauge the witness's confidence or nervousness. An overconfident witness and an unduly nervous witness are both likely to under-perform. Most witnesses will be nervous to some degree about testifying. For example, it may be the fear of public speaking, forgetfulness as to details, not knowing an answer, or concern as to how they will hold up under cross-examination. Once the source of anxiety has been identified it can be addressed.

How to address anxiety varies with the source of the anxiety but there are a couple of general responses to almost all nervous witnesses. Reassure a witness through explaining that most witnesses share the same concerns, but it does not make them unsuitable to testify. In fact, a little nervousness is a positive thing because it will mean the witness is alert and engaged. Explain that the witness preparation process they have been through (or will go through) equips them to deal with testifying. As a lay witness, they are not expected to be experts in courtroom testifying.

Occasionally, witnesses will be over-confident. They may see themselves as being the star who tells everyone what really happened. In this situation it may be helpful to tell the witness to concentrate on the questions that are being asked and answer them correctly. This approach also applies regardless of the tone or approach taken by the lawyer. The witness should remain calm and not to get angry and fight with the lawyer questioning them. Equally, the witness should not be fooled into thinking that the opposing lawyer is their friend, no matter how charming they appear. Remind the witness that their job is to truthfully answer the questions put to them.

At the end of the preparation process leave the witness with only a couple of reminders so that they are not overburdened with procedural matters to recall and can concentrate on the substance of their testimony. Exactly which reminders a lawyer may give a witness will depend on what areas the particular witness needs assistance with.

10. Witness Appreciation.

Most of the above advice has focused on telling the witness what to do. The lawyer should be certain to let the witness ask them questions about anything the witness does not understand or that worries them. Get the witness to provide feedback on whether they understand the advice given to them. Ask the witness if they perceive that they have any conflicts or vulnerabilities that could present a problem in their testimony. This could be prior unrelated criminal offences or potentially embarrassing statements made to, or relationships with, other witnesses.

Frequently, the third-party witness or the busy client sees the litigation as a distraction that takes up time they could profitably be using to do something else which is more important to them. While law is a profession, it is also a service, and as such the lawyer needs to be flexible when dealing with witnesses and appreciative of the time they give.

Conclusion

Witnesses are a key source of facts and therefore evidence. Consequently, lawyers need to be skilled in effective and ethical witness preparation. This article has sought to assist the legal profession by providing ten key lessons or steps to aid in the witness preparation process.