This document is an abridged version of the 1st Edition Manual, containing relevant chapters on Advocacy Skills, but without a number of additional chapters that cover specialised areas of advocacy.

This Manual was updated in 2017 as a Second Edition, with additional chapters on the Uniform Evidence Act, Case Theory, Evidence and Appellate advocacy. This can be obtained by ordering at www.advocacy.com.au

ADVOCACY MANUAL

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The Complete Guide to Persuasive Advocacy

Version 13.02.11

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ABOUT THIS MANUAL

The purpose of this manual is to provide a practical guide to the philosophy, practice and teaching of advocacy developed by the Australian Advocacy Institute.

Advocacy is an art, not a science. It is the art of persuasion. There is no one correct way of performing any advocacy task, but there are more effective ways. There are important fundamental principles, which are generic and which underlie the practice of all good advocacy.

The challenge is to learn to avoid fundamental error and then to continue developing as a skilful, persuasive and ethical advocate.

Effectiveness of an advocate cannot be measured by results in court, as the performance of a competitor in sport can be measured by scoring results. The only measure is the persuasive quality of the performance.

Many interesting books have been written about advocacy, great advocates and famous cases. They all have something to add to our understanding of advocacy, and some are useful teaching and learning aids.

The most useful ones for learning advocacy are those that have a practical focus and provide illustrations, such as Thomas Mauet's *Fundamentals of Trial Techniques*, the second Australian edition of which is co-authored by Professor Les A. McCrimmon and published by LBC Information Services (2001).

However, the only means to truly effective learning and teaching of the disciplines, skills and techniques of advocacy is the workshop method—that is, coaching.

Although the very talented may improve quickly without coaching, most self-learners will improve only to a certain level.

Self-learning of skills has a number of disadvantages:

- no objective assessment
- no basis for constructive self-analysis

- difficulty in identifying error
- difficulty in remedying error, even if identified
- entrenchment of error, making progress difficult.

What is much more effective is practical skills training, which involves performance, objective assessment, review, and methods for change provided by competent trained teachers who can explain and demonstrate.

This manual is a guide to the fundamentals of advocacy and its teaching by practical training. It is designed to enhance the workshop experience, but there is no substitute for workshop instruction. Skills can be described, but the learning process must be supplemented by demonstrations of each skill by instructors and performance by the pupils. This applies particularly to communication skills, as the style and manner of performance are so important in persuasive advocacy.

In this manual there are two case studies that will be used as illustrations, as well as other practical examples. The main case study is *DPP v Daniel Jones*, on which most of the illustrations are based. The second case study is *DPP v Lucia Gonzales*, which is used to illustrate pleas in mitigation (Chapter 8).

Because communication skills are fundamental to good advocacy, we could well have put the chapter on communication at the start of the manual. However, we have placed it at the end because skills must come first. For example, it is unhelpful to focus on communication in the leading of evidence and cross-examination until the advocate is able to ask non-leading and leading questions.

Case Study

DPP v DANIEL JONES

The purpose of including this case study in the manual is to provide illustrations and exercises in the skills and techniques of advocacy, and to do this in a practical way by examining the case as a whole.

Although the case is criminal, the advocacy principles and issues that arise from it are generic and adaptable to other cases in other jurisdictions.

The case study is concise but is an effective and challenging advocacy teaching tool.

The name of one of the witnesses is Maria Stojkowska. For speakers of English who are not familiar with Slavic names, it is not an easy name to pronounce.

The name is used intentionally to make the point that in multicultural societies, it is important that advocates learn to pronounce all names correctly. This can be done by finding out what the correct pronunciation is, by listening to the witness pronounce his or her own name in court, or by asking the witness how to pronounce his or her name correctly.

The correct pronunciation of 'Stojkowska' is stoy-*kov*-ska.

INSTRUCTIONS

Daniel Jones is charged with an offence pursuant to section 5 of the *Public Order Act*, which provides—

> s 5(i) Any person who knowingly supplies alcoholic beverage to an intoxicated person shall be guilty of an offence.

This charge would normally be dealt with by a magistrate.

However, for the purpose of this exercise, assume that:

- the case is being tried before a judge and jury;
- the accused has been committed for trial on the basis of a hand-up brief. He was not represented and witnesses were not cross-examined;
- the defence has provided the prosecution with the accused's instructions, in an attempt to persuade the prosecution to withdraw the charge.

CONSTABLE JAMES BIER'S STATEMENT

I am a Constable of Police attached to the Licensing Squad. On 24 December last year I was on duty with Constable Fisher.

At about 8.45 p.m. we were parked near the Royal Oak Hotel on the corner of Wide Street and Jackson Avenue, when I saw a man I later recognised as Walter Watkins attempting to cross Wide Street. I saw him initially through the rear view mirror of the car. It was a hot night. He was wearing dark jeans and a light-coloured t-shirt. He was staggering and had great difficulty in making it to the other side. He stumbled and almost fell at the southern kerb of Wide Street. I then turned and watched him through the side window of the police car. He walked to the entrance of the bottle shop and paused for a few moments before entering.

I then observed him approaching the counter. He appeared to have a short conversation with the attendant, who I now know to be Daniel Jones. I could see Watkins' and Jones' heads and shoulders above the displays and advertising, which covered the lower portion of the plate glass windows of the bottle shop. I did not lose sight of either of them in the shop.

A short time later Watkins emerged from the bottle shop. He was carrying a brown paper bag, which I later ascertained contained a bottle labelled Mildara Cream Sherry. Watkins was stumbling all over the place. Constable Fisher and I approached Watkins a short distance down Jackson Avenue. He smelt of intoxicating liquor, his eyes were bloodshot and his speech was slurred. When we approached him and identified ourselves, he began singing in a loud and tuneless fashion. He mumbled what sounded like 'I tricked Danny again'.

We arrested him for being drunk and disorderly, an offence against section 4 of the *Public Order Act*, confiscated the bottle of sherry and took him back to the police station, where we lodged him in the cells. He was not in a fit state to be interviewed.

He was released next morning by the Duty Officer and we have not been able to locate him since. The police records show that Watkins is about 60 years of age. He has three previous convictions for minor thefts. On the last occasion the court ordered an alcohol treatment program, which Watkins did not complete. He also has twelve previous court appearances over twenty years in three states on charges of being drunk and disorderly.

Later that night, at about 9.00 p.m., I had a conversation with Daniel Jones, in the presence of Constable Fisher, in the bottle shop of the Royal Oak Hotel. After he gave me his name and address, I cautioned him and then the following conversation took place:

I said: 'Were you on duty in the bottle shop tonight?'

He said: 'Yes. It was a busy night and I was all on my own.'

I said: 'Do you know Walter Watkins?'

He said: 'Yes, he is a regular here.'

I said: 'Was he in the bottle shop tonight?'

He said: 'I can't remember—hang on—yes, he was. Another customer bumped into him. Don't tell me the old bastard has knocked off another bottle from me.'

I said: 'What condition was Watkins in tonight in the bottle shop?'

He said: 'I don't know. Nothing special. I didn't really take much notice.'

I said: 'I put it to you that Watkins was obviously drunk tonight in the bottle shop.'

He said: 'Was he?'

I said: 'I put it to you that he walked up to the counter and you sold him a bottle of Mildara Cream Sherry tonight, knowing he was drunk.'

He said: 'If you say so, but I don't remember selling him anything tonight.'

I then informed him that I wanted to conduct a formal interview with him. He agreed to attend at the police station the following morning for that purpose.

I made notes of this conversation with him when I returned to the police station.

Daniel Jones attended the police station the next morning and I conducted an interview with him which was tape-recorded and later transcribed. I produce an accurate transcript of the interview.

I later drew up the attached plan and made the markings on it. They accurately depict the scene of these events. The police car was parked approximately 10 to 12 metres from the corner of Wide Street, and approximately 8 to 10 metres from the counter of the bottle shop. Wide Street is approximately 6 to 8 metres wide.

Constable Fisher took a statement from a witness, Ms Stojkowska, who came to the station at about 9.30 p.m.

The contents of the bottle were analysed and found to contain sherry. Mildara Cream Sherry is an alcoholic beverage to which the provisions of section 5 of the Public Order Act apply, and I produce a certificate to this effect.

RECORD OF INTERVIEW

Record of interview between Constable James Bier and Daniel Jones, conducted on 25 December last year.

Interview commenced at 9.30 a.m.

Constable James Bier asking questions. The interview was tape-recorded.

Q1 Your full name is Daniel Jones and you live at 360 Little Dorritt Street, Clifton Hill. Is that right?

A *Yes.*

Q2 How old are you?

A *34.*

Q3 I wish to interview you in relation to selling liquor to an intoxicated person at the Royal Oak Hotel at approximately 8.50 p.m. yesterday. Before I do so I must inform you that you are not obliged to say or do anything and that anything you do say or do may be given in evidence. Do you understand that?

A *Yes.*

Q4 I must also inform you that you may communicate with a friend or relative to inform that person of your whereabouts, or a legal practitioner. Do you understand those rights?

A *Yes.*

Q5 Do you wish to exercise any of those rights?

A *No.*

Q6 Do you understand why you are here today?

A *You asked me down.*

Q7 It is alleged that last night you sold Walter Watkins a bottle of Mildara Cream Sherry knowing that he was drunk. What do you say to that?

A *Is that what he said? He'd have to be lying. I can't remember him buying anything off me.*

Q8 Well, you were on duty last night, weren't you?

A *Yes, you know that.*

Q9 And I observed you speaking to Watkins at the counter.

A *If you say so.*

Q10 Do you know Ms Stojkowska?

A *Yes. She was in the store last night. If she's put me in, it's because she's got it in for us. She's trying to get a licence for a restaurant diagonally opposite the Royal Oak to compete with us, but we have objected and I know you have too.*

Q11 Do you feel sorry for Watkins?

A *Yes, in a way, but I wouldn't break the law by selling anything to a drunk because it could blow the boss's licence.*

Q12 Are you saying that you know the law?

A *Of course I do. Anyway I don't know why I'm worried. I never sold anything. I refuse to make any further comment.*

Q13 If you are not prepared to answer any further questions I now propose to terminate the interview. OK?

A *OK.*

Interview terminated 9.42 a.m.

MARIA STOJKOWSKA'S STATEMENT

On 24 December I was in the bottle shop of the Royal Oak Hotel at about 8.45 p.m. I was choosing a bottle of wine from a stand of specials near the window. Daniel Jones was behind the counter at the other end. There are shelves behind the counter where spirits and fortified wines are kept. There is a cash register on the counter with brown paper bags stacked beside it. The cash register is an old-fashioned one, which makes a loud ringing noise when a sale is recorded.

I was thinking what to buy, and several people came in and out while I was there. After I had been there for a few minutes a man came in through the door and bumped into me on his way to the counter. I remember I was quite annoyed because he glanced at me and didn't apologise. I noted a strong smell of alcohol about him. I watched him approach the counter and have a conversation with Daniel. I could hear their voices but not what was said.

A short time later the man who bumped into me came back past me as if to go out. He walked straight into the door, bounced off, almost fell but recovered, as if he was used to falling and recovering his balance. He then opened the door and left. I kept watching him through the windows. As he walked down Jackson Avenue he was staggering. Then I saw the two policemen approach him and take him away. In my opinion, he was drunk.

I was still there when the police arrived and spoke to Jones. I overheard only some of the conversation between the police and Jones about the matter. I didn't really follow it.

When the police left, I walked over to the bar and said to Daniel: 'Just as well the police have arrested that old drunk; I wonder what they will do with the bottle they took from him—probably drink it for Christmas.'

He said, 'The poor old bugger. I suppose I shouldn't have sold him the grog if he was so drunk. I feel sorry for him. I hope this doesn't blow the boss's licence.'

I left the hotel and went over to the police station across the road.

Signed—*Maria Stojkowska*
10.30 p.m., 24 December

INSTRUCTIONS FROM DANIEL JONES

I have been charged with 'knowingly supplying alcoholic beverage to an intoxicated person'.

The police evidence of the conversation with me and the record of interview sound right, but I cannot remember all the details. It sounds right.

I do not remember anything about Walter Watkins on that evening except that I noticed him when a customer bumped into him and Watkins nearly lost his balance.

It was a very busy night. I was working alone, as the other barman had taken ill. I was serving people from the counter who came up from the bottle shop, the lounge and the bar area. There was a lot of noise from people making orders and there was a smell of beer around the counter. Fortified wines, like Mildara Cream Sherry, are kept only on the shelves behind the counter.

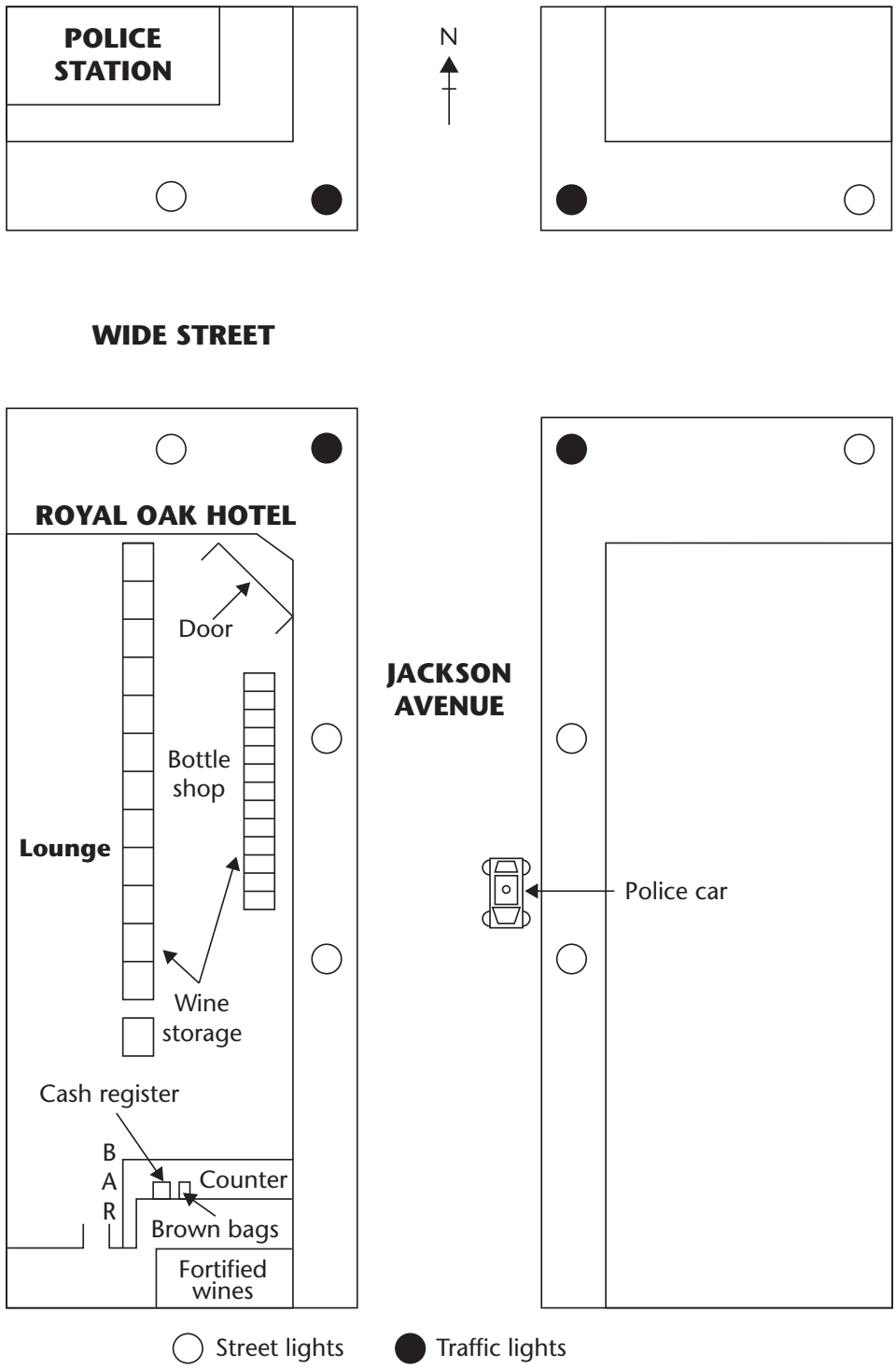
I recall the conversation with Ms Stojkowska. She made some nasty comment about the police. I did not say to her 'The poor old bugger. I suppose I shouldn't have sold him the grog if he was so drunk. I feel sorry for him. I hope this doesn't blow the boss's licence.'

I recall her saying that the hotel will soon not be the only place with a licence in the area.

I know that she is an applicant for a restaurant and liquor licence diagonally opposite the Royal Oak Hotel, which is opposed by the police and the hotel on the ground that she has two convictions for being drunk and disorderly. The Royal Oak is also opposing it on the ground that it is an unnecessary additional liquor outlet.

I have never been in trouble with the police before.

If I did supply the bottle to Watkins, which I do not recall doing, I would not have done so if I had known he was drunk.



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PREPARATION AND ANALYSIS

Thorough preparation is essential as a foundation for competent advocacy.

There are four components of, or steps in, preparation:

- Knowledge of case materials
- Knowledge of current relevant law, evidence and procedure
- Analysis to develop a case theory (what to do)
- Performance preparation (how to do it).

Preparation is best approached in this way because these steps follow a logical order.

For instance, analysis is not possible without knowledge of all available relevant materials from all parties, and the current relevant law. Performance preparation is not possible without a developed case theory, because the performance would lack direction and could even be counter-productive.

Although it is useful to approach preparation under these four steps, you will need to return to earlier steps to reassess the materials as you progress in preparation, refine the case theory and prepare for performance.

KNOWLEDGE OF CASE MATERIALS

Become thoroughly familiar with:

- all available and potentially relevant factual materials in your case
- the available and anticipated material in the opponent's case.

In a criminal case, this will include:

- witness statements
- police statements
- recorded interviews
- depositions
- exhibits
- expert reports
- records of surveillance
- results of tests
- telephone intercepts
- documents and records in the possession of the prosecution
- documents and records in the possession of third parties
- pre-trial proceedings and conferences.

In a civil case, this will include:

- pleadings
- further and better particulars
- discovered and subpoenaed documents
- witness statements or affidavits
- expert witness reports
- affidavits in interlocutory proceedings
- pre-trial decisions, directions and orders.

It is important to assess the quality of the evidence in your case, by:

- conferring with witnesses
- examining all original documents and other real evidence
- visiting relevant sites.

CONFERRING WITH WITNESSES

- Confer with the client and witnesses well before the hearing. This will give you the opportunity to shape your case further, and to obtain further evidence if necessary.
- Use the opportunity to correct and clarify your impressions from the instructions or written material.
- In conference with each witness, explore:
  - the witness's personal background, if relevant

  - his or her full version of events, particularly in light of other versions and obvious gaps
  - the witness's explanations or reasons for his or her behaviour
  - the witness's instructions about documents that he or she prepared or can identify
  - further information to assist in cross-examination (see further Chapter 6, 'Cross-examination', and Chapter 8, 'Pleas in Mitigation').
- Have the witness prepare any visual aids like plans, diagrams, charts or graphics to explain his or her version of events.

EXAMINING ALL ORIGINAL DOCUMENTS AND OTHER REAL EVIDENCE

- Copies of documents can obscure important annotations.
- Photographs or descriptions of real evidence can mislead.

VISITING RELEVANT SITES

- Visit in conditions similar to those described by witnesses, such as:
  - same time of day
  - similar weather conditions
  - similar lighting conditions.
- Bring witnesses who can help you better to understand the scene and the events.
- Take measurements to check relevant distances.
- At the scene, consider whether the various versions of events are realistic based on the features of the scene, and the location of the parties or witnesses at the time.

ORGANISING THE MATERIALS

This can be done by arranging information according to:

- events, by preparing chronologies
- sources of evidence, such as witnesses or documents
- particular scenarios
- factual issues
- legal issues.

Each method has its benefits in the preparation process.[1]

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[1] For a detailed explanation of these marshalling techniques, see A. Palmer, *Proof and the Preparation of Trials*, Law Book Company, Sydney, 2003, Chapters 3 and 4.

ILLUSTRATION

For the accused in *DPP v Daniel Jones*, preparation includes the following tasks.

1. Collecting material

Obtain copies of:

- presentment or charge sheets
- committal depositions, including records of interview and witness statements from police and Stojkowska.

2. Check documents

- certificate of analysis of the contents of the bottle
- presentment and other court documents.

3. Prepare a chronology

For example:

24 December, last year

8.45 p.m.	Police in car on Jackson Avenue, outside Royal Oak Hotel
	Police see Watkins stumble across Wide Street to hotel
	Stojkowska at hotel
	Police follow and arrest Watkins, take him to station
9.00 p.m.	Police conversation with Jones at hotel
After 9 p.m.	Stojkowska conversation with Jones at hotel
9.30 p.m.	Stojkowska attends police station to make statement

4. Confer with Daniel Jones

Find out from Jones:

- his recollection of the events
- what were his duties on the night?
- what were the conditions: temperature, noise level, lighting, smell of beer?
- explanations for his inconsistent statements to police about supplying the liquor to Watkins (at first he does not remember, but then denies any sale to Watkins)
- what information can he provide about Stojkowska and Watkins?

5. Visit the Royal Oak Hotel

- in conditions similar to the night of the alleged offence if possible, for example busy evening, warm weather
- check distances and take measurements, for example between wine racks, from police car to counter, from behind counter to where fortified wines are kept
- examine the view that the police, Jones, and Stojkowska would have had from their positions: for example, sit in car where police were parked
- have Daniel Jones demonstrate where and how he was serving.

KNOWLEDGE OF RELEVANT LAW, EVIDENCE AND PROCEDURE

Become familiar with the relevant current law applicable to the issues in the case.

Consider where the onus of proof lies.

You should then identify and consider any evidentiary issues that may arise. It is important to understand the principles behind the rules of evidence. Even in tribunals which are not bound by the rules of evidence, those principles can assist in argument about the weight of the evidence. See further Chapter 3, 'Evidence in Action'.

ILLUSTRATION

The prosecution must prove beyond reasonable doubt that Daniel Jones:

- supplied
- an alcoholic beverage
- to an intoxicated person
- with knowledge that the person supplied was intoxicated at the time of supply.

Check the law to determine:

- whether supply includes a gift
- whether 'knowingly' includes 'recklessly' or 'negligently'
- meaning of 'an intoxicated person'.

Consider the evidentiary issues:

- Is 'I tricked Danny again' admissible in evidence in chief, in cross-examination, or not at all?
- Is Jones' alleged admission to Stojkowska admissible?
- To what is it an admission? Sale? Knowledge of intoxication?

ANALYSIS TO DEVELOP A CASE THEORY

First, analyse the factual and legal issues in the case from all the available material in your case and from what you know of your opponent's case. Then choose and develop an overall case theory or case theories.

A case theory can be described in various ways as:

- the thesis of your case
- a set of conclusions or propositions about what happened or might have happened

- a system of ideas providing an explanation, which is essential for your client to succeed.

CHARACTERISTICS OF A GOOD CASE THEORY

A good case theory should be:

- consistent with your instructions
- a positive construct
- simple
- balanced, taking into account the strengths and weaknesses of your case
- logical
- credible and realistic:
  - makes sense in the light of human knowledge and experience
  - realistic and not fanciful; based on evidence and rational inferences, not on mere supposition or speculation
  - consistent with as much evidence as possible; where it is inconsistent, those inconsistencies are explicable
  - has an appropriate emotional quality and is empathetic
- directed to the desired outcome.

A positive construct

A construct is a conceptual synthesis, or the drawing together of the various circumstances into an overall thesis. A positive construct has the following features:

- It is a positive explanation of the circumstances.
- It is expressed in propositional form.
- It is not simply the proposition that the defendant did or did not commit the crime, or that the prosecution or plaintiff has not proved its case to the relevant standard.
- It is not simply a narrative of the circumstances or a summary of the arguments.

CASE THEORIES AND THE ONUS OF PROOF

The case theory developed by the party that bears the burden of proof will be essentially different from that of the defence, which generally does not bear the onus of disproving the case against him or her, or of proving his or her own case.

Prosecution/plaintiff's case theory

The case theory developed by the party that bears the onus of proof must be:

- a positive construct of what happened, why and how
- built from all available evidence and inferences
- which leads to proof of each element of the case or claim to the required standard.

So, the prosecution in a criminal case must prove what happened to support the elements of the charge (beyond reasonable doubt), while the plaintiff in a civil action must prove what *probably* happened (on the balance of probabilities).

Defence case theory

The defence case theory can be described as:

- a Realistic Alternative Theory ('RAT'), which must also be rational (that is, supported by facts or inferences), and not fanciful or unfounded
- a theory that sufficiently undermines the theory of the party bearing the onus of proof, so as to create a reasonable doubt or shift the balance of probabilities.

So, the defence theory explains what might reasonably have happened, by providing an alternative possibility that arises from the evidence.

In a criminal or civil case where the defendant advances a positive defence (rather than simply the direct negative of the prosecution or plaintiff's case), the defence theory of the case must be consistent with that positive defence, and the range of realistic alternatives may be constrained by the evidential demands of that positive defence.

DEVELOPING THE CASE THEORY OR THEORIES

The development of a case theory is a continuing process. From the first impressions of your brief, a possible case theory or theories may emerge. The final case theory, however, will emerge only after thorough analysis and consideration of possible alternatives.

To develop the case theory, you must:

- thoroughly evaluate the available factual material in your case
- thoroughly evaluate the available and anticipated material in your opponent's case
- assess the factual and legal foundation for each side's case
- consider the likely evidentiary issues
- assess the strengths and weaknesses of each side's case
- identify the available case theories on each side
- select a case theory or theories that provide the easiest and most consistent path through all of the factual and legal issues.

For instance, where a witness gives evidence that does not support your case, one case theory may be that the witness is mistaken about what he or she perceived. This would be simpler and easier for the decision-maker to accept than a case theory that the witness is lying. This is so unless there is a basis to support the conclusion that the witness is lying.

If several theories are potentially available, then you may choose one or more, provided they are consistent with each other. To be consistent, the factual foundation for one must not be destructive of the factual foundation of the other.

Methodology for developing the case theory

One method of developing a case theory is to begin by setting out in table form all available facts, and classify them into what appear to be 'good', 'bad' and 'neutral' facts from the perspective of your case and from your initial impressions.

The table below is designed to identify which evidence may support or negate the elements of the offence or claim.

ILLUSTRATION

Preparation for the development of the defence case theory

Element	Good	Bad	Neutral
Supply	Police see Watkins' head and shoulders only No evidence of Stojkowska hearing the cash register bell ring No evidence of Stojkowska seeing any handing over of a bottle or money	Police see Watkins go to counter Police see Watkins and Jones having a short conversation at the counter Fortified wines located behind the counter Brown paper bags at counter Watkins leaves shop carrying sherry in brown paper bag Stojkowska hears admission as to sale from Jones	Police don't lose sight of Watkins or Jones Shortly after the conversation, Watkins left shop Watkins says 'I tricked Danny again'

(This table continued from p. 26.)

Alcoholic beverage		Watkins leaves shop with bottle of Mildara Cream Sherry Bottle analysed and found to be sherry	
Intoxication		Police see Watkins before he entered the shop: ■ stagger across Wide Street ■ difficulty walking ■ stumble at the kerb Police see Watkins after he left the shop: ■ stumbling 'all over the place' ■ smelling of liquor ■ eyes bloodshot ■ speech slurred ■ singing loud and tuneless Watkins unfit to be interviewed Stojkowska says Watkins bumped into her and didn't apologise Stojkowska thinks Watkins is drunk and smells of alcohol Stojkowska sees Watkins bump into door when leaving	Watkins pauses before entering bottle shop Police see his head and shoulders, don't lose sight Police do not report seeing Watkins bump into anyone in shop

(This table continues overleaf.)

Knowingly	Jones was the only staff member serving on that night Jones was serving to people from the bar, lounge and bottle shop area; there was a smell of alcohol all around Busy night; Christmas Eve; noisy Conversation with Watkins was 'short' Stojkowska was closer to Watkins when she smelt alcohol on him	Behaviour of Watkins described above under 'Intoxication' Jones would have to have heard and understood what Watkins asked for Jones was close to Watkins—over the counter Jones would have been keeping an eye on Watkins, as he had stolen before Jones knew Watkins as a regular customer Jones had an obligation not to serve alcohol to an intoxicated person	Comment by Jones to Stojkowska Police saw Watkins pause for a few moments before entering bottle shop
You will note that in this case, we have not included Jones' instructions in the table. We cannot assume that his story will be relied upon by the court, and so the case theory should at first be constructed around an interpretation of the other evidence. However, the case theory must be consistent with his instructions, and the evidence that he may ultimately give. In other cases, it may be possible or even essential to rely on your instructions in formulating the case theory. Consider in what categories you would place the remaining facts.			

From this table, different case theories may be constructed.

Once the possible case theories have been identified, go back to the table, where the facts have been categorised into 'good', 'bad' and 'neutral', re-evaluate them and select the best case theory.

The best case theory will often be one that applies the principle of Ockham's Razor, the principle of 'economy of hypothesis'. That is, the correct explanation of any problem is usually the one that makes the simplest use of all available information. This will help to avoid unnecessary confrontation.

Before selecting your final case theory or theories consider the likely case theory on the other side. How will your opponent best put their case?

What are the strengths and weaknesses of the case against you? How does your case theory sit with the opponent's theory? How can you develop your case theory to conflict with the opposing theory as little as possible?

Almost invariably, there will be gaps in the information available. The process of analysis will help to identify where those gaps are and will often also suggest to you the lines of further inquiry that are required. Before finally deciding on your case theory or theories, you may be assisted by further conferences.

Using that approach, select a case theory or theories that provide the easiest and most consistent path through all of the factual and legal issues.

Your chosen case theory should:

- be consistent with your instructions
- contain a higher proportion of 'good' or 'neutral' facts
- sit most comfortably with your opponent's case theory
- have fewer witnesses to contradict
- allow any remaining 'bad' facts to be explained credibly and realistically or to be weakened or destroyed in cross-examination.

ILLUSTRATION

Possible case theories for the defence

The available information suggests four possible defence case theories:

- That Watkins was not intoxicated.
- That Watkins brought the bottle with him.
- That Watkins stole the bottle of sherry.
- That even if there was supply and Watkins was intoxicated, Jones did not know Watkins was intoxicated.

Once you analyse the facts categorised in the table, you will see that the case theory that will most effectively undermine the prosecution's case relates to Jones' lack of knowledge of Watkins' intoxication.

The case theory that Watkins was not intoxicated is not viable on the police evidence because:

- the police evidence before and after Watkins was in the bottle shop shows intoxicated behaviour and appearance;
- Stojkowska's evidence supports the police evidence;
- there is not sufficient material to contradict or challenge the police evidence; and
- Jones is not able to contradict the police evidence.

The case theory that Watkins already had the bottle is not viable because:

- the police saw Watkins approach the hotel;
- Watkins was wearing only a t-shirt and jeans;
- it is unlikely that he concealed the bottle or carried it in his hands without the police noticing it;
- no one saw him with the bottle in the hotel;
- Watkins' behaviour is inconsistent with his having brought the bottle with him;
- Jones is not able to deny that he supplied the bottle; and
- although the police in their statement do not refer to Watkins having or not having the bottle, a cross-examination of them to suggest that he did have it before entering the bottle shop is unlikely to be productive.

The case theory that Watkins stole the bottle is not viable because:

- the police did not lose sight of him or of Jones in the hotel;
- the fortified wines are kept behind the counter;
- the police did not see Watkins go behind the counter so as to be in a position to steal it;
- at the time the police saw Watkins at the counter, he was in the presence of Jones, engaged in a short conversation;
- the bottle that Watkins later had was in a brown paper bag;
- there is not sufficient material to contradict or challenge the police evidence;
- Stojkowska's evidence supports the police evidence; and
- Jones is not able to deny the police evidence because he does not remember.

ILLUSTRATION

Case theory for the defence

The following defence theory is the one that is most realistic in the circumstances of this case, particularly in light of Jones' alleged admission to Stojkowska that he sold the bottle to Watkins. It is based on a challenge to the element of knowledge, which is the weakest part of the prosecution case.

Watkins set out to trick Danny by briefly disguising the state of his intoxication. He composed himself at the door and was seen by the police to be steady in the bottle shop.

The conversation was short, with a busy barman in a busy bar. The bar was noisy and there was a smell of alcohol, thus limiting the barman's opportunity to notice the symptoms of intoxication.

Stojkowska's evidence is exaggerated when compared with the police evidence. If Jones made the comments to Stojkowska that she attributes to him, it may amount to an admission of supply, but not of knowledge because of the expression 'if he was so drunk'.

This case theory:

- requires no challenge to the police evidence;
- undermines the weakest part of the prosecution case;
- does not fly in the face of the admission alleged by Stojkowska (as this is not an admission of knowledge);
- does not contradict Stojkowska's observation of the conversation between Watkins and Jones;
- is consistent with your instructions that Jones had no knowledge of Watkins' intoxication, even if he did sell him the bottle; and
- is most realistic in the circumstances.

The selection of this case theory may allow you to abandon a challenge to the other elements of the offence.

PREPARING EXPERT EVIDENCE

Choice of expert

The choice of expert is important in preparation when you will be calling an expert as an independent consultant to support your case.

In choosing the consultant expert, you should consider:

- what aspect of the case requires expert opinion
- whether the expert has the specialised knowledge in his or her own discipline to express that opinion, based on his or her training, study or experience
- whether the expert is sufficiently independent, open-minded and credible
- whether the expert is of good standing among his or her colleagues and among lawyers and judges
- how thorough and well-prepared the expert will be
- how the expert's qualifications, experience and opinion will compare with those of any opposing expert
- how the expert will withstand cross-examination
- how experienced the expert is in giving evidence in court
- whether the expert is able to communicate in such a way as to be an effective witness, and to explain technical concepts to a lay audience.

Conference and expert witness preparation

To prepare expert evidence effectively, you should:

- inform the expert of the issue about which the expert opinion is sought
- ensure that the expert is instructed in a way that does not affect the expert's objectivity

- provide all relevant material to the expert
- give the expert sufficient time to conduct a comprehensive assessment and prepare a report
- understand the expert's report
- assess the strengths and weaknesses of the expert opinion.

The conference is necessary:

- for you to become familiar with the expert's qualifications, research or experience (or lack of it) and how this supports or diminishes his or her opinion
- to give you a better understanding of the expert's opinion and the reasoning that supports it
- for the expert to help you to ascertain the strengths and possible weaknesses of his or her opinion
- to equip you to cross-examine the opposing expert.

During the conference, you will:

- review with the expert how you will elicit his or her qualifications
- prepare the expert for examination in chief by you and cross-examination by your opponent
- identify weaknesses in the opinion of any opposing expert
- instruct the expert in the need to:
  - answer the questions
  - use as little technical language as possible
  - have all relevant materials available in court, organised and ready to produce if required
- if the expert is not experienced, inform the expert of relevant legal terminology, procedure and the manner in which the expert will give evidence
- explain that the expert is limited to answering the questions asked in cross-examination, but that you may re-examine if necessary
- ensure that you see the original working notes, lab records, interview schedules and any other reports
- ensure that the expert prepares any helpful visual aids, such as graphs, charts, or simple illustrations, in a way that clearly communicates the point to be made.

PRESENTATION OF EXPERT EVIDENCE

Expert evidence may be adduced in a number of ways, depending on the rules and practice of the jurisdiction:

- In criminal trials before a jury, the expert will have to give oral evidence in chief, although he or she would usually be able to refer to the report and other notes.
- In non-jury trials, and in most civil cases, the expert's report is usually used as evidence in chief.
- If the report is used as evidence in chief, there may still be oral evidence to supplement or explain the report, or, by leave of the judge, to give further evidence.

PERFORMANCE PREPARATION

Knowing what to achieve in your case does not prepare you for how to achieve it during the hearing. Performance skills and techniques require performance preparation. After preparing a case theory, you will know *what* you need to achieve in the case. Then you should prepare *how* you will achieve this during your performance, consistently with your case theory.

The normal contested hearing will have four main stages, which are performed in this order:

- opening addresses
- examination in chief
- cross-examination, possibly followed by re-examination
- final address.

In preparation for performance, these four stages must be prepared in a different order. The starting point must be the final address.

This approach is necessary because a trial is a purposive process. Each advocate tries to achieve a specific result based on his or her case theory and the arguments available to support it. A trial is not an inquiry or investigation.

The most useful order of preparation for performance therefore is:

	Opening	**Examination in chief**	**Cross-examination**	**Address**
Prepared	Last	Second	Third	First

The closing address must be prepared first because:

- When prepared first, argument as to facts and law, based on your case theory, will give you the direction needed for the other steps in the trial.

- It will serve as a guide to what needs to be done in order to support your case theory, on which the result will depend. This is like an architect preparing final plans before the building starts.
- This approach will enable you to focus and organise your case in chief, to identify what needs to be done in cross-examination, and to decide on the most effective opening address.

Examination in chief is prepared next because:

- it usually provides the foundation for your final factual argument. Your case theory and final argument are usually based on your client's instructions and evidence to support the desired outcome.

Cross-examination is prepared next because:

- the need to cross-examine and the nature and scope of cross-examination of the other side's witnesses will be dictated by the argument prepared first in support of your case theory; and
- having prepared your final address, you will know what you need to add or weaken by cross-examination.

The opening address is prepared last because:

- in preparation, the trial is not shaped by the opening address. The opening address is shaped by the way you will conduct the trial.

Note that re-examination cannot be prepared effectively in advance:

- It is limited to matters arising from cross-examination.
- It can be prepared only during cross-examination of your witnesses.
- However, it is possible to consider in advance the likely line of cross-examination and therefore the evidence that may have to be dealt with in re examination. This is so particularly with expert witnesses.

This approach to the trial process is the same in a criminal case (and in the less common circumstance of a civil case) in which you do not propose to call evidence. Although you will not be preparing evidence in chief for presentation, it will still be necessary to identify the material that supports your case theory and your final argument, and to build that into your argument prepared in advance. This approach is helpful in identifying the need for and the direction of cross-examination.

ILLUSTRATION

Prosecution preparation for final address

After analysing the Jones case you will be able to prepare in advance an argument for the prosecution.

As to intoxication:

The following factors support the clear conclusion that Watkins was intoxicated.

1. Evidence of two experienced police officers in a specialised squad:

- seeing Watkins crossing the road, staggering and stumbling
- after he leaves the bottle shop, they observe tuneless singing, slurred speech, smell of liquor, bloodshot eyes and mumbling

2. Evidence of Stojkowska:

- Watkins bumps into her
- he smells of liquor
- he does not apologise
- he bumps into the door

As to supply:

The following factors in combination lead to the conclusion that Jones supplied liquor to Watkins.

1. Circumstantial evidence supports an inference of supply:

- Watkins walks into the bottle shop
- goes to the counter
- speaks to the busy barman
- short conversation—not a social chat
- he comes out with a bottle of sherry
- of the kind kept only behind the counter
- in a paper bag—paper bags are on the counter
- says 'I tricked Danny again'—that is, got the bottle from him by a trick

2. Admission by Jones to Stojkowska—unlikely to be invented:

- recalled by Stojkowska
- a short time later
- recorded by the police
- contains Jones' sentiment—feeling sorry for Watkins
- contains Jones' words as used in the police interview: 'blow the boss's licence'

3. Jones' inconsistent accounts:

- 'I don't remember selling him anything tonight'
- 'I can't remember him buying anything off me'
- 'I never sold anything'

4. Watkins did not bring the bottle with him:

- hot night—Watkins wearing jeans and t-shirt
- trained police watching carefully for considerable time
- unlikely to have concealed a bottle in a paper bag—why would he?
- if he had brought it, why go to counter and speak to Jones?
- Watkins' comment 'I tricked Danny again' would be meaningless

3. Watkins could not have stolen the bottle:

- Fortified wine is stored only behind the counter.
- To steal he would have had to go behind the counter, through the one opening, or he would have had to lean or jump over the counter.
- If Watkins has stolen before, Jones would be watching him carefully.
- Watkins would have to have put the bottle in a paper bag, which he would have had to get from the counter.
- All this while Jones is there.
- During this time the two of them are seen by the police having a short conversation.
- This is supported by Stojkowska.

As to knowledge:

Even if Watkins steadied himself before entering the hotel, Jones had to have noticed that Watkins was intoxicated when he supplied the bottle, given the high level of intoxication as seen by the police and Stojkowska:

- Jones was under an obligation to take notice.
- He is an experienced barman.
- He is aware of signs of intoxication.
- He knows Watkins as a regular customer.
- He would watch him, as Watkins had stolen before.
- He saw the bump with Stojkowska.
- Watkins would have been close to him across the bar.
- Watkins spoke to him.
- Jones would have had to hear Watkins and look at him.
- He had to notice slurred speech, bloodshot eyes, smell of liquor.

Defence preparation for final address

Having analysed the case from the defence point of view, you may consider that:

- the argument that Watkins was not in fact intoxicated is difficult because of the police evidence and Stojkowska's observations of Watkins' actual condition. There is nothing with which to attack the credibility of the police that is relevant to their observations.
- the argument that there was no supply is difficult because of the circumstantial evidence and the likelihood that Stojkowska's evidence of Jones' admission to a sale will be accepted. This is because the comments attributed to him by Stojkowska are unlikely to have been invented, given the similarity between the words used by Jones in the police interview and the words attributed to him by Stojkowska.

- the real weakness in the prosecution case is Jones' knowledge of intoxication. Watkins paused before entering and composed himself, with the intention of tricking Danny. He was seen by the police in the bottle shop and the police, who saw his head and shoulders at all times, do not suggest that he was unsteady. This is in contrast to his behaviour before entering the shop and after leaving.

You will be able to prepare in advance an argument as to knowledge. The following circumstances in combination raise a reasonable possibility that Jones did not notice that Watkins was intoxicated. This reasonable possibility may detract sufficiently from proof beyond reasonable doubt that he knew Watkins was intoxicated.

1. Circumstances likely to lead to Jones not noticing Watkins' bloodshot eyes, slurred speech and smell of alcohol:

- busy night—Christmas Eve
- only one barman serving
- people coming from bar, lounge and bottle shop
- short conversation with Watkins—may only have been a short request
- noisy bar: Jones may not have detected Watkins' slurred speech
- he would have had no reason to look at Watkins for long, or carefully, when he was at the counter
- liquor being served around the bar, smell of alcohol in the air
- Jones had no opportunity to carefully examine the colour of Watkins' eyes, and there is a reasonable possibility that Watkins' eyes were not normally clear.

2. The bump with Stojkowska, however it occurred, was not significant enough to indicate intoxication, from Jones' perspective:

- narrow space
- other people
- Jones' perception was that Stojkowska bumped into Watkins
- near loss of balance is a natural result of a bump
- not necessarily indicating intoxication
- the bump was not so significant or obvious: police did not see it.

Having chosen your case theory and prepared the final address by setting out all the available arguments in support of your case, and identifying all the facts that support each argument, you are now in the best position to order and prepare:

- the evidence in chief to support your arguments;
- cross-examination:
  - to elicit further facts or add emphasis to support your arguments, and/or
  - to discredit evidence that contradicts your case and argument;
- an opening that will persuasively introduce your case, limit the scope of the disputed issues, and defuse the opponent's case; and
- argument about evidentiary issues.

Each of these steps, and the method of preparation for its performance, is described in the chapters which follow.

THE PHYSICAL PROCESS OF PERFORMANCE PREPARATION

The method of performance preparation will differ from person to person. Some people will write out what they intend to perform; others will make brief notes, use diagrams, highlight passages of text, or use other methods.

The important point to remember is that you prepare to perform; you do not perform your preparation. You perform *on the basis of* your preparation.

PREPARING AND USING NOTES

During the earlier steps of preparation and in the process of preparing your case theory and deciding what to do, you will produce notes such as chronologies, lists and propositions in argument.

These are not the notes that will assist you during your performance in court, because the court performance is not a presentation of your preparation.

Notes must be prepared as triggers to assist you during your performance. They must be:

- brief
- clearly set out
- easily referred to at a glance, and should
- include clearly identified references to documents or other matters to be referred to during performance.

Use of notes during the performance should be minimal and they should be used only as a prompt when necessary. There should be no reading of notes, although in a complex case, notes may be necessary for details such as figures, tests or dates. Performance without notes is best, particularly when dealing with the basic story of your case and the main arguments that you wish to advance.

ORGANISING YOUR MATERIAL

At trial you must have all of your materials well organised and readily accessible. This may be done by preparing a trial notebook or folder, clearly indexed and tabbed with headings such as:

- indictment (or statement of claim)
- particulars (or pleadings)
- exhibit lists
- list of authorities
- chronology
- performance notes for each stage of the trial.

Such a notebook should be kept separately from other materials, especially if the materials are voluminous, as in a complex case.

Thorough preparation, as described, will help you to:

- significantly reduce performance anxiety
- present with confidence
- be more creative in your style because you know what to do
- communicate more effectively
- gain the respect and confidence of the judge and jury
- be a more credible advocate
- impress your clients and those who brief you.

The importance of preparation and the amount of time that must be devoted to it are encapsulated in an American advocacy teacher's comment: 'One hour of preparation for every minute on your feet.'

3

EVIDENCE IN ACTION

To be effective as an advocate both in preparation and in court, you must know the rules of evidence relevant to your jurisdiction. Some evidentiary issues can be anticipated in preparation, but others can arise quickly, when there is no opportunity to research and prepare.

This chapter does not aim to teach the rules of evidence. While there are several references to the rules of evidence and illustrations of how those rules are applied, the rules and practices differ between jurisdictions. There is now a trend towards uniform evidence law in Australia, but not all states have adopted it.

This chapter will help you to:

- understand the cycle of evidence
- identify evidentiary issues that commonly arise
- understand when and how to make submissions about admissibility before and during a trial
- argue about the form and fairness of questions.

You must distinguish between admissibility of evidence and the weight of evidence. Courts will not consider evidence that is found to be inadmissible. However, once evidence is admitted, the court will consider its weight or probative value, that is, whether the court should rely on the evidence.

During preparation you must:

- consider evidentiary issues apparent from the materials
- assess the admissibility of potential evidence on both sides
- prepare to argue about the admissibility of evidence
- consider which evidentiary issues should be dealt with before trial.

Evidentiary issues typically arise in relation to:

- relevance
- admissibility
- form of questions
- fairness.

Common admissibility issues include:

- hearsay and its exceptions in jurisdictions where the proposed uniform evidence legislation does not apply
- opinion evidence
- privilege
- confessions
- identification evidence
- similar fact evidence
- propensity evidence
- *res gestae*
- discretionary exclusions
- statutory exclusions
- evidence that can be adduced only with leave of the court.

You might make submissions about the admissibility of such evidence:

- on a *voir dire* in which there are evidentiary and legal issues before or during trial, or
- by making or answering objections during the course of a trial.

A question may be objectionable if the form of the question is:

- leading
- argumentative
- compound or multiple
- a comment or statement.

A question may also be objectionable as unfair if it is:

- misleading, ambiguous, confusing, or unintelligible
- harassing, intimidating or oppressive
- repeated if it has already been asked and answered
- an inappropriate conclusion from evidence already given
- vague or lacking content about the subject matter
- a misstatement of evidence already given
- asking for speculation or a guess
- hypothetical, except in the case of experts.

Some further common evidentiary issues include:

- dealing with a hostile witness
- refreshing a witness's memory
- impeaching the credibility of a witness
- dealing with prior inconsistent statements
- dealing with prior consistent statements
- using the principle of judicial notice
- tendering documents or other exhibits
- complying with the rule in *Browne v Dunn*.

THE CYCLE OF EVIDENCE

The system of calling evidence used in court is intended to create a complete and orderly but fair cycle, to ensure that each party has every opportunity to bring out the relevant and admissible evidence it wishes to rely on.

The process cannot be a free-for-all where witnesses are at liberty to say whatever they want to say, whenever they want to say it. The system requires a disciplined and controlled process. The court relies on the advocates' knowledge of what is relevant and admissible. The advocates are therefore expected to exercise control over what is adduced in evidence.

The cycle of evidence is designed to ensure that:

- during evidence in chief, all relevant and admissible evidence is given;
- during cross-examination, the witness and his or her evidence can be discredited or accredited, or additional evidence adduced under the control of the cross-examiner by leading questions.

  The cross-examiner is entitled to confine the witness to answers to specific questions.

During re-examination, material raised in cross-examination can be clarified, completed or explained. Because leading questions are permitted in cross-examination, and the witness is confined to answering only the questions that are put, the process would not be fair without the opportunity to re-examine.

Evidence sought to be adduced in re-examination must be relevant and admissible.

With leave, further examination in chief of a witness can be permitted, and the cycle of evidence begins again with respect to that further evidence.

SOME EVIDENTIARY ISSUES INVOLVING QUESTIONS OF LAW

It is important to understand the principles behind the rules of evidence, and the application of the rules, even when appearing before tribunals which are not bound by the rules of evidence. Such understanding enables you to argue about the admissibility and weight of evidence in court, and about the weight of evidence in a tribunal.

RELEVANCE

The court will consider evidence only if it is relevant. Relevance is a matter of law, which is decided by the court.

Evidence is admissible if it is relevant to:

- the issues in dispute, such as the elements of the offence or claim, or
- a fact relevant to a fact in issue in dispute, or
- the credibility of a witness

and if it is not excluded in the judge's exercise of discretion.

ILLUSTRATION

For instance, the following circumstances are relevant to the facts in issue:

- Watkins' behaviour before and after he entered the bottle shop: relevant to intoxication.
- What Watkins had on him before and after he entered the bottle shop: relevant to supply.
- Watkins' proximity to Jones in the bottle shop, and Watkins' behaviour before and after entering the bottle shop: relevant to Jones' knowledge that Watkins was intoxicated.

The following circumstances are relevant to credibility:

- Stojkowska's application for a liquor licence, and the objections to it: relevant to possible bias against the hotel on the part of Stojkowska.
- Jones' interest in the outcome of the case: relevant to Jones' credibility, as his job may depend on it.

HEARSAY AND ITS EXCEPTIONS

At common law, an out-of-court statement is excluded as hearsay if it is tendered to prove the truth of the facts contained in it. This is because the source of the information cannot be tested.

ILLUSTRATION

Watkins' statement 'I tricked Danny again' is an out-of-court statement and would hence be hearsay if it were used to prove the truth of its content, that is, to prove that Watkins had in fact tricked Danny again.

Is the statement relevant to prove anything else? If not, then it is inadmissible, unless it falls within an exception to the rule against hearsay.

See further the *voir dire* illustration below.

The continuing legislative trend is to abolish the strict exclusionary rule and allow the admission of hearsay if the source is sufficiently reliable.

In jurisdictions where the common law rule remains in force, there are many exceptions, such as admissions against interest. See the chapters on the exceptions to hearsay evidence in J. D. Heydon's *Cross on Evidence*,[1] or Gans and Palmer's *Australian Principles of Evidence*.[2]

Self-serving statements, such as 'I told my neighbours that I didn't set fire to my car', are inadmissible, if the issue is whether the witness set fire to his car. However, statements made by a person under questioning which are part admissions and part self-serving statements or denials, in response to allegations, are admissible as part of the narrative and in the interest of fairness.

For example, a person being questioned about an assault could say that he was present on the occasion and that he struck the victim. Those are admissions. It would be unfair to exclude the next statement, that the striking was in self-defence, and so that statement, which is self-serving, would be admissible as part of the narrative.

OPINION EVIDENCE

Lay witnesses are permitted to give evidence of facts in their direct knowledge, based on the perception of their senses. For example: 'I saw a blue motor car enter the intersection against the red light'; 'I heard the screech of brakes'; 'I smelt the burning rubber'.

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[1] (7th edn), Butterworths, Sydney, 2004.
[2] (2nd edn), Cavendish Publishing, Sydney, 2004.

Lay people are not permitted to give opinion evidence because it is the function of the court, not the witness, to draw relevant inferences or reach conclusions based on the witness's observations. For example, it is the court's role to decide why the accident occurred or who was at fault.

In some circumstances, lay witnesses may be allowed to give limited opinions about matters of common understanding, knowledge and experience, such as assessing speed or intoxication, or identifying people. Such statements are more impressions than they are opinions of the kind given by expert witnesses.

ILLUSTRATION

Stojkowska and the police form the opinion that Watkins was drunk. They would be entitled to give evidence of their impression that Watkins was drunk.

However, evidence must also be led of the observations on which Stojkowska and the police based their opinions.

EXPERT EVIDENCE

Unlike the lay witness, the expert witness may give evidence of an opinion, and must give evidence of the basis for it. This will include information relied on, the methodology used, tests and investigations conducted, and the reasoning process that led to the opinion.

Expert evidence is admissible only if the opinion is outside the ambit of normal human knowledge and experience. Also, the opinion must be in a field of recognised and specialised knowledge or learning.

Expert evidence is important because it provides the court with the basis for making findings of fact in areas that are beyond the knowledge and understanding of lay people.

Before the expert is permitted to give evidence of an opinion, he or she must qualify to express such an opinion by reason of training or experience. The opinion must be limited to issues within his or her area of expertise.

Such an opinion is treated as part of the evidence: the court assesses and may accept or reject it like other evidence. Once the expert evidence becomes admissible the question of its weight is for the tribunal of fact, which is not bound by the opinion. The court cannot substitute its own expert opinion because it cannot properly reach one without the assistance of expert evidence.

Thus, the expert opinion usually becomes part of the evidence that the court considers in reaching its final factual conclusion.

EXPERT REPORTS

Experts will usually provide reports to the party calling them, which set out their qualifications, involvement, investigation, methodology, opinion and reasons for it. Most rules of court in civil proceedings now require these matters to be disclosed by the expert in the report.

Generally, the evidence of the expert is what is said in court. However, in some civil proceedings there are rules that require written reports to be provided, exchanged and treated as evidence in chief.

Reports or any documents created by the expert which are relevant to the opinion expressed may be used by the opposing party in cross-examination.

For a full discussion of the rules of expert evidence, see I. Freckelton and H. Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy*.[3]

PRIVILEGE

Privilege against self-incrimination

The common law privilege against self-incrimination allows a witness or party to a criminal or civil case to refuse to answer questions or produce documents that tend to incriminate them, that is, to expose them to criminal conviction or other penalty.

The witness or party must establish some reasonable grounds for the claim of privilege.

The privilege has been modified by statute in most jurisdictions, not in courts but in proceedings such as Royal Commissions and inquiries. In such cases, a witness can be compelled to answer questions, but usually those answers cannot be used in criminal proceedings if the witness relies on the cover of privilege.

Legal professional privilege

Confidential communications between a lawyer and client which have been created for the dominant purpose of legal advice, or actual

[3] (3rd edn), Law Book Company, Sydney, 2005.

or contemplated legal proceedings, are protected by the client's legal professional privilege. The privilege is that of the client, not the lawyer, and may be waived by the client.

This extends to documents exchanged between either the lawyer or the client and third parties for the purpose of actual or contemplated litigation.

There are several exceptions to the privilege and many instances where it will be deemed to have been waived.

ILLUSTRATION

Legal professional privilege would protect Jones from having to disclose what he told his lawyers, despite having made a statement to the police.

If Jones' lawyer writes to an expert setting out his client's instructions, then the privilege is maintained. It would be waived if the expert was called to give his or her opinion in evidence based on the information he or she received.

CONFESSIONS

Admissions or confessions made out of court are admissible under an exception to the rule against hearsay, as admissions against interest.

However, in criminal proceedings, courts will exclude admissions and confessions from evidence if they are involuntarily made, for instance as a result of inducement or oppression.

Courts also have a discretion to exclude confession or admissions made in circumstances where it would be unfair to the accused or against public policy for them to be admitted. For example, where a confession is obtained during unlawful detention, or some other unlawful or unfair means, it could be excluded.

Some statutes also require certain procedural steps, such as recordings, to have been taken at or after the time of admission before any confession can be admitted.

ILLUSTRATION

The prosecution will allege that Jones made an admission to Stojkowska about supply. Illustrations of the issues relevant to exercising the discretion to exclude this evidence are considered below under '*voir dire*'.

IDENTIFICATION

In criminal proceedings, identification evidence can be excluded if the evidence is so inherently unreliable that its prejudicial effect outweighs its probative value. Once identification evidence is admitted, its weaknesses must be considered by a judge sitting alone, and must be highlighted to the jury.

Various principles have developed to exclude identification based, for example, on a single photograph shown to the identifying witness, or an identification in court, known as a 'dock' identification.

SIMILAR FACT EVIDENCE

Similar fact evidence is generally used to identify a person as the same actor on different occasions. This frequently occurs where an accused is alleged to have used the same specific technique on different occasions.

For example, if a person can be shown to have unlawfully entered a house by a specific pretext and method, the evidence of the use of the same or a similar method can be used to identify that person as the actor on other occasions.

PROPENSITY EVIDENCE

Propensity evidence involves the attempt to prove that a person acted in some way on a previous occasion, from which the court may infer that he or she acted in the same way on the occasion in question at the trial.

The potential overlap between similar fact evidence and propensity evidence, and the purposes for which they can be used, can pose difficult questions requiring careful analysis of the evidence and current law.

RES GESTAE

The doctrine of *res gestae* is used to characterise evidence which becomes admissible because it forms 'part of the story' needed to understand other parts of the evidence.

The doctrine is chiefly used as an exception to the rule against hearsay, on the basis that the evidence sought to be admitted is reliable, as it was made proximate in time to the events, and its purpose is to explain those events.

ILLUSTRATION

Watkins' statement 'I tricked Danny again' could arguably be considered an exception to the hearsay rule as forming part of the *res gestae* to explain Watkins' conduct, which is relevant to the allegation that Jones knew Watkins was intoxicated. It may explain conduct such as Watkins pausing before entering the bottle shop and appearing steady in the bottle shop.

CHARACTER EVIDENCE

Evidence of the good character of the accused may be given:

- at trial, where it is limited to good reputation and the absence of previous convictions.

  This lays the foundation for the direction to the jury that good character can be used in the accused's favour in deciding whether he or she committed the offence and whether his or her evidence should be accepted;

- in a plea in mitigation, where additional details of the accused's activities, contributions and attributes can be given by character witnesses.

  These can be mitigatory factors in sentencing.

DISCRETIONARY EXCLUSIONS

Courts in criminal proceedings have the discretion to exclude evidence on the basis of unfairness if:

- the evidence has been illegally or improperly obtained, or
- the prejudicial effect of the evidence on the accused would outweigh its probative value.

EVIDENCE EXCLUDED BY STATUTE

Some evidence is excluded specifically by statute.

For instance, in all jurisdictions, the prior criminal history of the accused in a criminal proceeding is inadmissible, unless character is put in issue by the accused, or an attack is made on the character of a prosecution witness which has no connection to the issues in the case. See, for example, *Crimes Act 1958* (Vic), s 399(5).

EVIDENCE THAT CAN BE ADDUCED ONLY WITH LEAVE OF THE COURT

In some situations, statutes require a party to obtain leave before leading evidence relevant to particular issues.

For instance, this applies to the prior sexual history of the complainant in sexual offences, under *Evidence Act 1958* (Vic) s 37A.

WHEN TO MAKE SUBMISSIONS ABOUT ADMISSIBILITY

Good advocates will anticipate admissibility issues, and deal with them before or at the start of any trial. This will help the efficient running of the trial.

It is helpful to prepare a written summary of all objections before the hearing, identifying:

- the evidence that you will argue is inadmissible
- the legal basis for your objections.

This can be given to your opponent and to the court before the hearing, and provides an efficient structure to help the court consider the arguments.

ARGUING FOR OR AGAINST THE ADMISSIBILITY OF EVIDENCE ON A *VOIR DIRE*

A *voir dire* is a procedure for determining the admissibility of evidence.[4]

A *voir dire* is a procedure:

- before or during a trial
- to enable a ruling to be made
- as to whether evidence is admissible
- and if admissible, whether it should be excluded in the exercise of discretion.

[4] Kerry David Stephens, *Voir Dire Law*, Criminal Law Publications Pty Ltd, Croydon Hills, Victoria, 1997.

The party who seeks to exclude evidence has carriage of the proceeding on a *voir dire*. Generally, the onus is on the party who seeks to exclude the evidence to establish that it is not admissible.

In criminal cases where a confession is challenged, and the question of voluntariness is raised, the prosecution must establish that the confession was voluntary. In such a case, the prosecution has carriage of that issue. If the confession is shown to be voluntary, it is for the accused to show that it should nevertheless be excluded in the exercise of discretion.

Both parties can call evidence and make submissions.

ILLUSTRATION

The prosecutor has informed the defence that she does not intend to lead evidence of Watkins' statement 'I tricked Danny again'. She also said that she objects to its being brought out in cross-examination. The defence wants to rely on it.

The defence counsel has informed the prosecutor that he wishes to argue against the admissibility of the alleged admission by the accused to the witness Stojkowska.

Parties have agreed to ask for rulings on those issues on a *voir dire*.

Prosecution position about Watkins' comment

- What is said is uncertain: 'He mumbled what sounded like "I tricked Danny again"'.
- The comment was made by an intoxicated man and is unclear.
- It was made after the event in question.
- The comment is vague, as the determination of its meaning is speculative.
- At most, if a meaning is given to it, then it is being tendered to prove the truth of what is said.
- It is in the nature of hearsay, because it is an out-of-court statement at which the accused was not present.

Defence position about Watkins' comment

- It is open to the jury to accept the police evidence of what was said.
- The comment is close in time to the relevant events and relates to them.
- It was made by a person who was involved in those events.
- The words are relied on as part of the conduct relating to the event and explaining its nature.
- Other evidence of the event both gives meaning to and receives meaning from that comment.
- The comment has probative value because it helps to explain the nature of the transaction, that is, Watkins' conduct and its relationship to the element of Jones' knowledge.
- It would be unfair to exclude it.

Defence position about the admission

- The accused denies making the admission.
- Even if Stojkowska's evidence is accepted, it is not an admission of knowledge that Watkins was intoxicated because it is qualified by the word 'if'.
- It is equivocal as an admission about sale.
- The words 'I shouldn't have' do not necessarily admit that the accused made the sale.
- The words are said after the police asserted in a compound question that he made a sale (Question 7 in the record of interview).
- The accused has no memory of the sale and may have simply speculated about what he should not have done, assuming that he did it.

Prosecution position about the admission

- The prosecution accepts that it is not an admission of knowledge.
- It is open for the jury to conclude that the accused knew that he supplied liquor.
- The words are inconsistent with some of his assertions to the police that he did not sell the bottle (Question 12 in the record of interview).

VOIR DIRE ON THE ADMISSIBILITY OF EXPERT EVIDENCE

The admissibility of proposed expert evidence can be challenged on the grounds that:

- there is not an accepted field of expertise relevant to the opinion
- the witness does not have the necessary training, skill or experience to give expert evidence
- the evidence is within common knowledge.

In a *voir dire* where the expertise of the witness is challenged, the following background information about the proposed expert witness may be relevant:

- occupation and length of time in occupation
- place of employment and current title
- current duties
- areas of specialisation
- academic qualifications and research
- professional licence or certification
- past relevant work experience
- publications and teaching
- membership of professional societies and organisations
- awards or other recognition received.

These questions remain relevant to the weight of the evidence once it is admitted, particularly where there are conflicting expert opinions.

MAKING AND ANSWERING OBJECTIONS DURING A TRIAL

Each party may object to any piece of evidence if they have a basis for arguing that it should not be admitted.

When making an objection during the trial, you must identify the nature of the objection before you make the arguments to support it. The court may rule there and then, or hear from the other side. In civil cases, the court may hear the evidence objected to, subject to later argument about its admissibility.

To make an objection, you should:

- stand up, and your opponent should sit down
- say that you object to the question or answer and give your basis for the objection
- sit down while your opponent is responding to it.

Opposing counsel should wait until the objection is made and the reason articulated before responding.

ILLUSTRATION

Cross-examination of Constable Bier

Defence:	When you identified yourself to Watkins, he said something to you, didn't he?
Constable Bier:	Yes.
Prosecutor:	[Anticipating the next question, stands, and Defence sits] Your Honour, I object to my friend if she is seeking to lead hearsay evidence of Watkins' comment. [Prosecutor resumes seat.]

WHEN NOT TO OBJECT

Objections should be based on the substance or form of the question, and should not become a personal attack on or criticism of counsel who is attempting to lead evidence.

It is unethical to object unless there is a basis for the objection (for instance, objecting merely to interrupt is inappropriate).

You do not have to object unless it suits your purpose.

In a jury trial, you should consider whether the objection is appropriately

made and argued in the presence of the jury. If you wish to argue in the absence of the jury, you should state that:

- you have an objection to the evidence
- the objection raises a question of law, and
- it may be appropriate for the judge to hear it in the absence of the jury.

OBJECTING TO THE FORM OF A QUESTION

Leading questions

You may object to the form of a question where it is leading, in evidence in chief or re-examination. The rules of evidence prohibit the asking of leading questions in evidence in chief, particularly as to contested facts.

Argumentative questions

Questions must be directed to eliciting factual information from the witness. Argumentative questions are phrased in a way that puts an argument or a conclusion to the witness.

ILLUSTRATION

Cross-examination of Jones

An argumentative question would be:

Q Mr Jones, do you think you gave the police a consistent story?

A non-argumentative way to achieve the same result would be:

Q When the police questioned you in the bottle shop, you told them you could not remember selling Watkins anything, didn't you?

A *Yes.*

Q During the interview at the police station the following morning, you told the police 'I never sold him anything', didn't you?

A *Yes.*

That series of questions provides you with the facts to support an argument in your closing address that the witness has been inconsistent, but you have not asked the witness's opinion or been argumentative.

Compound or multiple questions

In cross-examination, the witness should be asked questions with only single propositions, and only one question at a time.

If a witness answers a leading question by 'Yes' or 'No', where the question has two or more propositions in it, the court does not know which proposition the answer relates to.

ILLUSTRATION

Cross-examination of Constable Bier

Impermissible form:

Q Constable Bier, you did not see Mr Jones give anything to Watkins, or see anything below their heads and shoulders in the bottle shop, did you?

Permitted form:

Q From your position in the car, you could see into the bottle shop; is that correct?

A Yes.

Q You could not see below the heads and shoulders of Mr Jones and Watkins, could you?

A That's correct.

Q You did not see Mr Jones give anything to Watkins, did you?

A No, I didn't.

Comments or statements that are not questions

Your role in examination in chief and cross-examination is not to comment, but to ask questions or put propositions that elicit factual information from the witness.

OBJECTING TO THE FAIRNESS OF QUESTIONS

You may object to a question as unfair where the question is:

- misleading, ambiguous, confusing, or unintelligible
- harassing, intimidating or oppressive
- repeated, if it has already been asked and answered
- an inappropriate conclusion from evidence already given
- vague or lacking content about the subject matter
- a misstatement or misquotation of evidence already given
- asking for speculation or a guess.

See further the many examples given by Bernie Gross QC, 'Making and Meeting Evidentiary Objections', in *Introduction to Advocacy*.[5] Note also section 41 of the *Evidence Act 1995* (NSW).

[5] NSW Young Lawyers Continuing Legal Education Seminar Papers, 16 September 2006.

THE RULES OF EVIDENCE IN SPECIFIC ADVOCACY TASKS

DEALING WITH A HOSTILE WITNESS

At common law, where a witness you have called displays an intention not to give full and truthful evidence, you may apply to cross-examine him or her as a hostile witness.

You must establish first by non-leading questions what evidence the witness is giving in court, and you may then apply to cross-examine the witness.

The court will:

- require you to establish that the witness is not being truthful, or is not prepared to give evidence consistent with a previous statement, and
- assess the demeanour of the witness to determine whether the reason for what the witness is doing is hostility to the party calling him or her.

The proposed uniform evidence legislation dispenses with the formal requirement of showing that the witness is hostile, and provides that you may cross-examine your own witness during evidence in chief where the witness:

- gives evidence that is not favourable to your client
- does not appear to be making a genuine attempt to give evidence on a matter about which he or she could reasonably be supposed to have knowledge, or
- gives evidence that is inconsistent with a prior statement.

See for example section 38 of the *Evidence Act 1995* (NSW).

REFRESHING WITNESS MEMORY

At common law, when you apply to the court to allow a witness to refresh his or her memory from a written document, you must establish that:

- the witness has exhausted his or her recollection of the event or conversation
- the witness made or acknowledged a written note or statement about the event
- the statement contains the witness's own recollection of the event

- the statement was made when the event was fresh in the witness's memory; for example it was made contemporaneously with the event
- the statement would help the witness to refresh his or her memory, and
- the statement is available.

After this process, either under the common law or the uniform evidence legislation, you may apply to the court for leave for the witness to refresh memory from those notes.

The proposed uniform evidence legislation specifies the matters to be taken into account, among others, in granting leave to refresh memory. These are:

- whether the witness will be able to recall the fact or opinion adequately without using the statement, and
- whether the statement was written (or found by the witness to be accurate, in the case of a statement prepared by others) when the events were fresh in the witness's memory.

See for example section 32(2) of the *Evidence Act 1995* (NSW).

ILLUSTRATION

Leading evidence from Constable Bier

Prosecutor:	After Watkins left the bottle shop, where did he go?
Bier:	I don't recall.
Prosecutor:	What do you recall happening after Watkins left the bottle shop?
Bier:	I really can't remember offhand.
Prosecutor:	Is there anything that may refresh your memory?
Bier:	Yes, I made a written statement.
Prosecutor:	When did you make that statement?
Bier:	The next morning.
Prosecutor:	When you made the statement, how was your recollection of the events?
Bier:	It was clear in my mind.
Prosecutor:	Would it assist your recollection to read that statement?
Bier:	Yes, it would.
Prosecutor:	Where is that statement?

Bier:	I have it in my file here.
Prosecutor:	Your Honour, may the witness be given leave to refresh his memory by reading his statement?
Judge:	Yes.
Prosecutor:	Thank you, Your Honour. Now, Constable Bier, please produce that statement. I would like to look at it before you read it.

[Associate hands statement to counsel, who reads it to herself, then hands it back to associate to return to witness.]

Prosecutor:	Constable Bier, please read paragraph two on page one to yourself, then put it to one side.
Bier:	Yes, I have read it.
Prosecutor:	Now that you have refreshed your memory, would you tell the court where Watkins went after he left the bottle shop.

There is no consistent authority as to whether the witness who refreshes his or her memory should simply read the notes and then give oral evidence from memory, putting the notes to one side, or alternatively whether the witness may read into evidence the relevant part of the statement. The proposed uniform evidence legislation allows a witness to read from the statement with leave of the court (see for example section 32(3) of the *Evidence Act 1995* (NSW)).

In practice, particularly where refreshing memory is about a lengthy conversation or set of events, the witness will be entitled to read it aloud or to continue referring to it.

Your opponent is entitled to look at any document used to refresh memory, and to cross-examine on it. If the document covers more than what the witness read to refresh memory, and your opponent uses the document to cross-examine about other evidence in the document (that is, material that was not used to refresh memory), then you may require your opponent to tender the document.

IMPEACHING THE CREDIBILITY OF A WITNESS

Counsel are not permitted to attack the credibility of one witness through another witness.

ILLUSTRATION

You would not be permitted to ask Constable Bier: 'Ms Stojkowska would like to get the hotel into trouble, wouldn't she?' This is cross-examining Bier directly about Stojkowska's credibility.

For further details, see Chapter 6, 'Cross-examination'.

IMPEACHING A WITNESS WITH A PRIOR INCONSISTENT STATEMENT

Before you can cross-examine a witness about the content of a prior inconsistent statement, you must bring the occasion of the making of the statement to the witness's attention.

If the prior statement is in writing, you may produce the document or give enough particulars of it to satisfy the court that the witness was aware of the document you were referring to.

ILLUSTRATION

Assume that Stojkowska has given evidence in chief that she heard the cash register bell ring when Watkins was at the counter of the bottle shop.

Cross-examination of Stojkowska

Q You made a statement to police on 24 December last year?

A *Yes.*

Q Following your visit to the bottle shop that night?

A *Yes.*

Q The events of that evening were clear in your mind when you made the statement?

A *Yes.*

Q You told the police the truth in your statement?

A *Yes.*

Q You included everything that you thought was relevant?

A *Yes.*

Q In your statement, you did not tell the police about hearing the cash register bell ring, did you?

A *No.*

Where the witness denies making the prior statement or disputes the precise wording, you may produce the statement to the witness. You may call evidence about the making of the prior statement only where it is relevant to an issue in dispute or relevant to a fact relevant to the issue.

USING PRIOR CONSISTENT STATEMENTS

If your opponent seeks to impeach your witness with the suggestion that the witness's evidence is a recent invention, you will be permitted to use a prior consistent statement to rebut such a challenge.

MAKING USE OF THE PRINCIPLE OF JUDICIAL NOTICE

Once a fact has been established under the principle of judicial notice, there is no further need to prove it in evidence.

ILLUSTRATION

The court would take judicial notice of the fact that Christmas Eve is on 24 December, or that Boxing Day is the day after Christmas.

In argument, you would submit that when a witness gave evidence that she made a statement on Christmas Eve, the court should take judicial notice of the fact that Christmas Eve is 24 December.

TENDERING DOCUMENTS OR OTHER EXHIBITS

Documents must be tendered if they are to be considered as evidence by the court. Before they are tendered, they must be proved.

To prove a document, generally a witness must swear to having been the author of it or having sufficient knowledge of it, and affirm its accuracy. This is to establish its provenance.

Refer to the illustrations in Chapter 5 on examination in chief.

In order to tender a document, use the following phrase after having proved it: 'I tender that …' (not 'I seek to tender …').

It is also possible to use aids or documents that have been prepared to assist the court. For instance:

- setting out the blood analysis evidence from a murder scene in a schedule which identifies different blood types found in different places
- preparing graphs, charts or diagrams, provided that the information in them is established by the evidence. For example, charts illustrating money movements must first be proved by other documents.

COMPLYING WITH THE RULE IN *BROWNE V DUNN*

The rule in *Browne v Dunn* is a rule of fairness, intended to give the witness and your opponent an opportunity to deal with contradictory evidence. The rule applies to contradictory *facts*, not to inferences, conclusions or opinions.

If you intend to call evidence of significant facts that contradict the witness's story, then you must raise those facts with the witness during cross-examination.

For example, if a witness you are cross-examining gives evidence that your client was seen committing some act at a specific time and place, and your instructions are that the witness was not there and could not have seen such an act, then you must draw the witness's attention to that contradictory evidence in cross-examination.

If you intend to argue in closing that a witness has made an honest mistake, for example where a witness describes a conversation inconsistently with your evidence, you must confront the witness with your version of the conversation. However, you need not specifically suggest to the witness that he or she has made a mistake. Whether or not the witness has made a mistake is a conclusion, and a matter for the court to determine.

Failure to comply with the rule is not a proper basis for an objection. The effect of failure to comply with the rule is that the decision-maker is entitled to place less weight on the version of the story given by your witness. One reason for this may be an assumption that the evidence was invented by the witness in the witness box, as the contradictory facts of which he or she gave evidence were not put to the opposing witness in cross-examination.

In complying with the rule, it is not effective merely to say 'I put it to you that …', and especially not as a series of propositions at the end of the cross-examination. A more effective way is to consider the best time during the cross-examination to confront the witness with a contradictory proposition of fact.

This is best done when you have laid a foundation by establishing a significant basis for putting the opposite position. This is when the tribunal is most likely to consider that the contradictory facts are preferable, or that they at least create a realistic possibility.

ILLUSTRATION

Cross-examination of Stojkowska

Q You have applied for a liquor licence?

A Yes.

Q It has been objected to by the police?

A Yes.

Q And it has been objected to by the Royal Oak Hotel?

A Yes.

Q You would like to get your liquor licence despite these objections?

A Of course.

Q You know that if the hotel sells liquor to an intoxicated person, it may lose its liquor licence?

A Yes.

Q That would put you in a better position in your application?

A I suppose so.

Q If you help the police, that would also help you in your application?

A I don't know.

Q When you spoke to Daniel Jones last Christmas Eve, you had no reason to remember exactly what he said to you?

A No.

Q You did not take a note of what was said at the time?

A No.

Q That night you went to the police station?

A Yes.

Q No one asked you to go there?

A No.

Q You told the police what Mr Jones had said to you?

A Yes.

Q You did that to help yourself?

A No, I thought it was the right thing to do.

Q What you told the police is not what Jones said to you, is it?

A Yes it is.

This illustrates laying the foundation for putting the contradiction to Stojkowska at a time when the preliminary propositions provide the best basis for the court to doubt her evidence because of bias or self-interest.

The importance of dealing effectively with evidentiary issues and the diverse ways in which such issues can arise means that the law of evidence is an area with which advocates must be thoroughly familiar, regardless of the jurisdiction in which they practise.

4

OPENING ADDRESS

An opening address is:

- a simple, narrative outline of your case
- consistent with your case theory
- told as a persuasive story
- directed to a specific legal result
- without argument.

An opening is a powerful forensic tool because it is the first presentation of your case to the decision-maker.

You should use an opening address whenever possible, whether appearing for the party that bears the onus of proof—that is, prosecution or plaintiff—or for the defendant.

Traditionally in criminal cases, the defence opened its own case at the close of the prosecution case. Since the 1990s, the practice has developed of allowing the defence to open its case at the end of the prosecution opening.

The law and practice vary from state to state. In Victoria, Section 13 of the *Crimes (Criminal Trials) Act 1999* requires the defence to 'respond' to the prosecutor's opening in accordance with Section 7(2), that is, to identify 'the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken'.

It is essential for defence counsel to avail themselves of the opportunity to use this powerful forensic tool, and to open before the prosecution begins its examination in chief. This will:

- allow the jury's attention to be refocused to the defence case before the prosecution evidence is led, and
- avoid having to regain lost ground.

Knowing the defence case also helps the judge to make evidentiary and other rulings in the trial. In civil cases, the defence position is better known from pleadings. Nevertheless, it is an advantage to open immediately after the plaintiff's opening, for the same reasons as in a criminal case.

AN OUTLINE OF YOUR CASE

The opening must be a relatively brief and concise outline of your case.

It should identify the essential facts of the story.

ILLUSTRATION

The prosecution opening would include these essential facts:

- The police were on duty in their car.
- They saw Watkins stumble across Wide Street to the door of bottle shop.
- Watkins paused, then entered the bottle shop.
- Watkins bumped into Stojkowska on his way to the counter.
- She could smell alcohol on him.
- The police saw Watkins approach the counter and have a conversation with Jones.
- Watkins then left with a bottle of sherry in a paper bag.
- Watkins was arrested by police on the street.
- When they arrested him, they saw clear signs of intoxication.
- After Watkins' arrest, Stojkowska had a conversation with Jones.
- Jones admitted to her that he sold alcohol to Watkins.
- Jones told the police that he did not remember selling anything to Watkins.

An opening by the party going first is different from an opening by the defence.

A defendant's advocate should not repeat the uncontested facts in the prosecution's or plaintiff's opening, which the court will have just heard. There is no need to set the scene and identify the actors already mentioned.

A defence opening is better made as a positive story, based on the defence's realistic alternative theory focusing on the facts that support it.

In a criminal case, it is useful to bring out the good character of the accused as early as possible.

ILLUSTRATION

The defence opening might be as follows:

> 'Daniel Jones has been a barman for many years and has never been convicted of any criminal offence. He has a good reputation in the hospitality industry.
>
> On the busy Christmas Eve last year, he was serving many customers. He recalls seeing Watkins briefly but does not recall speaking to him or serving him. He denies making the comment that Maria Stojkowska attributes to him. If he did sell the bottle of sherry to Watkins, he did not know that Watkins was intoxicated. He would not have done so had he known.'

It may be appropriate for the defence to indicate in the opening that Watkins' intoxication is not contested.

The opening may include a brief summary of your position in relation to the issues in the case; for example, it may be appropriate for the defence to indicate that it does not contest one of the elements of the offence.

It is not appropriate for the defence to make positive assertions that are inconsistent with the client's instructions. So while the defence may wish to concede some facts—that is, to state that some of the facts are not contested, or that no issue is taken with one of the elements of the offence—it would not be appropriate for the defence to assert that Watkins was drunk or that there was a supply of alcohol.

CONSISTENT WITH YOUR CASE THEORY

As noted in Chapter 2, 'Preparation and Analysis', the opening is performed first, but is prepared last. Before you prepare the opening, you will have prepared:

- the case theory
- the arguments in support of it
- the final address
- the order, scope and emphasis of evidence in chief, and
- the direction of cross-examination.

This approach will enable you to prepare an effective opening, which will set the scene for your case at trial.

TOLD AS A PERSUASIVE STORY

An opening is an exercise in storytelling.

A good story will:

- be well-structured
- engage the interest of the listener by bringing people, places and events to life
- be told simply
- be communicated clearly
- be realistic and not overstated
- make appropriate use of visual aids.

The opening delivered to a judge alone may differ from an opening delivered to a jury. The differences may be about legal principles or issues, but as a fact-finder the judge is 'just another juror'.

THE STORY WILL BE WELL-STRUCTURED

To be persuasive, the opening should be structured so that the story can be easily understood and remembered by the decision-maker.

A structured narrative of events is much easier to understand and remember than a list of facts, or merely a summary of each witness's statement.

The structure of your opening address must:

- apply the principle of primacy (see Chapter 11, 'Communication'), and
- relate to the legal framework of the case.

Start your opening with the story of what happened. That is what the judge or jury wants to hear first. Do not start by discussing legal principles or issues in a vacuum.

How the story is organised and told is ultimately a matter for you to choose in each case. There is no right way to do it, but it would be wrong not to consider how to do it in the most effective way.

In a complex case, in which many factual and legal issues must be communicated in an opening address, the advocate must be conscious of the 'communication bottleneck', where the quantity and density

of information make it difficult to be absorbed and processed by the decision-maker.[1]

This bottleneck occurs because lawyers have had the advantage of thorough preparation, which the judge or the jury does not have. They are truly the 'first-time listeners'. The risk for the advocate who delivers the opening address lies in attempting to provide too much complex information to the decision-maker too quickly. As a result, it can be difficult for the decision-maker to absorb and understand the opening.

The approach sometimes adopted of presenting the judge with a densely written opening accompanied by many volumes of materials is undesirable.

While the fundamental principles of good storytelling still apply, care must be taken in complex cases to ensure that the simple significant narrative of the case is told first, before providing more detail. In this way, the judge or jury will hear and absorb the story progressively, adding the more complex elements to the simple story that has already been told, understood and remembered.

Especially in complex cases, much of the detail is not necessary in the opening; it is more important first to capture the story of the case as a whole. How much detail has to be included is a matter for the advocate's judgment.

A useful exercise is for the advocate to consider how to outline the case generally to a lay person in a few minutes. Such an exercise might start with the advocate formulating the initial simple story by beginning, 'This case is about …'.

A different approach applies in a simpler case such as *DPP v Jones*.

ILLUSTRATION

Here are some examples of how the prosecution might start its opening.

Starting with Daniel Jones

On the evening of 24 December last year, the defendant was working as a barman at the Royal Oak Hotel. While he was attending the counter of the bottle shop, Walter Watkins entered the store. Watkins bumped into another customer. The defendant saw Watkins, and when Watkins approached the counter, the two had a conversation. Jones sold Watkins a bottle of sherry, knowing that he was intoxicated. Watkins then left the store carrying a bottle of Mildara Cream

[1] Justice David Byrne, Supreme Court of Victoria.

Sherry. The police had been watching Watkins and Jones from their car, parked on the other side of Jackson Avenue. They arrested Watkins, who was obviously intoxicated.

Starting with Watkins

One the evening of 24 December last year, Walter Watkins was obviously drunk. He staggered across Wide Street towards the Royal Oak Hotel, and had difficulty making it to the other side. When he reached the kerb, he stumbled and almost fell. He paused and then entered the bottle shop. He bumped into another customer, then approached the counter and had a conversation with Jones. Jones sold him a bottle of sherry, knowing that Watkins was intoxicated. Watkins then left with the bottle of sherry from the bottle shop.

Starting with police

On the evening of 24 December last year, Constables Bier and Fisher were on duty, parked on Jackson Avenue opposite the Royal Oak Hotel. Constable Bier saw Walter Watkins crossing Wide Street, staggering and stumbling towards the Royal Oak Hotel. Watkins paused and entered the bottle shop. He spoke to Jones, the barman, who sold him a bottle of sherry, knowing that Watkins was intoxicated.

Starting with Stojkowska

On the evening of 24 December last year, Maria Stojkowska was selecting wine in the bottle shop of the Royal Oak Hotel. She saw Walter Watkins enter the bottle shop. He bumped into her on his way to the counter. He smelt strongly of alcohol. She noticed him approaching the counter and speaking to the defendant, whom she knew. She later saw the police arrest Watkins outside the bottle shop.

While each illustration starts with a narrative from the perspective of one party to the action, you will note that each narrative has primacy, location and action, and introduces other characters as the narrative unfolds.

To gain the impact of immediacy, avoid introductory formality and padding.

ILLUSTRATION

These types of introductory formalities should be avoided in opening:

- 'Good morning, members of the jury.'
- 'The accused is charged with …'
- 'It is my function to open the case for the prosecution.'
- 'I will outline the facts but it is the witnesses' evidence that matters.'
- 'As a matter of law, the elements of the offence are …'
- 'What I say is subject to Her Honour's directions on the law.'

The outline of your case will include a brief summary of your position on the issues in the case, stated at the end of the opening.

Where it is appropriate to identify the details of the charge, or the role of the jury, these are better left until later in the opening, so that they can be understood in the context of the story. The legal issues in the case will make better sense once the narrative has been told.

It is unnecessary to refer to the elements of the offence before a judge, unless the offence is an unusual one.

In a criminal trial, the judge will probably have explained the jury's role to them.

ILLUSTRATION

The prosecution might include a reference to the law at the end of the opening:

> 'From these circumstances, you will be satisfied beyond reasonable doubt that Watkins was intoxicated, that the defendant supplied him with alcohol, and that at the time, the defendant knew that Watkins was intoxicated.'

In the defence opening, after referring to the facts of the case from the defence perspective, the defence position about the issues in the case might be:

> 'If Watkins was intoxicated, and if Mr Jones supplied him with the sherry, which he does not remember, Mr Jones might not have realised that Watkins was intoxicated.'

There is a significant risk that Jones did not realise that Watkins was intoxicated.

A prepared strong finish is also important. An effective approach is to relate the story to the elements of the offence in a positive way, as demonstrated in the illustration above.

THE STORY WILL ENGAGE THE INTEREST OF THE LISTENER

The listener should be able to visualise the events as the story is being told. To bring the people, places and events to life, the advocate must first visualise the story.

A good story will answer the questions:

- Who was involved?
- What happened?
- Where and when did it happen?
- Why did it happen?

You should always personalise your client and witnesses, referring to them by their names. You should refer to opposing witnesses in a more objective way.

ILLUSTRATION

Personalise your client

For the prosecution, you would refer to 'Constable Bier', not 'the police'.

For the defence, you would refer to 'Daniel Jones', not 'the defendant'.

THE STORY WILL BE TOLD SIMPLY

To make the story simple, include the important facts but do not give the whole detail of the case in the opening.

Your opening address is designed to work with evidence in chief, during which you will lead all the detail of your story from the witnesses.

By leaving out some details from your opening, and then leading them in evidence in chief, you are progressively informing the listener. This will have the effect of:

- maintaining the interest of the listener in the story during evidence in chief, and
- creating the impression of corroborating your opening address, as each witness gives evidence in chief in detail, which fits the more general story told in the opening.

Limiting the detail in your opening will also have the benefit of avoiding potential discrepancies between what is said in opening and the evidence given during examination in chief.

ILLUSTRATION

In opening for the prosecution about Stojkowska's evidence, you might include:

'Watkins bumped into Ms Stojkowska and she concluded that Watkins was drunk.'

Leave out detail such as:

'Stojkowska was very close to Watkins and when he bumped into her, he smelt strongly of alcohol.'

In opening for the prosecution about what the police saw Watkins do, you might include:

'Constable Bier saw Watkins stumble across the intersection, pause and enter the Royal Oak Hotel bottle shop. He saw Watkins speak to the defendant and leave.'

Leave out detail such as:

'Constable Bier saw Watkins first through the rear view mirror and then through the side window of the police car.'

THE STORY WILL BE COMMUNICATED CLEARLY

For maximum effect, your opening should be a good piece of communication. That is, it should cater to the needs of the listener.

It must be presented in a manner and at a pace that enables the listener to hear, understand and absorb the story.

You should be sufficiently familiar with the story to present it without notes, or with limited use of notes, so that you can engage the listeners when you speak by talking to them instead of reading.

You should use simple language. Simple words and phrases have an immediate impact on the listener because they make it easy for the listener to understand, visualise and remember the story. Simple language is effective in creating 'word pictures'.

ILLUSTRATION

Avoid complicated and superfluous language and sentences, such as:

> 'On the evening in question, the police were performing their duties in a police vehicle parked in the vicinity of the corner of Wide Street and Jackson Avenue. They were seated in the stationary vehicle from which they had the ability to observe activities inside the bottle shop of the Royal Oak Hotel and the surrounding streets. From this location, Constable Bier made observations of Watkins' activities both outside and inside the bottle shop.'

This can be more simply expressed as follows:

> 'On the evening of 24 December last year, the police were on duty in their police car, parked on Jackson Avenue, opposite the Royal Oak Hotel. From there, Constable Bier saw Walter Watkins attempting to cross Wide Street, and entering the hotel bottle shop.'

THE STORY WILL BE REALISTIC AND NOT OVERSTATED

Another factor in the power of the opening narrative is that the listener tends to measure other versions of the story against the one first heard.

A realistic story clearly told leaves a strong impression on the listener.

Avoid overstating or exaggerating the evidence that will be given. This may damage your credibility because the detail in the evidence, once given by the witness, will not permit of overstatement or exaggeration.

ILLUSTRATION

It would be overstating or exaggerating the evidence to say in opening: 'The police had a clear view into the bottle shop.'

The police could see only the heads and shoulders of the defendant and Watkins. Their view was partially blocked by advertising on the hotel window.

An understatement is often more effective, as it emphasises the strength of the evidence.

ILLUSTRATION

The defence opening about Stojkowska's interest in the case might be properly understated as: 'Ms Stojkowska, who had her own interests at heart, spoke to …'

THE STORY WILL BE ENHANCED BY THE USE OF VISUAL AIDS

A picture is worth a thousand words. Use plans, diagrams, exhibits and other visual aids during the opening to explain events.

Relevant documents and other physical evidence can be used in an opening address with your opponent's consent or by leave of the court. You must be able to prove the documents or exhibits in evidence.

Take time to show and explain the visual aid to the listener before describing the action in your narrative.

ILLUSTRATION

Using and/or tendering an exhibit in opening address

Prosecution:	Your Honour, with my learned friend's consent, may I use (or tender) a plan of the hotel and surrounding streets?
Judge:	Does the defence consent to that?
Defence:	Yes, Your Honour, the defence consents to the document being used (or tendered).

[Prosecution hands up the plan to the court officer, and a copy to opponent.]

Judge:	That will be Exhibit 1, plan of Royal Oak Hotel.
Prosecution:	Could the jury be given copies of Exhibit 1?
Judge:	Yes.

[Prosecution hands copies to the court officer, to distribute to the jury.]

Prosecution:	[Holding up the plan to jury and indicating locations] You can see

> the intersection of Wide Street and Jackson Avenue with the Royal Oak Hotel and its bottle shop in the corner. There is the counter. There is the door. The police car was parked here. The police could see into the bottle shop through a plate glass window that was partly covered by advertising ...
>
> The prosecutor would then proceed to give a narrative of the events of the evening of 24 December last year.

DIRECTED TO A SPECIFIC LEGAL RESULT

The story should be organised and told in a way that supports the conclusions relating to the elements of the offence.

It is not enough to state that a witness will give evidence to establish an element of an offence or claim. Let the narrative do the work.

ILLUSTRATION

It is not enough to state in an opening:

- 'Evidence will be given that there was a supply' or
- 'Evidence will be given that Watkins was intoxicated.'

In the prosecution opening to support the conclusion that there was a 'supply', you might relate the circumstantial facts:

> 'Constable Bier saw Mr Watkins enter the bottle shop, walk to the counter and speak to the barman. Watkins then left the shop with a bottle of sherry, of the kind kept behind the counter, in a brown paper bag, and said "I tricked Danny again!"'

In the prosecution opening to support the conclusion that Watkins was intoxicated, you can describe the observations of the police:

> 'The police saw Watkins staggering and stumbling. When they approached him, they noticed that Watkins smelt strongly of alcohol, had bloodshot eyes, and was slurring his words and singing in a loud and tuneless fashion.'

NOT ARGUMENTATIVE

The only rule of law that applies to openings is that argument is not permitted. This is because there is no point in argument before the evidence is heard.

If told as a good story, an opening can be persuasive without being argumentative. It is permissible and desirable at the end of the opening

for the prosecutor to identify the elements of the offence intended to be proved by the facts outlined. It will be desirable for the defence to identify the inadequacy of the prosecution case. Both of these things must be done without argument.

ILLUSTRATION

The prosecutor may say at the end:

> 'From those facts, you will be satisfied beyond reasonable doubt that Watkins was intoxicated and that Jones supplied him with the bottle of sherry, knowing that Watkins was intoxicated.'

The defence may say at the end:

> 'When you have heard all the evidence, you will see that if Watkins was intoxicated, and if Jones supplied the bottle to him, there is a real possibility that Jones did not notice the signs and did not know that Watkins was intoxicated.'

You descend into argument when you give reasons as to:

- why one witness is preferable to another
- why one version of events is preferable to another
- what conclusions should be drawn from the evidence, and why.

ILLUSTRATION

Argument as to why one witness is preferable to another

For instance, in a defence opening, the narrative form would be: 'Mr Jones did not admit to Ms Stojkowska that he supplied Watkins with the bottle of sherry.'

You would descend into argument if you continued: 'The evidence of Daniel Jones will be more reliable than that of Ms Stojkowska because Ms Stojkowska has an interest in the outcome of this case, owing to the objections that the police and the Royal Oak Hotel have made to her liquor licence application.'

Argument as to why one version of events is preferable to another, or about what conclusions should be drawn from the evidence, and why

For instance, the narrative form would be: 'When Mr Watkins left the bottle shop, he had with him a bottle of Mildara Cream Sherry in a brown paper bag. As you can see from the diagram, the fortified wines were kept behind the counter, and the brown paper bags were on the counter.'

It would be argument to continue: 'Watkins must have obtained the bottle of sherry from the defendant. The police never lost sight of Watkins in the store and did not see Watkins walk around to that side of the bar to get a bottle for himself.'

The opening is a powerful forensic tool because it provides an opportunity to anticipate and defuse the opposing case theory. That is not the same as presenting an argument.

ILLUSTRATION

In the opening, the prosecutor could mention the fact that Watkins paused at the door of the bottle shop. For instance:

'Watkins approached the bottle shop. When he reached the door, he paused, and entered.'

By referring to the pause, the prosecutor recognises that the pause would be an element in the defence case theory that Watkins composed himself so as not to appear intoxicated to Jones. Here, the fact of the pause is mentioned in passing and without detail as to how long Watkins paused. This removes the element of surprise for a fact the defence is likely to bring out.

A well-prepared and skilfully delivered opening by the prosecution or the plaintiff creates a positive, powerful story and impressions at the outset. It is the first telling of a story to a 'first-time listener'.

A good opening by the defence, delivered at the beginning of the trial, is effective in introducing parts of the story important to the defence and in refocusing the decision-maker's attention to aspects that will help the defence case.

The requirement to open is an opportunity that should never be wasted.

CHECKLIST

- Avoid argument.
- Structure the story.
- Try to tell the simple story of your case without notes.
- If you need notes, they should be triggers, not narrative to be read out.
- Maintain eye contact and involve the listener.
- Deliver slowly and punctuate so the listener can understand and remember the story.
- Use simple, clear language to create imagery.
- Tell the story before referring to a legal structure.
- Set the scene before describing the action.
- Use visual aids.
- Avoid unnecessary formality.
- Avoid unnecessary repetition.

5

EXAMINATION IN CHIEF AND RE-EXAMINATION

Examination in chief is:

- the detailed story of the case
- told by the witnesses
- in answer to non-leading questions
- based on relevant and admissible evidence
- organised and controlled by the advocate
- persuasively presented.

Re-examination is:

- clarification or expansion
- by the advocate who called the witness
- limited to evidence raised in cross-examination
- by non-leading questions.

The story told in examination in chief is usually the foundation for the party's case. It is the basis of the case theory and the arguments to support it.

To be effective, it requires rigorous preparation and skilful presentation.

Examination in chief should not be underrated or thought of as a mere prompting of the witnesses. You should prepare examination in chief to ensure that you maintain control of the witness, so that the story is told as planned by you in a relevant and admissible way. The witness is the medium for conveying to the decision-maker information of your choosing in an order of your choosing.

The techniques of examination in chief may seem difficult and unnatural at first, because examination in chief is not conducted like a conversation. Once the techniques are practised, however, they become second nature.

Effective preparation for examination in chief requires:

- mastery of the evidence that the witness can give, including the documents to which the witness will make reference
- development of a structure, and
- preparation for performance.

MASTERY OF THE EVIDENCE

Mastery of factual materials requires you to:

- confer with the witnesses
- prepare chronologies
- know the story of your case as if it were your own story, in all its detail, colour and emotive content
- visit the scene and examine documents and exhibits
- visualise the story from the perspective of each witness you are going to lead.

CONFERENCES

The purpose of the conference is to learn, to teach and to build confidence in both yourself and the witness.

At a conference you should:

- clarify ambiguities or inconsistencies in instructions or accounts of events
- explain to the witness:
  - the questioning process for examination in chief
  - the prohibition on leading questions
  - the need to address answers to the decision-maker
  - the process of re-examination
  - the prohibition against discussion when the witness is under cross-examination
  - behaviour in court, and form of address for judge, jury and counsel
- understand and rehearse any demonstrations you may ask the witness to give

- explain the structure that you will adopt in leading the evidence
- explain to character witnesses the nature and limitations of character evidence at trial.

See also special aspects of conferences for expert witnesses below, and Chapter 8, 'Plea in Mitigation'.

FORM OF QUESTIONS

Leading questions about contested facts are not permitted.

Their use also constitutes ineffective advocacy, because the answers lack probative value when given as a result of suggestions by the advocate.

A leading question is one that either:

- directly or by selection of subject matter suggests the answer, or
- assumes a fact not yet established.

ILLUSTRATION

Leading questions which directly or by selection of subject matter suggest the answer

In examination in chief of Stojkowska:

- Were you selecting wines?
- Did a man bump into you?
- Did you smell alcohol on him?

A leading question which assumes a fact not yet established

In examination in chief of Constable Bier:

- Where were you seated in the car when you first saw Watkins?
  (if it has not yet been established that Constable Bier was seated in a car)
- What colour was his t-shirt?
  (if his wearing a t-shirt has not been established first)

Advocates are able to ask leading questions because they know the answers. It would be impossible to ask leading questions and get the correct answers without that knowledge. Advocates are tempted to ask leading questions to get the answers they want.

To avoid asking leading questions:

- Use inquiring words such as 'when', 'where', 'what', 'why' and 'how'.

- Avoid words that require you to state the subject matter, such as 'did', 'was' and 'is'.

One exception may be if the question is general, for example 'Did you go *anywhere*?' or 'Was there *anyone* in the room?', provided those questions do not touch the real issue in the case.

ILLUSTRATION

Non-leading questions that would elicit the answers required in the previous illustrations

Examination in chief of Stojkowska:

- Instead of 'Were you selecting wines?', ask:
  'What were you doing in the bottle shop?'
  (after she gives evidence that she was in the bottle shop)
- Instead of 'Did a man bump into you?', ask:
  'After the man came in the door, what did he do?'
  (after she gives evidence that she saw Watkins come in the door)
- Instead of 'Did you smell any alcohol on him?', ask:
  'When he bumped into you, did you notice anything about him?'
  (after she gives evidence about Watkins bumping into her)

Examination in chief of Constable Bier:

- Instead of 'Where were you seated in the car when you first saw Watkins?', ask:
  'Where were you on duty that night?'
  (once he has said that he was on duty)
  A I was in a police car.
  Q Where were you in the car?
  A I was sitting in the driver's seat.
- Instead of 'What colour was his t-shirt?', ask:
  Q Was Watkins wearing anything on the upper part of his body?
  A A t-shirt.
  Q What colour was it?

To identify the contested facts:

- First, examine the pleadings or elements and particulars of the offence.
- Next, examine and compare witness statements and other accounts (including affidavits, records of interview, depositions, etc.).
- Consider what issues will be contested and what the opposing case theories may be.
- If necessary, talk to your opponent to clarify what may or may not be in issue.

Some non-leading questions may be useful even in the non-contentious areas, in order to:

- enable the story to flow more smoothly from the non-contentious into the contentious areas, so the transition is not sudden, and
- prepare the witness for the non-leading form of questions in contested areas.

Leading questions are permitted to get your witness to deny specific allegations or to contradict other evidence.

ILLUSTRATION

Leading questions permitted to obtain denials of allegations

Q (to Jones): Did you make the statement Ms Stojkowska attributes to you?

Q (to Stojkowska): Did you falsely invent evidence to embarrass the hotel?

This should be done early, particularly in the evidence in chief of an accused, as it allows the listener to appreciate the story in light of the denials.

ILLUSTRATION

Examination in chief of Jones

Q Did you know that Watkins was drunk that night?

A Definitely not.

Q Did you supply him with any alcohol?

A I don't recall, but I wouldn't have if I'd known he was drunk.

STRUCTURE

Structure is a matter for the advocate, not the witness.

Avoid merely following the structure in a written statement prepared by someone else, because this may not have been done with a view to the order in which the story should be told in court.

Examination in chief should be structured by the advocate to allow the witness to tell a persuasive story. You should ask yourself:

- How will the witness best recall the events?
- How will the decision-maker best understand the story?
- How will the decision-maker best remember the story?
- How will the decision-maker's interest be maintained?

To achieve these purposes, you should use the following techniques:

- Evidence should follow a chronological or other logical order.
- The story should progressively inform the listener.
- Where more than one witness tells the same story or part of it, decide the order of witnesses—usually strongest and most detailed witness first.
- The story must have sufficient detail to be credible and persuasive. A detailed story is more realistic and persuasive than a vague and generalised one.

PROVING DOCUMENTS AND TENDERING EXHIBITS THROUGH THE WITNESS

It is wise to show your opponent any document you propose to tender. This will allow you to resolve any possible objection before evidence is given.

Provide enough copies for your opponent and the court, judge and jury, to be handed out when the exhibit is marked.

To prove a document through a witness, you must

- show the document to the witness
- ask the witness to identify the document, its author, and when and how it was prepared, and if possible confirm its accuracy, and
- tender the document.

Once a document is tendered, you may question the witness about it and have the witness use it during evidence.

DESCRIBING THE SCENE AND THE EVENTS

Describe the scene of an event, preferably by using visual aids, before describing the action.

Use a plan by proving it through the witness.

ILLUSTRATION

Evidence in chief of Constable Bier

Q On the evening of 24 December last year, where were you?

A I was on duty.

Q Where were you on duty?

A *In a police car, parked on Jackson Avenue, near Wide Street.*

Q Was there anyone else in the police car?

A *Yes, I was with Constable Fisher.*

Q Please look at this document.

[Hand plan to the Associate/Clerk to be given to the witness.]

Q Could you identify this document?

A *That is a plan of the street where we were parked.*

Q Who prepared that plan?

A *I did.*

Q When did you do that?

A *On 25 December last year.*

Q What do you say about its accuracy?

A *It is not to scale but it shows the streets and other features in the right proportions.*

Q I tender that, Your Honour.

Court: That will be Exhibit 1, plan of Jackson Avenue and Wide Street.

When describing the scene, ensure that the witness describes and shows the relevant features such as:

- the place
- the time
- the layout
- who was present and their positions
- the state of lighting, natural or artificial
- distances, if necessary
- other relevant structures and objects.

It is helpful to have enlarged copies of plans or other diagrams so that they can be seen by others when the witness is using them.

ILLUSTRATION

Examination in chief of Constable Bier

Q Do you have the plan in front of you?

A *Yes.*

Q I will take you through that plan and ask you to describe the features marked on it. Please hold the plan up for His Honour and the jury to see and indicate.

A *Yes.*

Q	Where was your police car?
A	*It was parked here on Jackson Avenue. [Indicating]*
Q	How far was it from Wide Street?
A	*It was about 10 to 12 metres from the corner.*
Q	How wide is Wide Street?
A	*It is about 6 to 8 metres across.*
Q	Where were you in the car?
A	*Sitting in the driver's seat.*
Q	As you sat in the car, which way were you facing?
A	*South, down Jackson Avenue.*
Q	What was the state of the natural light?
A	*There was little natural light.*
Q	What was the state of any artificial light?
A	*There were two street lights here and here, which gave us a clear view of the street. There were also traffic lights on each corner of Wide Street and Jackson Avenue.*
Q	Using the plan, would you describe for His Honour the layout of the bottle shop?
A	*Through the door of the bottle shop there were wine racks left and right, followed by the counter. On the counter was a cash register and brown paper bags. Behind the counter were the fortified wines. The bar and lounge are located here.*
Q	What was your view of the bottle shop from the police car?
A	*I could see into the bottle shop through the plate glass window, which made up most of the eastern wall.*
Q	How much could you see through the plate glass window?
A	*I could see people's heads and shoulders inside the bottle shop above the displays and advertising on the window.*
Q	From where you were sitting in the police car, how far was it to the counter of the bottle shop?
A	*It was about 8 to 10 metres.*

Once the plan has been tendered and the scene described, the action which takes place is easier to understand.

ILLUSTRATION

Examination in chief of Constable Bier

Q As you sat in the car, did you see anyone in relation to this case?

A Yes.

Q Who did you see?

A I saw Walter Watkins.

Q How did you first see him?

A I first saw him through the rear view mirror.

Q Where was he when you first saw him?

A He was standing on the north kerb of Wide Street.

Q Would you use the plan to show the court where he was?

A Yes, he was here. [Indicating]

Q What did you see him do?

A He started walking across Wide Street.

Q How was he walking?

A He was staggering and had great difficulty making it to the other side.

Q How were you looking at him at this time?

A I had turned around and I was looking at him through the rear window of the police car.

Q What happened after he crossed the road?

A He stumbled and almost fell at the southern kerb of Wide Street.

DESCRIBING CONVERSATIONS

Where you want a witness to recount a conversation, set the scene by having the witness describe the place, the time, the circumstances and who was present.

Ensure that the conversation is recounted in detail by having the witness use the actual words of it, and not a summary of the meaning of the conversation. If a witness does not recall the precise words, then you should:

- seek permission to refresh the witness's memory if an appropriate document is available (see Chapter 3, 'Evidence in Action'), or
- have the witness give the substance of the conversation.

ILLUSTRATION

Examination in chief of Stojkowska

Q When the police left the bottle shop, where were you standing?

A I was standing near the door of the bottle shop.

Q Immediately after they left, did you go anywhere?

A I walked over to the bar.

Q What did you do at the bar?

A I spoke to Daniel Jones.

Q What was said?

A Well, we spoke about the police arresting the old drunk, and Daniel told me how sorry he felt for the old drunk.

Q Ms Stojkowska, I want to take you through that conversation in detail. Who spoke first?

A I did.

Q What did you say?

A I said to him, 'Just as well the police arrested that old drunk; I wonder what they will do with the bottle they took from him—probably drink it for Christmas.'

Q What did he say?

A He said 'The poor old bugger. I suppose I shouldn't have sold him the grog if he was so drunk.'

Q Was anything else said?

A Yes. Then he said, 'I feel sorry for him. I hope this doesn't blow the boss's licence.'

GETTING THE COMPLETE STORY FROM THE WITNESS

Ensure that the witness gives a complete account of his or her version of events. If you don't get all of the evidence out, then:

- you will weaken your case or fail to prove an element of your case, and
- the cross-examiner may use omitted evidence effectively as a surprise or use its omission to attack the honesty or accuracy of the witness.

ILLUSTRATION

Ensure that during the examination in chief of Constable Bier you lead the fact that Constable Bier saw Watkins pause for a few moments before entering the store, even if this evidence does not help the prosecution case.

Q What happened after he crossed the road?

A He stumbled and almost fell at the southern kerb of Wide Street.

Q And then?

A He walked into the bottle shop.

Q Did he do anything before he walked in?

A He paused at the door.

Q How long did he pause for?

A For a few moments.

EXAMINATION IN CHIEF OF EXPERT WITNESSES

Generally, the same principles about leading evidence in chief will apply to the examination of an expert witness. However, the evidence in chief of an expert may also include the following:

- the witness's qualifications, experience, and special expertise.

  Particular focus should be on qualifications and experience relevant to the issues in the case.
- information provided to the expert on which the expert's opinion is based
- methodology used by the expert
- the process of reasoning leading to the opinion
- reasons why the opposing opinion is incorrect.

In preparing to lead evidence in chief from an expert witness, you must consider:

- whether the written report will be tendered instead of evidence in chief;

  In criminal cases, particularly jury trials, the expert will not be permitted to present a report but will instead be required to give oral evidence of his or her opinion. In civil cases before a judge alone, the report is usually tendered, and sometimes stands in place of evidence in chief, with further oral evidence permitted only to correct, explain or supplement the report;

- whether you will anticipate problems to be raised in cross-examination and elicit them during evidence in chief;
- whether visual aids may enhance communication.

  Experts should be encouraged to use aids to communication with which they are most at ease.

To enable the decision-maker to understand and accept the expert evidence, it is necessary to inform and educate the decision-maker, and therefore the structure of the evidence should be such as to help in that process.

ILLUSTRATION

Qualifying an expert witness

When qualifying a witness as an expert, you might ask questions during evidence in chief such as:

- 'What is your occupation?'
- 'How long have you been an accountant?'
- 'What educational qualifications do you have?'
- 'What areas of accounting do you practise in?'
- 'What have you published in that area?'
- 'What is your experience in valuing similar businesses?'

ILLUSTRATION

Tendering and supplementing an expert report in a civil case

When tendering an expert report in a civil case, you may need to allow the witness to supplement or correct the report. For example, you may ask:

- 'Is there anything you wish to correct in the report?'

Alternatively, if no changes are needed, you might ask 'Is that document true and correct?'

- 'I want to take you to some parts of your report …'
- 'Look at paragraph 10. What do you mean by these words … ?'
- 'In paragraph 12 you refer to a valuation method you used. What is involved in that method?'
- 'You have seen that in Mr Smith's report, he chose a different method. Why should the method you chose be appropriate in this case?'

The expert in the witness box must also be a good communicator, although he or she is not the persuader. It is your role to ensure that the expert communicates his or her evidence effectively to the court. Effective communication by the expert witness involves:

- use of simple non-technical language
- the ability to explain technical terms, methodology and ideas to lay people
- good eye contact and delivery
- answering questions directly, simply and clearly
- not being defensive in cross-examination.

PERFORMANCE PREPARATION

When preparing for performance, you should:

- decide on the order in which you will call witnesses
- break down the story into individual, single facts
- list those facts in the order you would like them to be told.

This creates a checklist, which helps to ensure that no facts are left out by the witness during evidence in chief.

Writing out questions is not helpful because if the witness does not give you the full answer you want, your next prepared question may be irrelevant or objectionable.

Consider the questions that would elicit those specific facts as answers, and ensure that your checklist includes only facts, not opinions, arguments or other inadmissible material.

ILLUSTRATION

In the left column is a sample list of facts to be elicited from Stojkowska.

The non-leading questions to elicit the answers follow.

Fact	Question	Answer
In bottle shop	Where were you on 24 December last year at about 8.45 p.m.?	I was in the bottle shop.
Royal Oak Hotel	Where was the bottle shop?	In the Royal Oak Hotel.
selecting wine	What were you doing there?	I was trying to find a nice bottle of wine.
from specials stand	Where were you selecting wine from?	From the specials stand.
near the window	Where is the specials stand located?	Near the window.

saw man enter shop	While you were selecting wine, did you see anyone in the shop in relation to this case?	Yes, I saw a man come into the bottle shop.
bumped into me	What did he do when he entered the shop?	He bumped into me.
didn't apologise	Was anything said?	No. He didn't apologise, which I thought was very rude.
strong smell of alcohol	As he bumped into you, did you notice anything about him?	Yes. He had a strong smell of alcohol.
he approached the counter	After he bumped into you, did he go anywhere?	He went to the counter.
had a conversation	What did he do when he approached the counter?	He had a conversation with the barman.
with Daniel Jones	Who was the barman?	Daniel Jones.

PERFORMING EXAMINATION IN CHIEF

When you are performing examination in chief, you should:

- focus on the witness, and let him or her tell a story—without relinquishing control of the process;
- although you know the story, ask questions with the curiosity of someone who wants to know. This avoids flatness and will encourage the listener's attention;
- use simple language;
- ask short, one-proposition questions;
- focus on facts, not on conclusions;
- be aware of the decision-maker, and of how the decision-maker is responding to the evidence.

PIGGYBACK QUESTIONS

It is permissible to use part of a witness's answer to provide focus for the next question by reference to time, place or action.

The 'piggyback question' repeats in the new question useful facts already stated by the witness. This connects the facts between the prior answer and the current question, and further reinforces the story. An effective 'piggyback question' does not simply repeat facts.

ILLUSTRATION

Evidence in chief of Maria Stojkowska

Q What were you doing in the bottle shop?

A I was selecting wine.

Q While you were selecting wine, did you see anyone in relation to this case?

A Yes, the man who bumped into me.

Q As he bumped into you, did you notice anything about him?

This technique not only reinforces the fact of the bump, but also emphasises Stojkowska's opportunity of noticing something about Watkins while in close proximity to him.

COMMENTING ON ANSWERS

It is inappropriate to comment on a witness's answers using words such as 'okay', 'right', or 'I see'. This is usually done from force of habit, rather than as an intentional comment, but it is nevertheless objectionable. Some advocates have even commented 'great' or 'fantastic'.

Nor is it appropriate to thank witnesses for their answers.

Avoiding commentary will also help with the flow and continuity of the story in evidence.

INVOLVE THE LISTENER

It is natural for a witness to answer the person who is asking the question. You will need to get the witness to direct his or her answers to the decision-maker. (See the diagram in Chapter 11 on communication.) This can be achieved through the form of question, and also through your body language.

ILLUSTRATION

To involve the listener, you could turn or gesture with your hands towards the listener, to show the witness where to direct his or her answer.

When leading evidence from the police ask:

- Tell Her Honour (or the jury) what you saw in the shop?

Do not ask:

- Tell me what you saw in the shop?

FOCUSED QUESTIONS

Remain in control by using focused questions, but allow the witness to tell the story. Do not interrupt the witness's evidence if he or she continues with the account beyond your specific question. Using the checklist, make sure that the witness does not leave out significant detail.

If the witness is reliable and impressive, and you want to display this to the judge or jury, you may ask for a general description first without asking questions about each fact.

However, use questions such as 'What happened next?' sparingly.

GETTING THE ENTIRE STORY OUT

Listen to the answers, and check off answers on your checklist. Ensure that each fact on your checklist has been stated by the witness. With a vague witness, it may take several questions to do so.

If the witness gets ahead of you by providing more information than asked, then allow him or her to finish, provided the evidence is relevant and helpful.

Then return to your checklist to check what points the witness has covered ahead of you, and whether necessary evidence has been left out. Where evidence has been left out by the witness, take the witness back over the evidence and elicit those further facts.

ILLUSTRATION

Examination in chief of Constable Bier

Q When he entered the shop, what did you see him do?

A *I saw Watkins approach the counter and have a short conversation with the attendant, who I know now to be Daniel Jones. I didn't lose sight of either of them while Watkins was in the bottle shop. A short time later I saw Watkins emerge from the door of the bottle shop.*

Q Let me take you back to what you saw in the bottle shop. How much of Watkins and Jones could you see when Watkins approached the counter?

A *I could see Watkins' and Jones' heads and shoulders above the displays and advertising in the bottle shop window.*

If the witness cannot recall a fact you need, go back into a sequence which may help to prompt the witness's recollection of detail.

ILLUSTRATION

Examination in chief of Maria Stojkowska

Q After he bumped into you, did he go anywhere?

A Yes, I saw him leave the shop.

Q Let me take you back to the time when he bumped into you, and the time you saw him leave the shop. Did you see him do anything else?

A Oh yes. I saw him approach the counter and have a conversation with Daniel Jones.

Avoid unnecessarily complex and counter-productive questions.

ILLUSTRATION

Examination in chief of Constable Bier

Ask questions in the most direct way:

- Describe where the advertising was on the bottle shop window?
- Where did Watkins go after he left the bottle shop?

Do not ask:

- Can you describe whether there was anything on the bottle shop window?
- Are you able to recall where Watkins went after he left the bottle shop?

The complex questions should be avoided for two reasons:

- The correct answer to a question that begins with 'Are you able to recall …' is 'Yes' or 'No'. A pedantic witness may do that.
- The question that begins by asking whether a witness is able to recall or describe a fact suggests to the listener that her recollection or ability to describe is an issue. That is counter-productive.

HEADLINING

The use of headlining or topic phrases is helpful, particularly in the case of a lengthy story, in order to organise the story and concentrate the attention of the witness and the listener.

ILLUSTRATION

Examination in chief of Constable Bier

Q I want to take you back to what happened to Watkins after you spoke to him. What did you do with Watkins?

A I arrested him for being drunk and disorderly.

Q When you arrested him, where did you go?

A To the police station, where I lodged him in the cells.

Q After you lodged him in the cells, did you go anywhere.

A Yes, I returned to the Royal Oak Hotel.

Use evidence already given by other witnesses, if your witness was present in court, to direct the witness to a specific matter.

When leading evidence to contradict another witness, be specific and accurate about what the other witness said, then ask your witness to respond to that.

ILLUSTRATION

Examination in chief of Jones

Q You have heard Maria Stojkowska give evidence that when Watkins entered the bottle shop, he bumped into her. What do you say about that?

A No. I saw her bump into Watkins.

Have the witness use visual aids, such as plans or other exhibits, when describing events. Ensure that the witness is familiar with the document before you begin asking questions about it.

If the witness is not familiar with the document, ensure that he or she is given an opportunity to read it in the witness box and understand all its features before you ask questions about it and its contents.

ILLUSTRATION

Examination in chief of Stojkowska

Q Could the witness be shown Exhibit 1, the plan of the area and the bottle shop.

[Clerk/associate hands Exhibit 1 to witness.]

Q Ms Stojkowska, are you familiar with that document?

A I have seen it once, yes.

Q Could you hold up the plan and show to the jury where you were standing when Mr Watkins entered the bottle shop?

Where the witness has not seen it:

Q Ms Stojkowska, are you familiar with that document?

A No.

Q This is a plan of the area and the bottle shop. Do you understand it?

A Yes.

Q Please take a moment to familiarise yourself with it.

CHARACTER EVIDENCE

Character evidence may be given and used in two different ways in the course of a trial:

- to support the evidence of the accused that he or she did not commit the offence
- to support his or her credibility.

In a criminal trial, character evidence is limited to evidence:

- that the accused has no prior convictions (usually asked of the police and/or given by the accused)
- that the accused had a good general reputation
- of the witness's knowledge of the good reputation of the accused in the relevant community, for example as to honesty.

ILLUSTRATION

Evidence as to reputation

Should Daniel Jones call a character witness during the hearing, that witness could be examined in chief as follows:

Q What is your occupation?

A I am a retired barman with over 35 years' experience working in and owning bars, and in the hospitality industry.

Q How long have you known Daniel Jones?

A I have known him for 15 years.

Q What do you know of his reputation in the hospitality industry?

A He has a good reputation in the industry, and a good reputation for complying with the licensing laws.

Character evidence is used differently in a plea in mitigation (see Chapter 3, 'Evidence in Action', and Chapter 8, 'Plea in Mitigation').

EVIDENCE BY WITNESS STATEMENTS OR AFFIDAVIT

In some courts, particularly in the civil jurisdictions, evidence in chief can be received by affidavit or witness statements.

Provide the witness with the statement or affidavit in the witness box. Have the witness confirm that it is accurate, or make any corrections.

Direct the witness's attention to parts of the document and ask him or her to explain if necessary. If you need the witness to make major changes or expand on the material in the statement or affidavit, you must seek leave of the court to adduce this further evidence.

Notice of significant further evidence should be given to your opponent, as he or she may be entitled to more time to prepare cross-examination.

APPLYING FOR LEAVE TO RECALL OR FURTHER EXAMINE A WITNESS

The method of preparing and leading evidence in chief that we have outlined should ensure that you adduce all relevant and admissible evidence.

However, if you have completed your examination in chief of a witness, and you realise that there is further evidence you need to lead from the witness, then you should apply to the judge:

- to ask further questions of the witness in evidence in chief, where the witness is still in the witness box, or
- to recall the witness, if the witness has been excused.

You should make such applications promptly, as soon as you realise that there is a need to do so.

The court will usually ask for an explanation of why the omission occurred, and require you to state what evidence is sought to be led, and satisfy the court of its significance.

The court will usually allow further cross-examination following further evidence in chief.

In a criminal case, if the evidence left out by the prosecution is significant, and the defence has not had notice of it, the court may require formal notice of the content of the evidence, to allow the defence to consider it before cross-examination.

RE-EXAMINATION

Re-examination is permitted only in relation to matters which

- arise out of cross-examination, and
- require relevant clarification or explanation.

It is not permitted merely to add new evidence, which should have been led in evidence in chief. That can only be done by applying for leave to recall or further examine a witness.

ILLUSTRATION

Examination in chief of Daniel Jones

Q What was the condition of the bottle shop that evening?

A *It was busy.*

Cross-examination of Daniel Jones

Q I suggest to you that most of the people on the premises that night were in the lounge.

A *Not really.*

Re-examination of Daniel Jones

Q Approximately how many people were in the bottle shop when you saw the customer bump into Watkins?

A *There would have been four or five people in there at that time.*

This re-examination would not be allowed if there had been no cross-examination on the question of how many people were in the bottle shop or lounge area of the hotel.

ILLUSTRATION

Cross-examination of Constable Bier

Q You were watching Watkins and Mr Jones through the window of the bottle shop?

A *Yes.*

Q That window contains displays and advertising material, doesn't it?

A *Yes.*

Q So you could not see all of Watkins while he was at the counter?

A *No.*

Q Nor could you see all of Mr Jones while he was at the counter?

A *No.*

Q Your view of them was obstructed by the displays and advertising material?

A *Yes.*

Re-examination

Q During cross-examination, you agreed that your view of Watkins and the defendant at the counter of the bottle shop was obstructed. What part of your view was obstructed?

A I could only see their heads and shoulders above the display and advertising material on the window.

Here we assume that no questions were asked of Constable Bier in examination in chief as to whether his view was obstructed. This re-examination would not be allowed if there had been no cross-examination on the question of whether the police view was obstructed.

Both of the above illustrations show how re-examination is used to clarify matters raised in cross-examination, not simply to repeat matters already dealt with in examination in chief or to add new evidence.

The rule prohibiting leading questions in evidence in chief is strictly enforced in re-examination. Answers to leading questions in re-examination have little probative value.

It is permitted in re-examination to refer to the subject matter raised in cross-examination as part of the question.

Well-prepared and presented evidence in chief directed to your case theory, and effective re-examination, are important foundations of your case.

CHECKLIST

- Know the story in all its detail.
- Organise the story in the most persuasive way.
- Decide on the order in which to call witnesses.
- Guide the witness through the story.
- Use all details to flesh out the story.
- Ask non-leading questions in an interested, interrogative manner.
- Use direct inquiring words such as 'Where', 'When', 'Who', 'Why', 'How', etc.
- Ask short, one-proposition questions.
- Use simple language.
- Engage with the witness.
- Direct the witness's answers to the decision-maker.
- Listen carefully to the answers.
- Do not interrupt the witness.
- Do not comment on the answers.
- Do not look down at your notes while the witness is answering.

- Avoid expressions such as 'Can you describe …', 'Are you able to recall …'.
- Use piggyback questions to emphasise and reinforce the story.
- Do not affirm answers by words such as 'Okay', 'Right', 'Thank you'. This is not permitted and interrupts the flow of questioning.
- Have the witness 'show' as well as 'tell'.
- Use a checklist of the facts you need. Do not write out questions.
- Use a checklist to ensure that all significant detail is given.
- Have experts explain technical terms or concepts used in their evidence.

6

CROSS-EXAMINATION

The right of a party to a fair trial, whether civil or criminal, includes the right to cross-examine witnesses called by the other party.

This principle has been most forcefully stated as the right of an accused in a criminal trial:

> Confrontation and the opportunity for cross-examination is of central significance to the common law adversarial system of trial.[1]

> There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible … it is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer in defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well established principle that is closely linked to the presumption of innocence.[2]

In some jurisdictions this right is enshrined in statute.

To cross-examine witnesses effectively, you must be able to:

- understand the purpose and scope of cross–examination
- know the rules of evidence
- cross-examine consistently with the case theory
- use short, leading propositional questions
- apply the 'ten commandments of cross-examination'

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[1] Gleeson CJ, Gummow, Kirby, Hayne and Callinan JJ in *Lee v The Queen* (1998) ALJR 1484, 1489.

[2] *R v Osolin* (1993) 86 CCC (3D) 481 (SCC) 516–17.

- control the witness
- structure cross-examination effectively
- use the gate-closing technique
- use prior inconsistent statements or evidence
- use documents
- comply with the requirements of the rule in *Browne v Dunn*
- maintain a demeanour consistent with the nature of the cross-examination
- avoid unnecessary confrontation and aggression
- assess the risk of unhelpful answers and prepare to manage them.

PURPOSE AND SCOPE OF CROSS-EXAMINATION

Your aim in cross-examination is to lay a foundation for your final argument by demonstrating something about the evidence or the witness.

The purposes of cross-examination are to:

- elicit new favourable evidence to support your case
- accredit a helpful witness or evidence
- discredit an unfavourable witness or evidence, and/or
- emphasise or place a different complexion on existing evidence.

Counsel's right to cross-examine includes the right to use leading, pressing and persistent questions or propositions provided they are:

- relevant to an issue or to credibility, and
- not limited or prohibited by law.

Within those limits, the subject matter of cross-examination, its extent, its form and manner are matters for counsel, not for the judge.

The judge has, however, a discretion to curtail cross-examination if it is:

- unfair, such as unnecessarily repetitive, or based on misrepresenting what the witness has said
- scandalous, insulting or offensive, or
- designed to intimidate the witness.

These common law rules are now being reinforced and enshrined in legislation.

For example, under section 41 of the *Evidence Act 1995* (NSW) the judge **must** disallow a question put to a witness in cross-examination, or inform the witness that the question need not be answered if the court is of the opinion that the question:

(a) is misleading or confusing

(b) is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive

(c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or

(d) has no basis other than a stereotype (for example a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

It is likely that similar provisions will be enacted in all uniform evidence legislation. See further Chapter 3, 'Evidence in Action', as to fairness of questions.

ACCREDITING THE WITNESS

Cross-examination can be used to accredit a witness and the evidence given. You may wish to accredit a witness in cross-examination when the evidence in chief of the witness supports your case theory.

This can be done by expanding upon and emphasising the witness's evidence to support the account the witness gave, to make it more clearly consistent with your case theory. This is different from merely restating the evidence in chief before asking a question in cross-examination.

ILLUSTRATION

Cross-examination of Constable Bier

The purpose of this cross-examination is to emphasise the contrast between Watkins' behaviour inside the bottle shop and his behaviour before he entered and after he left. This will support the theory that Watkins intended to trick Jones by composing himself to appear sober, and succeeded in doing so.

The cross-examination emphasises Constable Bier's ability as a good observer because his observations support the defence case theory.

Q When you first saw Watkins, he was staggering?

A *Yes.*

Q He had great difficulty making it across the road?

A Yes.

Q And he stumbled and almost fell at the kerb near the bottle shop?

A Yes.

Q When he reached the door of the bottle shop, he paused?

A Yes.

Q And he paused for a few moments, didn't he?

A Yes.

Q The pause was so significant that you noted it in your statement?

A I did.

Q And then Watkins entered the bottle shop?

A Yes.

Q While he was inside the bottle shop, you saw his head and shoulders at all times, didn't you?

A Yes.

Q That was above the advertising on the window?

A Yes.

Q You didn't lose sight of him at all in the bottle shop?

A No.

Q You saw him approach the counter?

A Yes.

Q Where he had a short conversation with the attendant?

A Yes.

Q And then you saw him walk to the door and leave?

A Yes.

Q As soon as he left, you saw him stumbling all over the place, didn't you?

A Yes.

Q He began singing loudly and tunelessly, didn't he?

A Yes.

Q And he said 'I tricked Danny again'?

A Yes.

The pause is significant. To emphasise it, the cross-examiner should pause when dealing with it.

DISCREDITING THE WITNESS

In a well-known lecture, Professor Irving Younger, an early advocacy teacher with the National Institute for Trial Advocacy in the United States, sets out what he calls the 'Nine Pigeonholes of Impeachment'. These are the nine categories of impeachment (or attacks on credibility) of a witness, which cover the field of possible impeachment. They are adapted to the Australian context below.

Professor Younger refers to the nine pigeonholes as the technology of cross-examination, or the 'what to do' of cross-examination.

The first four pigeonholes relate to the principles of witness competence. To be competent, a witness must:

- take the oath or affirmation (except, for example, in the case of a child)
- have perceived the events about which he or she gives evidence (except expert opinion evidence, or where a witness's state of mind is relevant)
- be able to recall those events, and
- rationally communicate his or her perception to the court.

If any of these four elements is missing, a lay witness is not competent to give evidence, and therefore the evidence is inadmissible.

Competence and admissibility are matters of law for the judge to determine. This is usually considered on a *voir dire* before or during a trial.

Where the witness is ruled competent and his or her evidence is admissible, you may use the four pigeonholes as a basis to impeach the witness's credibility. You can direct your cross-examination during the trial to reducing the weight the court will give the evidence. Irving Younger calls this 'the reverse use of the principles of competence'.

For example, you may show that the witness:

- has problems of perception, for example poor vision, poor visibility in the conditions, or other difficulties in identifying the relevant events;
- has a problem of memory, or has reconstructed the events in his or her mind in a way that does not match reality;
- cannot rationally communicate what happened, in that he or she is using another's words without understanding them; or
- is lying.

The next four pigeonholes require a 'good-faith basis': in other words, some basis in either evidence or instructions to justify making the allegation during cross-examination.

You may impeach a witness by alleging that:

- The witness is biased in favour of a party, prejudiced against a party, interested in the outcome of proceedings, or corrupt. You will be permitted to lead evidence to prove these allegations if the witness denies them.
- The witness has prior criminal convictions. If the witness is the defendant in criminal proceedings, the use of this basis for impeachment is subject to the common law or statutory shield against cross-examination based on prior convictions, unless the accused opens the issue of his own character, or the defence is conducted in such a way as to open the issue of his credibility. See for instance *Crimes Act 1958* (Vic), s 399(5)(b).

  Subject to that proviso, you will be permitted to lead evidence to prove the convictions if the witness denies them.
- The witness has committed prior bad acts (acts of an immoral, criminal or vicious nature), even if those acts have not been the subject of a conviction or an adverse finding.

  Generally, in such an attack on credibility, you are bound by the witness's answer and you cannot go on to prove the truth of the allegations if the witness denies them.

  It is unethical to suggest prior bad acts without a proper foundation, just as it is unethical to allege fraud without proper foundation.

  This pigeonhole raises the question of the admissibility of propensity evidence, considered further in Chapter 3, 'Evidence in Action'.
- The witness has made a prior inconsistent statement. This prior statement can be proved as part of the impeachment of the witness if the material in the prior statement goes to a fact in issue, or a fact relevant to a fact in issue.
- The ninth pigeonhole, where a witness is called to give evidence about another witness's reputation for telling the truth or otherwise, has no practical application in Australia.

CROSS-EXAMINATION TO DISCREDIT ANOTHER WITNESS

It is not permissible to cross-examine a witness in order to discredit another witness.

There are some exceptions, such as where the cross-examiner seeks to prove previous convictions or bias. For example, cross-examination of Constable Bier to elicit the fact that Maria Stojkowska has previous convictions or that she has an application for a liquor licence, which is opposed by the police, is permitted as an exception to the general rule.

However, cross-examination of Constable Bier directed to other information about Maria Stojkowska would not be permissible—for example that she has an association with a well-known criminal (if there was any basis for that assertion).

CONSISTENCY WITH YOUR CASE THEORY

Because the purpose of cross-examination is to lay a foundation for your final address, cross-examination must be directly related to your case theory and to your arguments in support of your case theory in the final address.

Before you cross-examine a witness, you must know what your arguments will be about the credibility of that witness and about the weight the court should place on the witness's evidence.

Do not cross-examine for the sake of it just because you may see a potential weakness in the evidence. If the cross-examination is not aimed at supporting your case theory, mere 'point scoring', which does not support your closing argument, is unnecessary and may be counter-productive.

Do not cross-examine simply to please your client.

ILLUSTRATION

A cross-examination of Constable Bier which attacks his credibility is possible on several grounds:

- Bier should have ensured that Watkins was not released and should have been questioned.
- Bier should have taken a blood sample from Watkins.
- Bier should have arrested Watkins, and not let him risk his safety by crossing Wide Street to enter the bottle shop.

However, it would be counter-productive to attack the police because no useful closing argument will be mounted against them as a result of such an attack.

Where the defence case theory centres on Jones' lack of knowledge as a result

of Watkins' 'trick', the evidence of the police should be accredited and re-emphasised. This is because the police evidence fully supports the defence, by demonstrating the contrast between Watkins' behaviour inside the bottle shop and his behaviour before he entered and after he left the shop, and by reference to his pause outside the shop.

FORM OF QUESTIONS IN CROSS-EXAMINATION

In cross-examination, the rules of evidence permit leading questions.

We distinguish three forms of questions:

- non-leading questions
- leading questions
- leading propositional questions.

ILLUSTRATION

Non-leading question

Where were you seated?

Leading question

Were you seated in the front seat?

Leading propositional question

You were sitting in the front seat, weren't you?

While questions in evidence in chief and re-examination should be truly interrogative, questions in cross-examination should generally be leading and propositional.

Your propositional questions should:

- be expressed simply
- deal with only one factual proposition
- clearly be capable of being answered with 'Yes' or 'No'.

It is important to be prepared for cross-examination so as to be able to maintain a flow of questions. Pausing to think about the next question is likely to enable the witness to go on beyond the answer to your propositional question.

This form of questioning is vital to the cross-examiner's ability to control the witness. If your leading questions are expressed in such a form, you are entitled to limit the witness to the answer.

If the witness does not respond to a simple propositional question, you may repeat the question and insist on an answer.

The principles of advocacy dictate that you must put only leading propositional questions to the witness in cross-examination, unless there is a good reason not to do so.

It is rarely good advocacy to ask non-leading questions in cross-examination, such as 'Why didn't you contact the police?' or 'What were you doing on the morning of 1 June?'

It may be appropriate to ask such an open-ended question if there is a specific justifiable purpose for doing so. One such purpose might be if there is reason to believe that the witness will give an explanation that can be shown to be wrong—for example, if there is some independent evidence contrary to what the witness said. This may be a useful method of attacking the witness's credibility. It can be used, for instance, where a witness gives as an alibi an account of having been at a function, and you can show that the function did not take place.

In order to phrase propositions as leading propositional questions, they either should be asked in an interrogative voice indicating that you want a response, or you may add a phrase such as 'wasn't it?' or 'weren't you?' to the end of the proposition.

Witnesses often want to go on after answering the propositional question. While the cross-examiner has a right to confine the witness to the answer to a propositional question, a tactical decision should be made whether to do so. This is because confining the witness may look as if you are withholding information, and if done in an aggressive manner, it may look as if you are bullying the witness. In any event, once the topic has been raised in cross-examination, the witness will be permitted to explain and clarify in re-examination.

HOW TO DO IT: THE 'TEN COMMANDMENTS' OF CROSS-EXAMINATION

These 'Ten Commandments' are the subject of another seminal lecture by Professor Younger, on the 'art of cross-examination' or 'how to do it'. They are a mix of what to do and what not to do.[3]

[3] This material has been adapted for use by the Australian Advocacy Institute from material prepared by the National Institute for Trial Advocacy (NITA), USA.

1. **Be brief** is the first commandment. You need to be selective in cross-examination and to cross-examine only towards an identifiable case theory and arguments to support it. You should not be repetitive or cross-examine at large.

2. **Short questions, plain words.** Ensure that your questions deal with one subject matter only, so that they can be answered simply. Propositions can be agreed with or denied by the witness, but not explained. Plain, simple words provide clarity, both for the witness and for the decision-maker.

3. **Ask only leading questions.** Although Professor Younger calls them leading questions, we prefer to call them 'leading propositional questions'.

4. **Don't ask the question if you do not know the answer.** This commandment is based on the principle that cross-examination is designed to support your pre-prepared final argument. In both cross-examination to obtain further evidence, and cross-examination to discredit, it is important that the cross-examiner knows what the witness will say.

   This fourth commandment can be supplemented by the phrase 'unless you can contradict the witness if he or she gives an unhelpful answer, or you can live with an unfavourable answer'. In other words, you can ask a question to which you don't know the answer provided you have some material with which to contradict an answer that does not support your case.

   Cross-examination at trial is not an inquiry, an opportunity to investigate, or a 'fishing expedition'. If you have no material to contradict a witness's negative response, such as a prior inconsistent statement, or evidence of bias, you may wish to leave it to your closing address to argue that the witness's answer is improbable. The aim of the cross-examiner is to gain ground or at least remain in no worse a position than that already conveyed by the witness in evidence in chief. A bad answer should not be risked on important issues.

   As a general rule, a beginner at cross-examination should take the most conservative approach.

5. **Listen to the answer.** This commandment serves to remind the cross-examiner that cross-examination must be prepared in advance, and no questions or propositions should be dreamt up during the performance. If you are not sufficiently prepared and try to construct the cross-examination on the run, you will not be concentrating on the answers given by the witness, and useful information will be missed. The commandment also emphasises the need to pay close

attention to the words, the nuance of the answers, and the witness's demeanour, rather than focusing on the next question.

6. **Don't argue with the witness.** You argue with the witness when you try to persuade the witness that he or she is mistaken, or try to convince the witness to accept your propositions or conclusions. The aim of cross-examination is not to persuade the witness of anything, but to lay the foundation for your final argument and/or demonstrate something about the witness to the decision-maker. If you take up an argument with the witness, you risk the witness giving information which will enable him or her to win that argument.

   You will get into an argument with the witness by putting a conclusion to the witness with which the witness disagrees, and then using such material as you have to try to contradict the witness's answer. For example, you start your cross-examination by suggesting to the witness that he could not have seen what he claims he saw, which the witness denies, and then you put to the witness that it was a foggy night and the witness didn't have his glasses. The better approach is the gate-closing technique, discussed below.

7. **Don't allow the witness to repeat his or her evidence in chief.** Although when accrediting a witness, some selective repetition may be necessary, the danger of repeating the evidence in chief by asking whether it was given may reinforce the evidence. It will also give the witness an opportunity to change or add to what was said in chief. There is no need to repeat evidence already given in order to come to the propositions relevant to the point in cross-examination.

   The seventh commandment is often broken by questions which start with 'You told the Court that …' or 'In your evidence in chief you said …'. Instead, you should go directly to your propositions.

   For example, if you were to put to Maria Stojkowska, 'You said in your evidence that you could hear their voices, but not what was said; is that correct?', she could answer, 'Oh yes, but I heard a few of the words.' The re-examiner may enlarge upon that addition to include: 'I heard him say fifteen dollars'. Then you are in trouble.

8. **Never allow the witness to explain.** Leading propositional questions give the cross-examiner control over the witness, by forcing an answer of 'Yes', 'No', or 'I don't know/can't remember'. If the witness is asked for explanations, then that control is lost.

   This commandment is frequently broken by the use of inquiring phrases such as 'How could you have seen that?', 'What do you mean by …?', 'How can you explain this if …?'.

9. **Don't ask the one question too many.**

   There is no need to go beyond the questions that are necessary to support your final argument. The 'one question too many' is usually an attempt to get the witness to agree with the conclusions you want, and this may develop into an argument with the witness.

10. **Save the final point for your closing address.**

    These last two commandments reinforce commandment number six. The cross-examiner should go only as far as is necessary to obtain answers that support the final argument, and not put to the witness the conclusions from the evidence.

    Cross-examination questions that begin with words such as 'Therefore …' or 'So…' or 'But …' are likely to be argumentative.

    This commandment is subject to your obligation to comply with the rule in *Browne v Dunn* (see Chapter 3, 'Evidence in Action').

STRUCTURING YOUR CROSS-EXAMINATION

The structure will depend on the purpose of your cross-examination. If you want to get useful material from a witness who may have to be discredited about other parts of the evidence, then the helpful answers should be sought first, before you alienate the witness.

You may have to decide whether to use a logical structure. The logical structure tends to allow the witness to see where you are going. With some witnesses it may be better to use a structure that appears more jumbled, which does not so obviously lead a witness to identify where you are headed. This can be achieved by using a mix of questions about a number of different issues. Such cross-examination will be more difficult for the decision-maker to follow and understand at the time, but you can put it all together in the final address. It is also less likely to produce an argument from the witness.

THE GATE-CLOSING TECHNIQUE

Because the purpose of cross-examination is to lay the foundation for your final argument, when organising the structure of cross-examination, you should:

- build the facts to support your argument, and
- avoid putting the argument or conclusions to the witness.

Note that your obligation under the rule in *Browne v Dunn* does not require you to put your conclusions to the witness, only the different facts upon which you intend to base your case.

This process is known as 'gate-closing'. It can be described also as closing off avenues for the witness to escape, argue or explain away his or her position in a way that supports the witness's case, and not yours.

Preparation of the order of cross-examination is essential to effective cross-examination. If you start your cross-examination with the conclusion and the witness disagrees with you, then cross-examination tends to become argumentative.

Often you may have recourse during the 'gate-closing' process to other evidence which the witness could not deny (such as comments made in a police interview or written down by the witness), before moving to the more difficult 'gates' or to the conclusion.

ILLUSTRATION

Cross-examination of Daniel Jones

This cross-examination is designed to discredit Jones' denial of his conversation with Maria Stojkowska. It lays a foundation for the argument you will present in your final address: that it would be unlikely for Stojkowska to have invented Jones' sentiment and his precise words, and therefore that Jones is lying when he denies the conversation.

The first two matters raised are intended to establish and close the gates around Jones' sentiment (that he felt sorry for Watkins), and Jones' knowledge of the law (that he knew the effect of supplying liquor to a drunk).

Q You knew Watkins as a regular customer?

A *Yes.*

Q And you saw him as a down-and-out sort of person?

A *Yes.*

Q You felt sorry for him?

A *Of course.*

Q You are an experienced barman?

A *Yes.*

Q You know the laws about supplying liquor to intoxicated people?

A *Yes.*

Q And you know that if you supply liquor to an intoxicated person, it might affect the hotel's licence?

A Yes.

Q On Christmas Day, you were interviewed by the police?

A Yes.

Q Could you look at this document please?

[Shows transcript of police interview]

A Yes.

Q You agreed with the police in question 11 that you felt sorry for Watkins?

A Yes, I did.

Q In the same answer, you said that you 'wouldn't break the law by selling anything to a drunk because it could blow the boss's licence'?

A Yes.

Q Maria Stojkowska gave evidence that you said to her, 'The poor old bugger. I suppose I shouldn't have sold him the grog if he was so drunk. I feel sorry for him.' That is your sentiment, isn't it?

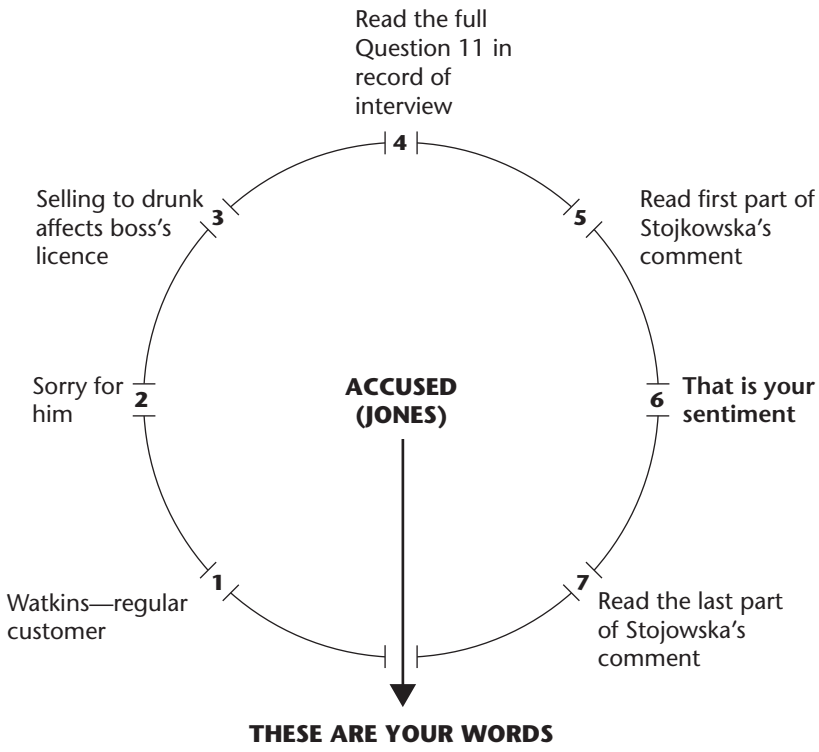
A Yes.

Q And that you then said 'I hope this doesn't blow the boss's licence.' They are your words, aren't they?

A I did not say that to her.

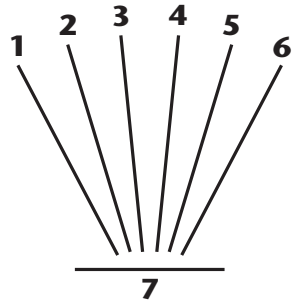
As to the last question and its denial, you will note that the point is made by the question itself, and Jones' denial really does not matter.

Each advocate may have a different method of preparing to perform a gate-closing cross-examination. It is not a good idea to write out questions. One method is to use a diagram which readily suggests the substance and order of gate-closing cross-examination.



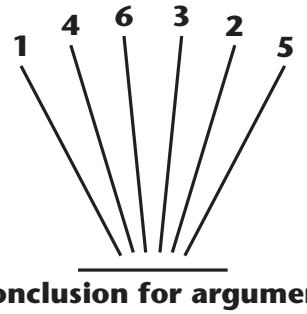
In some cross-examinations, it may be useful not to proceed to close the gates in an order that may signal to the witness where you are going. It may be better to jumble them and then put the answers together for the final argument.

Another diagram sometimes used for a building up or gate-closing technique is as follows:



Number 7 is the final proposition: 'These are your words, are they not?' The answer does not really matter.

A similar diagram can be used to show what propositions can be put to the witness and where the cross-examination should stop, leaving the conclusion until the final address. It also shows the jumbling of the order of questions.



SPECIFIC ASPECTS OF CROSS-EXAMINATION

CROSS-EXAMINATION ON PRIOR INCONSISTENT STATEMENTS OR EVIDENCE

Prior inconsistent statements can be oral or in writing, and either can be used to discredit the witness.

Before you confront the witness with the prior inconsistent statement, you must first direct the witness's attention to the occasion or writing of the prior statement (see further Chapter 3, 'Evidence in Action').

If the material in the prior statement is what Professor Younger calls 'important'—that is, sufficiently connected to the issues in the case—and is consistent with your case theory, then you can go on to prove the making of the prior inconsistent statement. If the impeaching information relates merely to credibility, you may not go beyond the answer.

ILLUSTRATION

Cross-examination impeaching Bier's credibility based on a prior inconsistent statement

If Bier were to give evidence that 'Watkins paused at the door of the bottle shop for a moment', not that Watkins paused 'for a few moments', his credibility could be impeached.

The prior inconsistent statement contained in his written statement may be necessary only to remind him of what he said in that statement. If in evidence he agrees that it was for 'a few moments', there is no need to take the matter further.

If, on the other hand, he persists in saying in evidence that Watkins' pause was only 'for a moment', then he may be cross-examined on the basis that his evidence is inconsistent with his prior statement.

Such cross-examination may proceed as follows:

Q You made a statement soon after these events?

A Yes.

Q The detail of what happened was fresh in your mind?

A Yes.

Q You were trying to be accurate and truthful?

A Yes.

Q Have a look at this statement. [Hands statement to witness] Do you see your reference to the pause, where you stated that Watkins 'paused for a few moments'?

A Yes.

Q That is in fact what happened?

If Bier agrees in evidence that 'a few moments' is correct, you need go no further. If he disagrees, you may tender his statement.

The prior inconsistent statement is not the evidence. The evidence is what the witness says in the witness box when confronted with the prior inconsistent statement. If the witness accepts having made it, you may argue that he has changed his story and hence lacks credibility. If he denies having made it, your argument is about his dishonesty in denying it.

CROSS-EXAMINATION ON DOCUMENTS

When cross-examining by reference to the contents of documents not already tendered in evidence, your opponent can demand that you tender them through the witness. Despite this rule, the court has a discretion in criminal trials not to enforce the tender.

CROSS-EXAMINATION OF EXPERT WITNESSES

The same advocacy principles apply to the cross-examination of expert witnesses. Further considerations apply given the nature of expert evidence as opinion evidence.

Cross-examination as to the *admissibility* of expert evidence may be:

- that the claimed area of expertise is not a sufficiently recognised field of specialist knowledge;
- that the area of expertise claimed is within common knowledge and so not appropriate for the reception of expert evidence; or
- that the witness does not have the training, qualifications or experience necessary to be classified as an expert witness.

Cross-examination as to the *weight* to be given to expert evidence will usually be directed to one or more of the following areas:

- qualifications or experience
- correctness of the facts upon which the opinion is based
- correctness and accuracy of the methodology used, and its appropriateness to the circumstances
- gaps in tests or investigations conducted
- the degree to which any assumptions were reasonable at the time they were made
- ultimate correctness of the assumptions
- the reasoning process leading to the opinion
- comparison between the opinion and other expert opinions
- bias.

It is permissible to cross-examine an expert by questions that appear to be hypothetical but in fact are designed to lay the foundation for new information, about which the expert witness did not know or which contradict the assumptions made. For example, you might ask of a medical practitioner consulted by a claimant: 'If you knew that the person you examined had made prior claims, you would have taken that into account in determining whether he was a malingerer?'

The potential to cross-examine about bias must be thoroughly considered. Bias may fall into three categories:

- the degree of independence from the issues. For example, is the expert involved in a generally connected cause?
- the objectivity of the expert's approach. For example, does the expert start out to prove a fact in issue such as 'This writing is a forgery'? Or does the expert have an ideological stance, perhaps reflected in his or her professional writing or opinions in prior cases?
- the expert's professional independence. For example, does the expert's income depend on a conclusion favourable to the income provider? If an expert's main income is from an insurance company, you might

consider how often this witness has given similar evidence, and her prior stance on similar issues.

By conferring with your own expert witness or a consultant, you should learn about the subject matter in dispute. It is unlikely, however, that you would develop a greater knowledge than the expert to be cross-examined. For this reason, you should avoid arguing about information within the expert's area of knowledge unless there is a sound basis for doing so. The expert will usually know more.

Similarly, lengthy cross-examination along the lines of the expert's theory or methodology can be counter-productive and should rarely be attempted. At most, you should focus on the plausibility of other theories or methodologies consistent with your client's case.

For illustrations of cross-examination of the expert witness, see Freckelton and Selby's *Expert Evidence: Law, Practice, Procedure and Advocacy*.[4]

COMPLYING WITH THE RULE IN *BROWNE V DUNN*

When complying with the rule by confronting a witness with contradictory facts upon which you wish to rely, do so in the course of cross-examination at a point at which the decision-maker is most likely to conclude that the contradictory facts are possible. This is much more effective than a set of 'I put to you …' questions at the end. (See Chapter 3, 'Evidence in Action'.)

MANNER AND DEMEANOUR OF THE CROSS-EXAMINER

To maintain the flow of cross-examination, you must be thoroughly prepared, so that you do not allow the witness time to supplement his or her answers while you are thinking about the next question to ask.

Generally, it is best to assume a demeanour in cross-examination which is:

- conversational
- not aggressive or confrontational.

Consider the following case study in relation to the manner and approach appropriate for cross-examination of an expert witness.

[4] (3rd edn), Law Book Company, Sydney, 2005.

ILLUSTRATION

In a case where the issue was whether a fire was deliberately lit or started accidentally, Expert A was consulted on the morning after the fire. He examined the scene and took photographs. In his opinion, the fire was intentionally lit with the use of accelerants.

The other party called Expert B, who was consulted one year after the fire. She had available Expert A's report and the photographs. The scene of the fire was no longer available. In her opinion the fire was probably accidental as a result of a faulty electric blanket.

Cross-examination of Expert B

The aim of this cross-examination is to lay the foundation for the argument that Expert B is disadvantaged by not having had the opportunity to inspect the scene, particularly if Expert A can give evidence of some advantage of having examined the scene.

There is no point in cross-examining Expert B in a confrontational manner about her not having gone to the scene, because she could not have done so. A question such as 'You didn't go the scene of the fire?' asked in an aggressive, critical, confrontational manner will elicit the right answer. However, it will also alienate the decision-maker, because it is unfair to criticise the witness when she could not have gone to the scene.

The better approach would be to get the same answer and also useful concessions from the witness without confrontation.

For example:

Q You were consulted about 12 months after the fire?

A Yes.

Q You were provided with the photographs and report of Expert A?

A Yes.

Q You didn't have the opportunity to attend the scene of the fire?

A No, I didn't.

Q Sometimes going to the scene may be helpful, mightn't it?

A Yes, it might.

Q Because there may be some things that don't appear in photographs?

A Yes, that's right.

Q Such as the smell of some substance or the feel of some object?

A Yes, that's right.

Q If you'd had the opportunity to attend the scene, you would no doubt have taken it?

A That's right.

It would be dangerous and unnecessary to go on and put the argumentative proposition, 'So you are at a disadvantage by not going to the scene?', because the witness may disagree and explain why not in re-examination.

The witness is most likely to agree with the last few propositions, but if she does not, then you could argue in your final address that her answers were unreasonable.

It is also counter-productive to preface your questions with often-used phrases such as 'It's true that …', 'Isn't it the case …', 'Isn't it a fact …', 'You would agree that …', etc. These phrases send a negative message to witnesses being cross-examined, and as a result they may feel that they are under siege and thus are not likely to want to agree with you.

While you should not get 'cross' in cross-examination, you may need to appear to be firm or confronting when that is appropriate to the cross-examination. For instance, you cannot pleasantly and conversationally suggest to a police officer that he assaulted your client or fabricated evidence. Your manner must be consistent with the subject matter of the cross-examination.

You should ensure that your manner of questioning, and your questions, are fair to the witness. This is particularly important for a prosecutor. See the recent decision of the High Court in *Libke v The Queen* [2007] HCA 30. See also Chapter 3, 'Evidence in Action', on objections to unfair questions.

As a matter of evidence law, your questions are not the evidence: only the witness's answers are. Nevertheless, your attitude, manner and body language communicate messages to the decision-maker.

RISK MANAGEMENT

In performance preparation, you must consider the possible reactions of the witness and be prepared to deal with them. If you ask simple, leading propositional questions, possible answers should be:

- Yes
- No, or
- I don't know/don't remember.

As a cross-examiner, you cannot be optimistic about what answers will be given. You must be prepared for the witness to give the least helpful response and consider how you can deal with such a response.

Cross-examination can require you to take measured risks in your questioning. See, for instance, our discussion of the fourth of the ten commandments of cross-examination, above.

To cross-examine merely for emphasis or about a minor issue can be risky, as you might allow the witness to retell the story in his own way, or explain other inconsistencies in the process, and so your case may come out worse than if you had not cross-examined the witness at all.

If you need to discredit a witness, it may be more difficult to rely on those parts of the witness's evidence that help you. If this has to be done, get any helpful information first, before discrediting the witness or his or her other evidence.

Cross-examination opens the gates to re-examination. If you conduct an unnecessary cross-examination which introduces new evidence or issues, you may indirectly damage your case, by giving your opponent the opportunity to re-examine the witness.

It is counter-productive to cross-examine to discredit a witness when doing so is not necessary to your case theory, even if an opportunity to do so arises, and particularly if the witness's evidence is otherwise helpful to your case.

How much you are prepared to risk must depend on:

- the value to your case of the answer sought. It is a benefit/detriment analysis asking whether the risk is worth taking in the context of the case as a whole.
- your experience. The beginner at cross-examination should be conservative. The experienced cross-examiner is able to make a better assessment of the witness during cross-examination to determine whether the witness is likely to be cooperative, and is also more likely to be able to get out of trouble by dealing with difficult situations if they arise.

CHECKLIST

- Obey the 'Ten Commandments' of cross-examination (see pp. 111–114) unless there is a good reason to depart from any of them.
- Use a conversational style for questions in cross-examination unless a different manner is appropriate.
- Avoid using an aggressive, confrontational manner.

- Confront only when necessary to be consistent with the subject matter.
- Do not begin questions with words such as 'You would agree …', 'Isn't it correct that …' 'Isn't it the case …' 'Isn't it true that …'.
- Watch the witness to assess his or her demeanour and body language.
- Listen to the answers.
- Maintain the flow of questions.
- Get useful evidence before discrediting the witness or the evidence.
- Close the gates.
- Comply with the rule in *Browne v Dunn,* without 'putting it' to the witness.
- Do not take risks unless you need to.
- Be prepared to manage any risk taken.

7

ARGUMENT

This chapter sets out the principles of preparation and presentation of persuasive argument.

Any argument made to a court should be:

- a series of structured propositions
- supported by reasons
- to persuade the tribunal
- to conclusions of fact and/or law
- towards the desired result.

Argument must be based on evidence and legal principle, consistent with your case theory, and consistent with the onus of proof.

General principles of effective argument apply no matter what type of argument is presented, including:

- argument in interlocutory applications
- argument about evidentiary issues before or at trial
- final address to a jury or to a judge alone
- plea in mitigation of sentence
- an appellate argument.

These principles apply whatever the nature of the argument, whether it is:

- purely legal argument, for instance the interpretation of a statute or the applicability of some legal principle or authority;
- factual argument, for instance about the credibility of witnesses; or
- mixed factual and legal argument, for instance final address in a civil or criminal trial about the factual conclusions and the legal consequences that flow from them.

ADDRESSING A JUDGE OR A JURY

The question is often asked whether there is a difference between argument directed to judges and argument directed to juries. The answer is yes and no. Legal argument before a judge is different because there is a common understanding of legal principles. Therefore, the language can be that used between professional people of the same discipline.

When addressing a jury and referring to the legal principles that must underlie its decision, different language must be used to ensure lay understanding of the applicable legal principles.

However, when it comes to argument about the evidence, we think it better to approach the judge as another juror. This is because when it comes to making findings of fact, and decisions about the credibility of witnesses, there is a respectable view that a judge is no better equipped than the jury to make those decisions.

PREPARATION OF ARGUMENT

The structure and focus of argument will depend on the jurisdiction in which it is performed and the purpose it seeks to achieve. However, as noted above, there are generic principles that apply to all argument.

The key to effective argument is that is it designed to persuade. In the words of Justice Mason:

> Too often counsel forget that advocacy is an exercise in persuasion rather than a defence or statement of a position. Persuasion calls not only for mastery of the materials, but also for an element of constructive imagination and boldness of approach.[1]

A persuasive argument is neither a list of facts nor merely a series of assertions.

So what constitutes a persuasive argument? The answer to this question emerges from the writings of the Greek philosopher Aristotle over two thousand years ago.[2] There has been no significant improvement on his approach since then.

---

[1] Justice A. F. Mason, 'The Role of Counsel and Appellate Advocacy' (1984) 58 ALJ 537.
[2] Aristotle, *Rhetoric,* 1356a1–5.

What emerges from Aristotle's work is that for an argument to be persuasive, it must have the following characteristics:

- *logos* (or logic)
- *ethos* (or credibility)
- *pathos* (or empathy).

LOGOS

A persuasive argument should be logical in its reasoning and its structure. The various parts of the argument must cohere.

Logical reasoning

To construct an effective argument, you must demonstrate the logical strengths of your case, and the logical weaknesses of your opponent's case.

An argument is designed to persuade the court to adopt a reasoning process that leads logically to the ultimate conclusion for which you contend. The argument must demonstrate that reasoning process, leading from the evidence to the desired legal outcome.

It will be useful in the preparation of argument to apply the 'because' test: that is, follow each statement or assertion you make with the reasons that support its correctness.

ILLUSTRATION

It is reasonably possible that Jones did not notice Watkins' slurred speech **because** the bar was noisy and busy, Jones was serving a number of customers, and Watkins, in an attempt to conceal his level of intoxication, may have uttered only a few words during the short conversation described by the police.

Logical structure

A logical argument is a conclusion supported by the evidence. In the context of advocacy, it usually consists of a number of conclusions, which are supported by the reasoning process based on the evidence and legal principle.

A structure that first informs the decision-maker of the conclusions helps the decision-maker to evaluate the reasoning process. This is because

the supporting facts and principles are understood in the context of the stated conclusions.

If, on the contrary, the argument begins with a statement of facts without the context of the conclusions, then the decision-maker may find it difficult to evaluate and appreciate the force of the reasoning process.

ILLUSTRATION

The argument for the defence about the element of knowledge by Jones that Watkins was intoxicated would consist of three conclusions concerning:

1. the slurred speech

2. the smell of alcohol

3. Watkins' bloodshot eyes.

Each would be supported by the available evidence, and the reasoning process would progressively lead to the ultimate conclusion, which should be stated first: that there is a substantial chance that if he did supply liquor to Watkins, Jones may not have appreciated that Watkins was drunk.

Conclusion: There is a real risk that Jones did not notice that Watkins was drunk.

Proposition 1: Jones may have missed the slurred speech.

Supporting evidence: The bar was noisy and busy, Jones was serving a number of customers, and Watkins, in an attempt to conceal his level of intoxication, may have uttered only a few words during the short conversation described by the police.

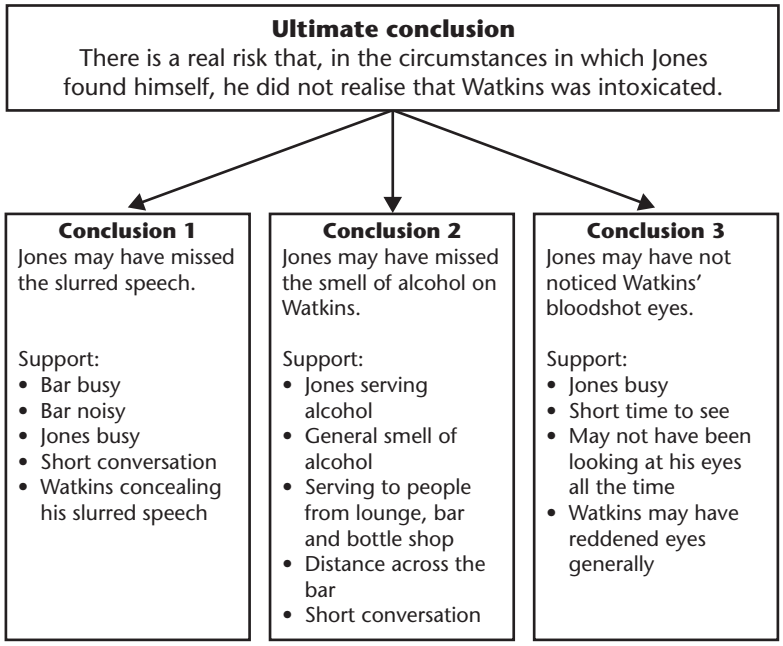
Proposition 2: Jones may have missed the smell of alcohol on Watkins' breath.

Supporting evidence: …

Proposition 3: Jones may not have noticed Watkins' bloodshot eyes.

Supporting evidence: …

This reasoning process could be expressed diagrammatically:



Usually, the ultimate conclusion should be stated first, followed by the other conclusions and supporting facts that lead to it. In some pleas in mitigation in which the ultimate conclusion is the identification of the sentence contended for, it may not be appropriate to state that conclusion first. (See Chapter 8, 'Plea in Mitigation'.)

The benefits of this structure are:

- it is easy to understand
- it enables the judge (or jury) to evaluate the supporting propositions when the conclusion is first stated
- it encourages conversation with the judge, and
- this enables the advocate to develop the argument further.

ETHOS

Ethos refers to credibility. It is about correctness in the light of human experience and knowledge, not necessarily having any relation to logical validity. It has two aspects:

- the credibility of the argument
- the credibility of the person presenting the argument.

It is also about character and reputation.

Credible argument

For an argument to be credible, it must be realistic and balanced.

To be realistic, it must be consistent with the understanding of ordinary people about human conduct and the way the world works. It must be sensible in the light of human knowledge and experience.

In terms of the defence case theory, it is the 'R' in RAT: Realistic Alternative Theory. It must not be fanciful or ridiculous. To be persuasive, the defence theory and the evidence that supports it must be reasonable and realistic.

So, a convincing argument may be credible yet not strictly logical. An argument which is logical but lacks *ethos* will rarely persuade.

ILLUSTRATION

Realistic argument in final address for defence

It is logically possible to argue that someone in the bottle shop gave Watkins the bottle for Christmas, or that he picked it up off the floor or stole it. These propositions are theoretical possibilities, but they are not realistic, because they are unreasonable in the light of the evidence.

The evidence of the police that they saw Watkins walk into the bottle shop and go to the counter, that they saw the head and shoulders of both Watkins and Jones all the time, and that they then saw Watkins walk out, realistically excludes the possibility that Watkins stole the bottle. The police evidence is supported by Maria Stojkowska.

To argue that Watkins already had the bottle or got it in some other way would not only be unrealistic, it would also be inconsistent with the defence theory that Watkins set out to trick Danny and was successful.

To be balanced, an argument must deal with its weaknesses in a realistic way, and not simply ignore them. It must also grapple with the strengths of the opponent's case.

ILLUSTRATION

Balanced argument in final address for defence

A balanced argument that Jones may not have noticed signs of Watkins' inebriation must be put in the context of that possibility. In other words, it must acknowledge the weak points: that Jones was an experienced barman who understood his obligation not to sell to intoxicated customers and would have had reason to keep an eye on Watkins because Watkins had stolen from him before.

A balanced argument is effective because:

- it shows that you have analysed and considered all the issues from both perspectives;
- it helps the decision-maker, who has to consider the issues from both points of view, not each side's argument in isolation; and
- it anticipates the opponent's argument and thereby takes the wind out of the opponent's sails, and removes the opponent's advantage of the element of novelty and surprise.

Credible arguer

The second aspect of *ethos* is the credibility and trustworthiness of the arguer. As an arguer, you should be trusted by the decision maker and have their confidence. This entails being respectful and tactful in dealing with the court and your opponent.

A credible arguer adds value to the argument.

The following may detract from the credibility of the arguer:

- lack of preparation
- misstatement of the evidence or law
- lack of cohesive structure
- overstating the argument
- unbalanced or unrealistic argument
- pursuing unsupportable or untenable arguments instead of making appropriate concessions.

It is better to volunteer concessions than to be forced into making them by questions and comments from the judge. Conceding at the outset shows that you have analysed the case, selected realistic arguments and abandoned untenable ones. The jury will also appreciate a focus on realistic arguments, and will be impressed by your forthrightness in making concessions.

As a professional, you must also comply with ethical obligations in argument—for example, citing of relevant authorities contrary to your argument, or in an *ex parte* application disclosing relevant information adverse to your case. See further Chapter 2, 'The Ethics and Etiquette of Advocacy'.

PATHOS

Another characteristic of a persuasive argument is what Aristotle called *pathos*. A persuasive argument must be empathetic.

This is a more elusive concept, but it is very important. It involves making a realistic connection with the thinking and the feeling of the decision-maker. The Chief Justice in his Foreword refers to the need for sensitivity and tact. This is obviously about empathy.

Empathy can also be expressed as 'making a connection', 'getting through', and 'being in touch'.

Pathos is also about commitment to the argument and passion for it.

It embraces the idea of mutual understanding, and maintaining empathy with the decision-maker, which is a relationship most conducive to persuasion. The advocate who understands the emotions and is able to put the listener into a receptive frame of mind has a decided advantage in the courtroom.

PERFORMANCE OF ARGUMENT

BURDEN OF PROOF

The argument must be framed and presented in a way that is consistent with the burden and standard of proof.

ILLUSTRATIONS

Saying in the defence argument 'Jones did not know that Watkins was intoxicated because …' is a positive assertion that is inconsistent with the onus of proof. The correct formulation is 'There is a real possibility that Jones did not realise that Watkins was intoxicated because …'.

In an appellate context, if you simply assert that 'the judge below misunderstood the effect of the decision of the High Court in *X v Y*', such an assertion is formulated in a way that does not recognise the role of the appellate court. A more accurate formulation would be: 'The judge below erred by applying a test which is inconsistent with the test formulated in the binding authority of *X v Y*.'

STRUCTURE

A well-structured argument will have the following characteristics:

- It will utilise the principle of primacy. It should start with something that will engage the listener's attention and interest.

  Mark Weinberg QC, now Justice of the Victorian Court of Appeal, argued an application for special leave in the High Court at a time

when there was much discussion about the real effect of the life sentence in Victoria. He opened his argument thus: 'The point of general importance is "What is the meaning of life?"'.

Humour, in this form and this context, is appropriate.

- It will be put positively. When responding to argument, it is more effective to reframe the issues or at least put the respondent's argument positively, not defensively.
- It will avoid repetition of the opponent's argument when attacking it. This unnecessary repetition may clarify and reinforce the opponent's argument.
- It will acknowledge and deal with weaknesses and make appropriate concessions. For example, on the evidence of the police and Stojkowska, it would be appropriate to concede that Watkins was in fact intoxicated. This is because there is nothing to contradict their evidence and an argument based on other possibilities would tend to weaken the defence argument about knowledge.

ILLUSTRATION

Defence closing

One way you might start a closing address for the defence, applying the principle of primacy, is as follows:

'"I tricked Danny again."

That is what Walter Watkins said to the police.

That is what he attempted to do.

That is what he succeeded in doing.

This is how he achieved it.'

PRESENTATION

The following techniques will assist in effective presentation of your argument:

- Structure your argument so as to inform the decision-maker progressively.
- Treat the tribunal as a 'first-time listener' to your argument. Although a jury has no previous knowledge of your argument, whereas an appellate court usually does, they are both 'first-time listeners' to the way you develop your argument.
- Reduce difficult factual argument and legal concepts to simple propositions.

- Do not restate the opponent's argument in order to put yours, as this may explain and reinforce the opposing argument. Go to your own first.
- State the proposition before the reasoning that supports it. This encourages the listener to consider the reasoning process in the light of the conclusion for which you contend.
- Encourage conversation with the bench, welcoming questions and responding.
- Listen carefully to questions and consider your answer. Do not rush in.
- Answer questions when asked. Saying 'I will deal with this later' results in a break in communication because while you are developing your point, the judge may still be thinking of the question and why you have not answered it. The better approach is to say 'The answer is …; may I develop this later?' If the judge says 'No, tell me now', you must do so.

  It is therefore necessary in preparation of argument to prepare for questions likely to be asked, and either deal with them in advance as part of a balanced argument, or be ready to answer them.
- Avoid a lecturing or oratorical style.
- Pose rhetorical questions and answer them to help explain your reasoning process.
- Adjust your pace and timing so that the decision-maker can absorb the argument as well as hear it. The aim is to persuade as you go.
- When using authorities, state the principles for which they stand rather than reading slabs of judgments.
- Use materials such as notes, affidavits and exhibits, transcripts or evidence, but not by simply reading the text aloud.
- Avoid unnecessary formality. The overuse of formal phrases such as 'May it please the court', 'In my submission', 'With respect', even 'Your Honour' interrupts the flow of conversational argument and is a distraction.
- Avoid meaningless clichés such as 'Your Honour, the balance of convenience is clearly in my client's favour'. Instead, refer to those matters that show that the balance of convenience favours your side.

Outlining the argument

When presenting oral argument without a written outline, avoid outlining the argument at the beginning. Avoid the 'road map' approach typical in debating.

For example, if the judge is told that there are five reasons why an expert witness should not be accepted, and the reasons are briefly identified at the beginning as a road map, there is a risk that while you are developing your first or second point, the judge may be thinking about the flagged fourth point. That detracts from the attention that you are able to command.

A different and often better approach is to say 'There are five reasons why the expert witness should not be accepted. The first is …', and develop that point fully before moving to the next. This is more likely to keep the judge's attention on that part of your argument while it is being delivered.

This approach is controversial, and some advocates take the view that the fuller road map is appropriate. Judges prefer the full road map so that they can move the argument along. It is our view that it is appropriate in some cases, such as when written outlines are required. However, in pure oral argument, we think the approach that focuses the mind of the judge on one thing at a time is better advocacy.

Speaking to written submissions

When the court has a written outline of your submissions, whether you were required to provide them or chose to do so, you must consider the best way to present your oral submissions to the court.

Do not simply read the submissions and then develop them. In oral presentation use different language to develop and illustrate the submissions. Relate the submissions to your outline as you develop them. This provides the opportunity to explain your argument differently and provides variety for the listener. In some cases you may consider adopting a different structure from your outline if it provides a better opportunity to tell a story and better illustrates your argument.

A similar approach is often adopted by good appellate advocates when speaking to the grounds of appeal. Rather than organising and delivering the argument by direct reference to each ground, it is often better to tell a story that supports the specific grounds. This story will give a context to the formal grounds of appeal.

APPELLATE ARGUMENT

In an address to an appellate advocacy workshop conducted by the AAI, Justice Michael Kirby introduced his 'Ten Rules of Appellate Advocacy'.[3] He said these rules are not exhaustive.

1. Know the court or tribunal that you are appearing in.
2. Know the law, including both the substantive law relating to your case and the basic procedural rules that govern the body you are appearing before.
3. Use the opening of your oral submissions to make an immediate impression on the minds of the decision-makers and to define the issues.
4. Conceptualise the case, and focus the attention of the court on the matter, viewed from the perspective of the party you are representing.
5. Watch the bench and respond to them.
6. Give priority to substance over attempted elegance.
7. Cite authority with discernment.
8. Be honest with the court at all times.
9. Demonstrate courage and persistence under fire. You will generally be respected for it. In any case it is your duty.
10. Address any legal policy and legal principles involved in the case and show how they relate to the case.

An appellate argument will have all the characteristics of a good legal argument. It will also have some special characteristics.[4]

- It should be based on the specific grounds of appeal. An appeal is limited by the grounds of appeal relied upon. The outcome you seek is to persuade the court that one or more of the grounds is made out and that the orders you seek should follow.

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[3] The full text of Justice Kirby's speech can be found on the website of the Law and Justice Foundation of New South Wales, <www.lawfoundation.net.au> (from the 'Judgments and Courts' menu, choose 'Justice Kirby's Papers', 'Browse date index', then choose 'May 1995'). On the various aspects of appellate advocacy, see: Brian Martin QC, 'Advocacy in the Court of Criminal Appeal'; D. F. Jackson QC, 'Appellate Advocacy'; Justice Michael Kirby, 'Appellate Advocacy—New Challenges', Dame Ann Ebsworth Memorial Lecture, London, 21 February 2006, all available at <www.advocacy.com.au>.

[4] See Suresh Senathirajah and Elizabeth Brimer, *Drafting Appeal Notices and Submissions in the Supreme Court*, Leo Cussen Institute, 2006.

- Generally it is directed to a review of the existing decision, not to a rehearing. An appeal court has different powers and obligations from the trial judge or the jury.
- It should address the court's jurisdiction and role.
- It should address the court's knowledge of the case appealed from, to ensure that the court is thoroughly familiar with the material in the case about which you are presenting argument. If in doubt, it is advisable to take the court to such material.

Grounds of appeal must:

- be appropriate to the nature of the appeal and the court's powers;
- be specific and not broad—they must identify specific errors to be relied upon;
- include the reasons why the findings are erroneous and how that should lead to the orders sought, *not* simply assert the errors; and
- contain a clear statement of the orders sought.

Grounds of appeal can be amended or added only by the leave of the court.

INTERLOCUTORY APPLICATIONS

In any interlocutory application, you must take care to formulate and identify the orders that you are seeking. In an injunction, for instance, you should propose the least restrictive orders necessary to maintain the status quo pending trial.

Evidence at the interlocutory stage is generally by affidavit. You must determine the extent to which the judge is familiar with the affidavit material, including whether the judge has the material and whether he or she has had the opportunity to read it.

During the course of your argument, you must refer to specific parts of the evidence that support your case, and take the judge to that evidence. You will usually do this by referring the judge to certain paragraphs and exhibits within the affidavit material, and summarising them or reading them to the court as part of your argument.

Where an application is presented in the absence of the opposing party, for example an *ex parte* injunction application, you have an ethical obligation to inform the court of any material that is detrimental to your case. Failing to comply with this obligation can lead to the setting aside of the injunction, in addition to subjecting you to disciplinary action.

ARGUMENT ON A *VOIR DIRE*

When a *voir dire* is conducted in order to exclude evidence, such as a confession, it is necessary to identify and formulate the legal principle for exclusion before examination of the evidence.

It is necessary to consider whether, on the basis of the best result in your favour on the evidence, you would succeed in arguing for its exclusion. The goal is to avoid the situation where, at the conclusion of the evidence in the *voir dire*, taken at its best, the court will still rule the evidence admissible.

Judges will often ask what is the basis on which you seek to exclude the evidence, and whether that will succeed on the most favourable view of the evidence. It is good advocacy to identify that basis for the judge, in order to avoid the *voir dire* becoming a fishing expedition.

As to the conduct of a *voir dire*, see Chapter 3, 'Evidence in Action'.

CHECKLIST

- Apply Aristotle's principles of *logos*, *ethos* and *pathos*.
- Apply Justice Kirby's "10 Rules of Appellate Advocacy"
- Structure the argument.
- Do not repeat opposing argument in order to deal with it.
- Apply the principle of primacy.
- Watch the tribunal.
- Actively listen to questions.
- Welcome and respond to questions.
- Use a conversational style.
- Avoid lecturing and oratory.
- Be tactful.
- Be respectful of the opponent and/or of the court appealed from.
- State conclusions before developing them.
- Speak at a pace that will enable the listener to absorb and consider your argument.
- Involve all judges or jurors.
- Do not read the argument: minimise use of notes.

Case Study

DPP v LUCIA GONZALES

The illustrations in Chapter 8, 'Plea in Mitigation', are based on this case study.

BRIEF TO COUNSEL FOR MS LUCIA GONZALES

Counsel is briefed to confer and appear to present a plea for Ms Gonzales.

Ms Gonzales is a 23-year-old unemployed single woman. She has had some training as a hairdresser and as a receptionist. She worked at one job for two years until age 18. Since then her work record has been sporadic.

Ms Gonzales will plead guilty in the Magistrates' Court to burglary and assault occasioning bodily harm. The police summary indicates that Ms Gonzales broke into a house and stole a quantity of jewellery, valued at approximately $3000. As she was walking out, the occupant, a woman aged about 60 years, arrived home and confronted her. Ms Gonzales punched the woman in the face, breaking her nose, and escaped.

Ms Gonzales instructs that she did not intend to hurt the woman, but just to push her out of the way and escape.

Ms Gonzales has a long history of drug abuse and at the time of this offence was on Valium. She states that she was in a depressed state at the time and needed money to pay substantial medical bills.

She has two previous convictions for burglaries, committed to support her drug habit when aged 19 and 21. She received three- and six-month gaol sentences.

A report from Dr Jules Berne is attached.

REPORT RE: MS LUCIA GONZALES

Dr Jules Berne
Clinical and Forensic Psychologist
Psy.D., New York, MA (Clin.Psych.), London, Ass.Dip. (Behavioural Sciences)

At your request, I saw and tested Ms Gonzales on two occasions last week, once in the presence of her father.

Ms Gonzales is suffering from long-standing and serious depression. The symptoms of this include chronic poor self-esteem, depressed mood, repeated suicidal ideas, difficulty with sleep and appetite, and feelings of hopelessness about the future. In addition, she shows a clear disturbance in judgment, difficulty in establishing satisfying relationships with other people, and considerable immaturity.

This woman also has a four-year history of heroin abuse and is currently using marijuana and alcohol excessively. In all likelihood, she is addicted to one or both of these substances. It is noteworthy that these offences occurred while she was taking Valium.

Ms Gonzales requires consistent and ongoing psychiatric treatment. This can be arranged through her local doctor. If Ms Gonzales cannot be weaned away from the abuse of alcohol and marijuana through the treatment outlined above, on an out-patient basis, she may need a period of in-patient treatment in a drug and alcohol facility.

It is likely that her current drug abuse represents her own meagre attempts at medicating herself for depression.

The overall prognosis for Ms Gonzales is guardedly optimistic. She expresses some remorse and guilt about her recent behaviour and in looking back at the last few years, she is clearly aware of the difficulty she has caused herself and her parents. She has apparently been able to stay off heroin since her release from prison last year. If this is correct, it shows great determination.

It is noteworthy that she did not have any difficulty with the law prior to her involvement with drugs.

Her relationship with her biological father is very new, but promising. He is supportive of her and clearly has both emotional and financial resources which he is eager and willing to make available to his daughter.

Yours sincerely,
Dr Jules Berne

8

PLEA IN MITIGATION

The illustrations in this chapter are based on the case study *DPP v Lucia Gonzales* on pages 141–142.

A plea in mitigation is an argument that is:

- well researched and prepared,
- structured,
- persuasively presented,
- for the most favourable outcome.

INTRODUCTION

Sentencing is one of the court's most difficult tasks. It involves an attempt to achieve a balance between various, often irreconcilable sentencing considerations, such as:

- the effect on the community
- the need to express the community's denunciation of serious crime
- the need to punish and attempt to deter the offender and others
- the consequences for the victims
- the consequences for the offender
- rehabilitation of the offender
- the need to give effect to the principle of parity between offenders.

There are additional pressures on the sentencer as a result of:

- the emotive nature of the subject
- the intensity of public scrutiny of sentences.

Sentences are often criticised as being contrary to 'public opinion' and 'community expectations'. These concepts are complex and difficult to define and ascertain.

The public is often not fully informed, and public opinion is manipulated by the media and by assertions in political campaigns of a need to be tougher on criminals.

Such assertions are often not backed up by any evidence that harsher sentences are effective in reducing crime rates. Rarely does one hear on radio talkback sessions or read in the newspapers a contention that a sentence imposed was too harsh. This is despite the fact that courts of appeal regularly reduce sentences originally imposed.

Because sentencing is a difficult task for the decision-maker, good plea-making is an important and complex challenge for the advocate. This is due to:

- the breadth of the sentencing discretion
- the range of available sentencing options
- the difficulty of balancing the various sentencing considerations
- the vast body of decisions by appellate courts
- ever-changing social conditions and developments in the understanding of human behaviour and methods of rehabilitation, and
- the realisation that punishment by imprisonment is often counter-productive to the individual and destructive of rehabilitation prospects, although it may sometimes help to appease the victims.

A good plea can make a significant difference to the result.

The large body of sentencing decisions and the availability of numerous sentencing options reflect a recognition of the complex issues that must be balanced when sentencing an offender.

So far, 'intuitive synthesis' by the court of the various sentencing considerations has prevailed over a formal, structured approach by which specified portions of the sentence are allocated. A balanced approach to sentencing is needed because in a civilised society, it is necessary to look not only to punishment to protect the community and express community views, but also to the integrity and responsibility of the justice system in dealing with problems. However, some inroads are being made into this approach, for instance by identifying the sentencing discount given for a plea of guilty.

The plea can be the ultimate feat in the art of persuasion because in that role the advocate can most effectively influence the outcome for the client. These factors highlight the importance of good advocacy in plea-making.

THE DECISION TO PLEAD GUILTY

The decision to plead guilty must always be the decision of the accused. There is an ethical obligation to inform the accused, when advice is sought, of all relevant considerations and possible consequences without exerting any pressure, which may affect the accused's free choice of plea.

The incentives and pressures on an accused person to plead guilty include:

- the availability of plea discounts
- temptation to plead guilty to a lesser charge to avoid the more serious one
- the likelihood of a lesser sentence than a sentence upon conviction
- the cost and publicity of the trial
- the emergence of damaging or embarrassing evidence at a trial
- the concern for or the fear of the victim
- a sense of guilt where the accused may consider him- or herself blameworthy although in law no crime has been committed
- taking the blame for someone else.

In the interests of justice and the interests of the accused, the advocate must take great care to ensure that the decision to plead guilty is appropriate in law and truly represents the accused's free choice to plead guilty because he or she committed the offence charged.

To be able to advise the accused properly, the advocate must be thoroughly familiar with:

- the elements of the offence charged
- the admissibility of the evidence relied upon to prove the elements of the offence
- procedural requirements and time limits governing the laying or prosecution of charges
- prospects of conviction or acquittal
- likely penalty range

- the mental state of the accused at the time of the commission of the offence
- the fitness of the accused to plead
- all the circumstances surrounding the commission of the offence and its investigation.

The decision to plead guilty should be made as early as possible, and once made, should be communicated to the prosecution and the court so as to:

- gain the most advantage from an early guilty plea
- allow as much time as possible for investigation and preparation
- establish a treatment or rehabilitative program
- enable the client to make arrangements in case of a likely gaol sentence
- allow time for the negotiation of appropriate charges with the prosecution
- allow time for settling the summary of facts with the prosecution.

PREPARATION FOR A PLEA IN MITIGATION

Once the decision to plead guilty is made, the plea must be well researched and prepared. Preparation is as important for a plea as for other advocacy performances.

Unfortunately, this is not always recognised, and comments such as 'This is only a plea; I'll see the client at court in the morning' are common.

Preparation involves three stages:

- Stage 1: Acquiring knowledge of the relevant law, the evidence and all the circumstances of the case.
- Stage 2: Analysing all of the available material and developing a 'case theory' upon which the plea will be based.
- Stage 3: Preparing for the performance of the plea.

STAGE 1: KNOWLEDGE OF THE RELEVANT LAW, EVIDENCE AND CIRCUMSTANCES

It is important to have a conference with the client as early as possible. This will allow the client to take advantage of the time between the conference and the plea to obtain further information, organise character evidence and take steps towards rehabilitation. Also, where appropriate, the client could begin making restitution.

A plea of guilty has special significance. The court must take it into account and must evaluate its significance in the light of the time and the circumstances in which it was entered. An early plea is more valuable, especially if the prosecution case is weak.

Making use of the time in this way may in some circumstances avoid the need for pre-sentence or other reports, and thus avoid delays in sentencing. The court will usually be more impressed by such steps having already been commenced than by a promise to do so on plea day.

Investigation of the circumstances of the case and collection of material will involve determining what is relevant and significant. Not everything will be relevant to the case, as it is finally presented.

The following information will need to be considered:

- a full account of the circumstances of the offence
- a complete history of events after the offence
- a full history of events personal to the accused after the commission of the offence
- details obtained from a thorough investigation of the accused's background
- details of the accused's character.

The advocate will also need to consider:

- the selection of witnesses
- the collection of expert evidence
- whether to call the accused as a witness, and
- defence input into the statement of agreed facts and/or the police or Crown summary.

Circumstances of the offence

A full account of the circumstances of the offence may need to include the following information:

- the relationship between the accused and the victim
- relationships between the accused, co-offenders and potential witnesses
- presence or absence of motive
- relative parts played by the accused and co-offenders
- physical and mental state of the accused, co-offenders and witnesses
- the whole of the prosecution brief, including original exhibits and photographs

- other relevant material in the possession of the police
- a view of the scene.

ILLUSTRATION

In conference with Ms Gonzales, the following account of the circumstances of the offence has been obtained.

- The house that Ms Gonzales broke into was a house chosen at random near where she lives. It looked as if no one was home. Ms Gonzales did not know who lived in the house.
- At the time of this burglary, Ms Gonzales was on Valium and was depressed. She has suffered from depression since she was a teenager.

History of events after the offence

A complete history of events after the accused has been charged may need to include:

- details of the arrest and police investigation
- conversations, statements and interviews between the accused and the police
- conversations between the accused and co-accused, witnesses, fellow prisoners and others about the offence charged
- police interviews and statements of co-accused and witnesses, along with charges and results of proceedings
- bail and remand of the accused
- the exact amount of time the accused has spent in custody
- details of the accused's behaviour in custody.

ILLUSTRATION

The following is a history of events given by Ms Gonzales:

- She was arrested the day after selling the jewellery to a pawnshop.
- Apparently the store manager was suspicious of Ms Gonzales and called the police to have a look at the items.
- It became apparent that the items were the stolen goods after the owner of the house reported them stolen that evening.
- Ms Gonzales left her address details with the salesperson at the pawnshop. The police went to her home the following day and took her to the police station.
- After speaking to her solicitor, Ms Gonzales made a 'no comment' record of interview.
- She was charged and bailed after spending the night in custody in the police cells.
- Her solicitor telephoned the prosecutor a few days before the hearing and indicated that she would plead guilty.

History of events personal to the accused after commission of the offence

Details of the behaviour and state of mind of the accused after commission of the offence may include any or all of the following:

- expressions and indications of remorse
- domestic and economic circumstances
- mental and physical state
- change of lifestyle and/or pattern of substance abuse
- restitution or compensation offered to victims
- employment, education and other indicia of rehabilitation.

ILLUSTRATION

Ms Gonzales instructed that:

- She has recently searched for her biological father. He has been in touch with her during the last five days.
- He is very supportive and eager to play a more active role in his daughter's life.
- He will come to court.
- Ms Gonzales has been seen by Dr Jules Berne.

Details of the accused's background

A thorough investigation of the accused's background should be conducted. It may need to include details of the following:

- childhood problems or trauma
- relationship with parents, siblings and friends
- education, outstanding achievements or failures and reasons for them
- sporting and other interests, talents, hobbies and community activities
- employment and financial history
- medical history, both physical and mental, of the accused and his or her immediate family
- substance abuse and rehabilitation attempts
- gambling history
- marriage and relationship history
- criminal history including circumstances of prior convictions: these should be examined before the hearing, as they may reveal matters that can be used in support of the plea
- court proceedings prior to and after commission of the offence charged
- pending charges.

ILLUSTRATION

In conference, Ms Gonzales instructs that:

- She has a long history of drug abuse.
- She was adopted as a child by Mr and Mrs Gonzales.
- The marriage was a troubled one, including physical violence by her adoptive father against his wife, which Lucia witnessed.
- Mr and Mrs Gonzales separated when Lucia was six years old and subsequently divorced.
- After this she was raised by her adoptive mother and saw her adoptive father on weekend access.
- There was much difficulty on contact visits because of unresolved problems between her adoptive parents.
- Her adoptive father remarried when she was ten years old.
- She did not get on with her stepmother and she dates this as the beginning of her difficulties.
- She has been in several long-term relationships with young men. Two of the men have been physically abusive to her.
- One year ago she was in a severe car accident. She was hospitalised for three and a half weeks, continues to have pain in her nose, and is expecting to have plastic surgery.
- She has made several suicide attempts and has some past psychological treatment, which was brief.
- She has been sentenced on two prior occasions for multiple burglaries, committed to support her heroin habit.
- Over the past few years she has been in touch with her biological mother. Their relationship has been somewhat stormy and she has also been depressed about her mother's lack of response to many of her letters.
- She has had some training as a hairdresser and as a receptionist. She worked at one job for two years until aged 18. Since then her work record has been sporadic.

Details of the accused's character

You may need to interview character witnesses to support the accused's plea. Witnesses may provide evidence to support propositions such as:

- the accused is of general good character and reputation;
- the offence followed upon unusual events such as loss of employment, trauma, breakup of a relationship, etc.;
- the accused is remorseful and has undertaken efforts towards rehabilitation;
- the accused fulfils family and other responsibilities; and/or
- the accused has made contributions to the community in the form of good deeds, help to others and/or achievements. Folios or examples of the accused's work may form part of the evidence of his or her achievements and talents.

Selection of witnesses

Witnesses should be selected who:

- are impressive, and
- can speak of specific matters in respect of the accused, as well as his or her general character.

Expert evidence

Collection of expert evidence may include:

- early assessment of the accused by experts
- obtaining psychiatric, psychological or medical reports
- obtaining progress reports, if a rehabilitation program is being undertaken
- conferences with experts.

Calling the accused as a witness

The general practice is not to call the accused as a witness, as not much can be added to the material already before the court in a plea.

It may be necessary to call the accused to establish mitigatory factors or to rebut aggravating factors relied on by the prosecution.

If an accused is obviously remorseful, articulate, and likely to make a good impression, it may be useful to call the accused as a witness, simply to personalise him or her and allow the sentencer to be influenced by his or her evidence. This is particularly important where the theme of the plea is rehabilitation.

Input into statement of agreed facts or police or Crown summary

It is common practice in pleas to have a police summary in the Magistrates' Courts, and a Crown summary or statement of agreed facts in other courts.

A plea of guilty is an admission of all the elements of the offence. It is not an admission of all the facts upon which the prosecution relies.

It is advisable, when possible, for the defence to have some input into the contents of such documents with a view to limiting the extent of any inflammatory material. An early discussion with the prosecutor may be useful, and may even result in some mitigatory factors being made part of such a summary or statement.

Where a dispute as to the facts arises in a plea, it is important to refer to the relevant authorities, which in each jurisdiction determine the onus and standard of proof to be applied in the resolution of such disputes.

A sentencer may not take facts into account in a way that is adverse to the interests of the accused unless those facts have been established beyond reasonable doubt. However, if there are circumstances that the sentencer proposes to take into account in favour of the accused, it is enough that they be proved on the balance of probabilities: *R v Olbrich* [1999] 199 CLR 270.

Factual disputes will usually have to be determined by the calling of evidence and not from statements from the bar table.

The sentencing process retains the adversarial characteristics of a trial. It is not the duty of the advocate for the accused to disclose to the court matters detrimental to the accused. This applies even to prior or subsequent convictions.

However, counsel cannot rely on an absence of prior or subsequent convictions, if to do so would be to mislead the court. Nor can the advocate conduct a plea that in any way implies that the accused has no prior or subsequent convictions, if this is not true. This applies particularly if rehabilitation is a factor in the plea.

STAGE 2: ANALYSIS OF ALL AVAILABLE MATERIAL AND DEVELOPMENT OF A 'CASE THEORY'

A case theory is just as important in an argument such as a plea as it is in a contested trial.

Such a case theory will be the foundation of a cohesive, balanced and persuasive argument for a specific result. (See Chapter 2, 'Preparation and Analysis', on the development of a case theory.)

A case theory on which a plea is based will be one which takes into account:

- the established facts and circumstances of the offence
- the motive for the commission of the offence
- the aggravating factors in the commission of the offence
- the mitigating factors of the offence
- the consequences of the offence to the victim and the community
- the aggravating and mitigating factors personal to the accused

- the relationship between the aggravating and mitigating factors (of the offence and the offender) and the sentencing considerations
- the effect of the sentence on the accused, including effects on his or her family, employment and health
- the community's interests in balancing denunciation, punishment and rehabilitation
- the need or otherwise of specific and general deterrence.

When discussing the development of a case theory, we referred to it as a 'thesis', a 'system of ideas', and a 'construct'. In a plea, it is also useful to develop a 'theme', which makes the connections within the case theory.

STAGE 3: PREPARATION FOR PERFORMANCE OF THE PLEA

Performance preparation will include:

- preparation of summaries of submissions where appropriate
- making copies of references and reports for the sentencer and the prosecutor
- consideration of the order in which character witnesses and other witnesses will be called
- identifying significant portions of evidence
- identifying relevant statements of principle from sentencing decisions
- identifying essential passages from sentencing decisions (with references and copies)
- preparation of clear, well-organised notes, if necessary
- finding out about the decision-maker's approach to sentencing and attitudes.

Knowledge about the sentencer's approach and attitudes may be obtained from colleagues and from the sentencer's previous decisions. It may also be obtained by listening to other pleas, and to the court's responses.

A PLEA IS A STRUCTURED ARGUMENT

To be persuasive, the plea should have a structure, which will take the sentencer through the 'case theory' of the plea to a specific conclusion.

The decision-maker wants to know as early as possible what you are contending for. You should therefore make this clear, either at the outset or at a later time. In some circumstances, however, if the result that you

want appears unreasonable on the face of it, asking for what you want at the outset may result in a negative reaction from the decision-maker.

ILLUSTRATION

Opening submission: 'I submit that a non-conviction bond is appropriate for Ms Gonzales.'

Likely response (articulated or silent): 'You must be joking; she's already been in gaol twice before for similar offences, and these are serious offences.'

If it is done this way, the advocate will then have to battle against the decision-maker's early unfavourable view through the rest of the plea.

On the other hand, if you leave the identification of the result for which you contend to the end of the plea, and the decision-maker does not agree with you, then you have no further opportunity to persuade the decision-maker to change his or her view.

In the plea for Ms Gonzales, it will be better to start by summarising the case theory and introducing a theme, to lay the foundation for a more favourable result. It provides a softer, more fertile ground, and makes the suggested result at least feasible.

ILLUSTRATION

A useful beginning sets the stage for the case theory and introduces the theme of change:

> 'This plea is about change.
>
> Change from: "A young adopted girl who saw violence in her family, experienced violence herself, became depressed, turned to drugs and spent time in gaol"
>
> to: "A young woman who has given up heroin, sought medical advice, has the support of her father and is set on a path of rehabilitation".
>
> Allowing her to continue her rehabilitation and not sending her to gaol would be more beneficial for the community and to her.'

This structure uses a short summary of the case theory and theme. It focuses on the principle of primacy: that is, saying something meaningful and interesting instead of padding.

Padding remarks such as 'my client has pleaded guilty', when the court has just heard the plea, or 'Your Honour has heard the evidence' are useless, because they add nothing and detract from an interesting start.

Continue with the structure of the contrast between the past and the future by highlighting factors that throw light on the theme of change and good prospects of rehabilitation.

At the end of the plea, having illustrated the theme of change, it is an appropriate time to ask for the specific order contended for, such as a community-based order with drug rehabilitation conditions.

A well-structured plea has the following characteristics:

- It has a beginning, a middle, and a strong, effective end.
- It begins with a summary of the case theory.
- It takes the form of an argument that relates all plea material to the relevant sentencing considerations, rather than simply a recitation of the facts followed by a number of assertions and a request for leniency.

  Every fact should be placed in one of the categories of the plea and anchored to some part of the argument; for example:
  - denunciation
  - protection of the community
  - general and specific deterrence
  - rehabilitation
  - level of culpability within a sentencing range
  - current sentencing practices
  - parity between offenders.
- It includes, when relevant, reference to:
  - the relationship between the head sentence or sentences and the non-parole period
  - cumulation or concurrency with sentences already imposed
  - the imposition and effect of compensation, licence cancellation, loss of professional or director status, etc.
  - likely difficulties in custody with respect to health, isolation, language and/or lack of opportunity for rehabilitation and treatment.
- It identifies the specific result contended for at a stage of the plea when the sentencer may become interested and more receptive.

A PLEA MUST BE PERSUASIVELY PRESENTED

There is no one correct way of presenting a plea, nor is there a required structure or pattern. However, a creatively presented plea will not simply be a recitation of:

- the background of the accused, followed by
- a series of general propositions or assertions, followed by
- a request for leniency.

The advocate must employ his or her own style. A creative, original presentation is more likely to arouse the interest of the listener.

A persuasively presented plea involves:

- good communication
- balance
- courage
- integrity.

GOOD COMMUNICATION

To persuade is to influence the decision by formulating or changing the sentencer's perception and approach. This means that the advocate must take the sentencer through his or her reasoning process in the course of the plea, and not leave it to the decision-maker to put it all together at the end.

In summary, good communication is about:

- involving the decision-maker
- getting through to the decision-maker
- catering for the decision-maker's needs
- taking into account the fact that the sentencing process involves the emotions as well as the intellect of the decision-maker: 'the head and the heart'.

Simple, strong and appropriate language is most persuasive. It helps to create imagery.

ILLUSTRATION

'When Lucia Gonzales was a little girl, she often saw her father hit her mother. She was frightened. She did not understand.'

rather than

'During the course of her childhood, Ms Gonzales witnessed physical violence perpetrated by her adoptive father towards her adoptive mother.'

It is important to personalise and humanise the person for whom you are making a plea. Avoid using the expression 'my client' instead of 'Lucia Gonzales'.

THE PRINCIPLES OF PARITY

In a case where a number of offenders have pleaded guilty and some have been sentenced, the principles of parity in sentencing may become an important issue. The plea-maker must:

- read the sentences in respect of the other offenders;
- analyse the differences and similarities between those offenders and the offender for whom the plea is being made;
- consider the legal principles relating to parity and sentencing; and
- be prepared to argue why a similar or a different sentence should be passed.

BALANCE

To be balanced, the plea should take its weaknesses into account.

These may need to be stated and dealt with in a positive way, and not left to the prosecutor or the sentencer. If ignored, these weaknesses may be used to undermine the argument.

Although the sentencer knows that the advocates are trying to get the best result, the sentencer must balance all factors, both mitigatory and aggravating.

The sentencer will be best assisted, and the advocate's case best served, by the use of an argument that combines the two, rather than one that avoids the 'bad' points. The argument will be more credible as a result, because the advocate will be seen to have considered all relevant features, not just some of them.

Balance is also achieved by dealing with the competing sentencing considerations. While sentences imposed in other cases may not be of much assistance except to indicate a range of sentences, the sentencing principles that emerge from other decisions are of importance and can be used effectively as part of a balanced plea. For example:

- the greater emphasis on rehabilitation with youthful offenders
- the limited use of the principle of general deterrence in cases of offenders with mental illness
- the limited use of specific deterrence where the offender is unlikely to re-offend.

A positive, constructive and realistic suggestion as to the appropriate sentence should be advanced and reasons for the choice clearly articulated.

COURAGE

In exercising their sentencing function, the courts are generally, by their very nature, conservative. Changes in sentencing trends are often the result of creative and courageous advocacy.

It is the advocate's proper role, in the interests of the client, to push the boundaries by a well-developed and presented argument, which may make reference to other disciplines, studies, research, and changes in social conditions and attitudes.

To be creative and courageous does not mean to be outrageous, unrealistic or controversial for its own sake. The courts welcome a novel approach provided that it is reasoned, based on evidence, and clearly, persistently presented.

In this way, the advocate can achieve results by persuading the court to move beyond the previously accepted limits.

INTEGRITY

Many matters are put to the court from the bar table, particularly in Magistrates' Courts, where time is short.

The advocate must make sure that facts are accurate and conclusions not overstated. He or she must never mislead the court.

A good reputation in this regard may ultimately save much time and give support to the propositions that are put on behalf of the client. A good reputation helps to gain the court's trust and confidence in the advocate. It is hard to get but easy to lose.

Prosecutorial cooperation, particularly where the case turns into a plea, is important and both sides should be in a position of being able to trust each other. Once the advocate loses trust, he or she may find it much harder to obtain the advantages that flow from getting to know the prosecution case before the hearing, and from getting assistance.

PLEA IN MITIGATION AFTER CONVICTION

Special considerations apply to a plea after conviction because the client's instructions may be inconsistent with the facts on which the conviction is based. An accused who pleads not guilty often maintains his or her story of innocence at plea time, despite the conviction.

The structure and content of the plea will therefore have to vary with the circumstances of each case, so as to be consistent with the accused's instructions and yet also consistent with the fact of conviction.

This means that the plea will have to be made on the basis of such facts as had to be accepted by the tribunal to found the conviction. Comments by the advocate such as 'my client maintains his innocence' are of little assistance to the sentencer, who must proceed on the basis of the essential facts underlying the conviction.

The treatment in the plea of sentencing factors such as prior convictions, subsequent behaviour, remorse and rehabilitation must be carefully considered, in the light of the client's instructions as well as the facts on which the conviction is based. The case theory must accommodate these problems.

In most cases, it is possible to confer with the accused and prepare for a plea before or during the contested case. In some cases, however, it may not be desirable to involve the accused who is contesting a case in discussions relevant to the plea, because the accused may lose confidence in the advocate's commitment to the case.

It is advisable, particularly where the conviction is in respect of some charges and not others, to have time to consider how the conviction affects the plea, whether evidence should be called and how the plea should be structured.

Time for a conference with the client and an explanation of the position in relation to sentencing is desirable.

Some advocates take the view that it is better not to embark on the plea while the pronouncement of the guilty verdict is still ringing in the sentencer's ears.

VICTIM IMPACT STATEMENTS

Victim impact statements are permitted in most jurisdictions and sentencers are required to consider them as part of the sentencing process.

The effects of crime on victims have always been considered by sentencers; however, it is now done more overtly and in greater detail through the victim impact statements.

When victim impact statements refer to general, common-sense effects on victims—such as, for example, a family's deprivation and grief as a result of the killing of a husband and father—they are taken into account and no problem for the plea-maker or the sentencer arises.

Sometimes, however, victim impact statements, coming both from the victims and from others such as doctors, psychiatrists or teachers, refer to specific consequences that are alleged to flow from the crime committed. In those cases the plea-maker must carefully consider questions of causation and weight of expert evidence, as well as the reliability of such claims, and if necessary be prepared to test them or call evidence to contradict them.

Judgment and tact are required because of the risk that a challenge to such statements may reinforce them on the one hand, or be seen as evidence of further hurt to the victim or lack of remorse by the convicted person on the other.

It would be a brave advocate who launches into a cross-examination of a victim or an author of a victim impact statement without carefully considering the appropriateness of such an approach and how it may backfire.

That does not mean that the plea-maker should uncritically accept all the claims of adverse consequence to the victim without considering how they should be dealt with, and how they should be challenged, if necessary.

THE MOST FAVOURABLE OUTCOME

Ultimately, the aim of the advocate in plea making is to obtain for his or her client the best outcome reasonably available in all the circumstances of the case.

Excellence in plea-making can be achieved only if the advocate recognises the importance of its role, and makes his or her best effort to obtain the most favourable result for the client.

Persuasive plea-making is one of the great challenges in the art of the advocacy and must be approached thoroughly and seriously.

11

COMMUNICATION

THE IMPORTANCE OF COMMUNICATION IN ADVOCACY

Advocacy is the art of persuasion.

The word 'persuasion' is from the Latin *persuadere*. In the forensic context it means to prevail by reasoned argument and communication of information and feeling, by both verbal and non-verbal means.

Effective communication is essential to persuasion. The origin of the word 'communication' is from the Latin *communicare*, meaning 'to share'. It involves the conveying and sharing of information, ideas and emotion, by both verbal and non-verbal means.

For an advocate, communication is:

- the building of a relationship
- between the advocate and the decision-maker
- which will assist the advocate
- to be most persuasive.

Persuasion involves affecting the decision-maker's intellectual and emotional responses towards a desired end by:

- engaging the interest of the decision-maker, and
- making the desired impression during argument and the evidence of witnesses in order to:
  - build a relationship conducive to persuasion;
  - create new perceptions in the mind of the decision-maker; and/or
  - change perceptions already held.

The first stage in the building of a relationship with the decision-maker is active listening. This applies to:

- what the advocate's opponent is saying
- what the judge is saying
- what the witnesses are saying.

Active listening involves:

- being in a position to look at the speaker and maintain appropriate eye contact
- taking in what is being said
- taking in how it is being said
- not interrupting.

As an advocate, you will be better able to listen actively if you are:

- not tied to notes
- sufficiently prepared, so that you can focus on what the speaker is saying rather than thinking about what you want to say next.

Active listening is essential to:

- understanding and absorbing
- being able to respond appropriately
- giving the speaker the confidence that you are listening and interested
- avoiding being at cross-purposes.

It is important to 'listen before you speak'.

The test of effective communication is the message that the decision-maker receives. Building a relationship allows the advocate's message to be understood, accepted and acted upon.

The content of the message must be good, but that in itself may not be sufficient. To be effective it must be communicated persuasively.

Therefore, effective communication is the most significant quality of good advocacy.

ADVOCACY SKILLS FOR EFFECTIVE COMMUNICATION

To communicate effectively, the advocate must first:

- be thoroughly prepared.
  That involves:
  - complete familiarity with factual material
  - knowledge of relevant law, rules of evidence and procedure
  - analysis of the materials and development of a case theory
  - preparation for performance
- have developed specific advocacy disciplines and techniques
- have knowledge of the characteristics of the decision-maker.

It is then necessary to:

- understand the characteristics of effective communication
- understand the obstacles to effective communication
- find a means of overcoming the obstacles to effective communication
- identify personal strengths and weaknesses, and
- consciously develop communication techniques through critical self-appraisal and practice.

As an advocate you bring to your task your own personality and experience of life. It is important to remember to be yourself. You will communicate more effectively if you use what comes naturally.

You may admire other advocates and their particular styles but you should not try to emulate their style in precisely the same way. Attempts to do so will invariably appear contrived and artificial. Nevertheless, we can learn from other advocates by adapting their techniques to suit our own.

Communication skills, like those of advocacy, are best taught and developed by the workshop method.

ASPECTS OF EFFECTIVE COMMUNICATION

Effective communication is manifested in an advocate's performance when that performance employs:

- appropriate language
- appropriate body language

- clarity
- brevity
- simplicity
- timing
- pace
- voice control
- appropriate eye contact.

Other skills that will be evident include:

- command of materials—the ability to use relevant materials and control their presentation
- precision or accuracy in the content of what is presented, either orally or in written form
- organisation
- active listening
- reason and logic—the conclusions argued for are validly drawn from the supporting information provided
- empathy—the ability to identify with a person
- sensitivity and responsiveness
- balance
- control—the power to hold people's attention and influence their behaviour.

These characteristics, in combination, exemplify good communication in advocacy. An observer can discern a good advocate by what he or she is doing. However, seeing what is done does not necessarily disclose the skills and techniques used to perform what is manifestly good advocacy.

For example, seeing a good cross-examiner control a witness or a good advocate exhibiting 'presence' in court does not teach how those qualities are achieved.

Before considering the specific skills and techniques involved in effective communication, it is useful to identify the obstacles to effective communication.

OBSTACLES TO EFFECTIVE COMMUNICATION

There are two categories of obstacles to effective communication: functional and psychological. A lack of specific advocacy skills in handling witnesses or presenting argument is a functional obstacle. The psychological obstacles are generally produced by performance anxiety.

By the time people become advocates they are generally good communicators in ordinary day-to-day situations. In everyday communication there are no barriers of the kind that affect communication in the courtroom, such as:

- hierarchical relationships
- formality of proceedings
- the layout of the courtroom
- the requirement to comply with the rules of ethics, evidence and etiquette
- the pressure of skilled performance
- competitive pressure in the adversary system
- pressure of responsibility for the client.

To gain understanding of what interferes with effective communication in the courtroom, it is useful to ask:

- What is the psychological impediment to effective communication?
- What can be done to minimise it?

The psychological impediment to effective communication is performance anxiety, caused by any of a number of factors.

A degree of nervousness or anxiety is to be expected before and during any performance. For an advocate, performance anxiety is increased by worries about:

- insufficient familiarity with the materials
- insufficient familiarity with the court process and environment
- insufficient familiarity with the characteristics of the decision-maker
- inadequate legal knowledge and skills level
- making mistakes
- looking foolish
- failure to do the best for the client
- professional failure.

It is natural for advocates to have critical, destructive thoughts as a result of those fears. Such thoughts ('I am not really up to it'; 'I am going to look stupid', 'I am going to fail') are sometimes referred to as 'the second voice'. If not dealt with, it undermines one's ability to perform.

This 'second voice' is something that develops and intensifies as we grow up. A toddler learning to walk does not, when falling over for the first, second or even third time, say to him- or herself, '*That's it, I give up, I'm never going to learn to walk. What will people think of me!*'. A toddler will keep standing up, and falling down, until he or she has learned to walk. Skills

are best learned when people are young, before they develop inhibitions and defences and their thoughts become critical and unhelpful.

Human thinking follows a pattern of asking and answering questions or dealing with propositions. For example, the questions 'What sort of day is it? What will I wear?' may be answered by, 'It's cool; wear a jumper.'

Positive questions or propositions can help to encourage constructive, positive thinking and actions. For example: 'I have to be at court by 9.00 a.m.; how do I get there on time? What time do I have to leave to make sure I'm on time?' In this example, the positive question will lead to looking in the street directory to find the best way to find that court, and checking train schedules for relevant departure and arrival times.

If the 'second voice' asks a negative question or puts a negative proposition—for example, 'I don't know how to get to Broadmeadows Magistrates' Court; I'm going to be late'—the answer will be an unhelpful response that will increase anxiety.

ILLUSTRATION

The 'second voice' undermines confidence:

Q Why didn't I put that argument?
A You're incompetent.

Q Why didn't I ask the right questions?
A You're lazy so you did not do enough preparation.

OVERCOMING OBSTACLES TO EFFECTIVE COMMUNICATION

In the above illustration, the obstacle can be minimised by understanding that positive thinking and asking positive questions will produce more useful responses leading to positive action. For example, ask 'How can I improve my questioning?'; 'How can I better analyse and prepare my case?'

Performance anxiety can also be minimised by:

- consciously developing performance skills;
- improving knowledge and preparation;
- becoming more familiar with the court and the decision-maker. By knowing the decision-maker and his or her approach, the advocate can better anticipate issues that may arise;
- analysing one's own performance and assessing it critically but positively;

- organising the materials for easy identification and access;
- using relaxation techniques such as deep breathing and slowing down;
- focusing on and visualising the performance;
- being realistic about what can be achieved in the available time and circumstances.

  It is important that expectations are commensurate with the advocate's level of experience, skill and ability. For example, it is unrealistic for a junior barrister to expect to achieve what a senior barrister could achieve in a short space of time. What is realistic is a positive commitment to preparation, and performance to the highest standard possible within the available time and level of ability.

COMMUNICATION SKILLS AND TECHNIQUES FOR PERSUASIVE ADVOCACY

ORGANISATION

An advocate must structure the evidence, cross-examination or argument to support the case theory in a way that is most likely to persuade the decision-maker.

To be most persuasive, the advocate should aim to capture the decision-maker's attention and interest in the first 20 seconds of the presentation.[1] The advocate should use this opportunity to:

- focus the attention of the bench on the most significant issue;
- encapsulate the case in a concise but interesting way; and
- eliminate unnecessary introductory padding.

ILLUSTRATION

A final address for the defence in *DPP v Jones* may begin:

> 'I tricked Danny again.'
>
> That is what Watkins said and that is what he did.
>
> How did he go about doing it, and why was it successful?
>
> Watkins, knowing that he would not be able to purchase a bottle from Jones if Jones thought he was drunk, composed himself to appear sober, and successfully bought the bottle of sherry.

[1] This is a view expressed by David Bennett QC, Solicitor-General of Australia, when teaching appellate advocacy for the Australian Advocacy Institute. It is known as the principle of primacy.

That immediately encapsulates the theme of the argument for the defence, which abandons argument in relation to the first two elements of the offence and focuses on the third element: that if the sale was made, Jones did not know that Watkins was intoxicated.

It also uses a rhetorical question, which is a good way of involving the listener and highlighting the points supporting the conclusion that the advocate wishes the decision-maker to reach.

The advocate should also provide the decision-maker with sufficient information, in progressive sequence, so that each point will be understood in the light of the previous information. This overcomes the problem of the advocate assuming that the decision-maker has the same knowledge of the facts as the advocate does, which may not be a justified assumption.

Finally, the advocate should ensure that the decision-maker is ready to absorb and respond favourably to each stage of the evidence or argument. The advocate must work out the most advantageous time to make the request, state the desired conclusion or make the best point. It must not be:

- too soon, when the listener is not ready and therefore may misunderstand or have a negative reaction; or
- too late, when the decision-maker may have formed a different or adverse state of mind.

The most persuasive style of argument in court is conversational, not oratorial. This helps to build the relationship between the arguer and the decision-maker (see Chapter 7, 'Argument').

A good structure should:

- reflect the principle of primacy
- provide a clear introduction, development and conclusion
- capture and maintain interest
- control the listener's reasoning process so as to persuade 'as you go'.

TELLING A STORY

People are conditioned from childhood to hear and respond to stories. We see and experience life as a set of stories and associated feelings. Most cases are based on events, which constitute a story. In most cases there are competing or different stories based on people's differing perceptions, recollections and honesty.

Storytelling is important in the courtroom in:

- the presentation of an interesting opening address
- the leading of evidence
- describing the factual foundation for an argument
- setting the scene in an application, a plea in mitigation, or an appeal.

A good, persuasive story will:

- have a structure that is easy to follow
- maintain interest
- be simple
- use words to create images in the mind of the listener
- engage other senses as well as hearing, by the use of visual aids and exhibits
- be directed towards an objective
- have appropriate, emotive content.

It is much easier to communicate a scene or event to a listener if the advocate has first visualised the scene for him- or herself.

In order to tell a persuasive story, advocates should, from the material available to them, be able to visualise the scene. Going to the actual scene to view it, if possible, can be of enormous assistance.

Effective use of visual aids such as diagrams, photographs, charts, etc. is a powerful communication tool.

The importance of communicating a scene effectively was highlighted during a mock trial at a workshop. During the trial, none of the advocates used a plan of the scene, which was available in their materials.

After the jury delivered its verdict, the jurors were asked to draw a plan of the scene. The jurors' perceptions of the scene were all very different. Many of the jurors placed important landmarks in completely different locations. The location of the landmarks relative to other important landmarks, and to sites where action took place, were different. The jurors' maps were all significantly different from the 'real' scene.

Even where visual aids are not available, the advocate should help the listener to visualise the scene. This can be done only if the advocate has visualised the scene first.

Storytelling and imagery are important, useful and admired—even in the High Court. Upon his retirement from the High Court Bench, Justice

Michael McHugh spoke to the NSW Bar. He described how he and Justice Kirby lamented the absence of eloquence and colourful advocacy in the courts. They attributed the decline to the increased use of written submissions and to the attitude of some judges who discouraged rhetoric. Sometimes this takes the form of a comment from the judge: 'Please get on with it. I am not a jury.'

This attitude is not shared by all judges. Justice McHugh referred to the 'powerful and electric moment' when senior counsel in the 1996 *Wik* case managed in a few moments to paint an image of the Wik people going about their everyday life in 1879.

Beginning the case with the story of the Wik people is an example of primacy in argument. The importance of primacy was also illustrated by Justice McHugh, who gave an example of what is *not* primacy:

> Nothing used to annoy Justice Kirby and myself more than counsel getting up, when we were eagerly waiting to hear what the answer was to the appellant's case, and saying, 'Now I want to take Your Honours to page 17 of my submission, footnote 4—it should be 77, rather than 74 ...'

The events and action that take place in a particular setting are much better understood when the listener understands the scene. Once the advocate has visualised the scene, it is easier to introduce action by reference to the scene.

The action should be visualised in the course of preparation. Where witnesses differ in their accounts of the action, it is useful in preparation to visualise the action from the perspective of each witness. This will help you to deal with each witness's account.

LINES OF COMMUNICATION IN THE COURTROOM

Communication lines in the courtroom are unnatural and can be difficult. Normally, when a person is asked a question, the communication is between the questioner and the person answering.

It is natural for the answer to be directed back to the questioner, particularly if the questioner shows interest and actively listens.

However, in the courtroom, the information, and therefore the impact of the story, should be directed to the decision-maker and not to the questioner. Witnesses find this difficult.

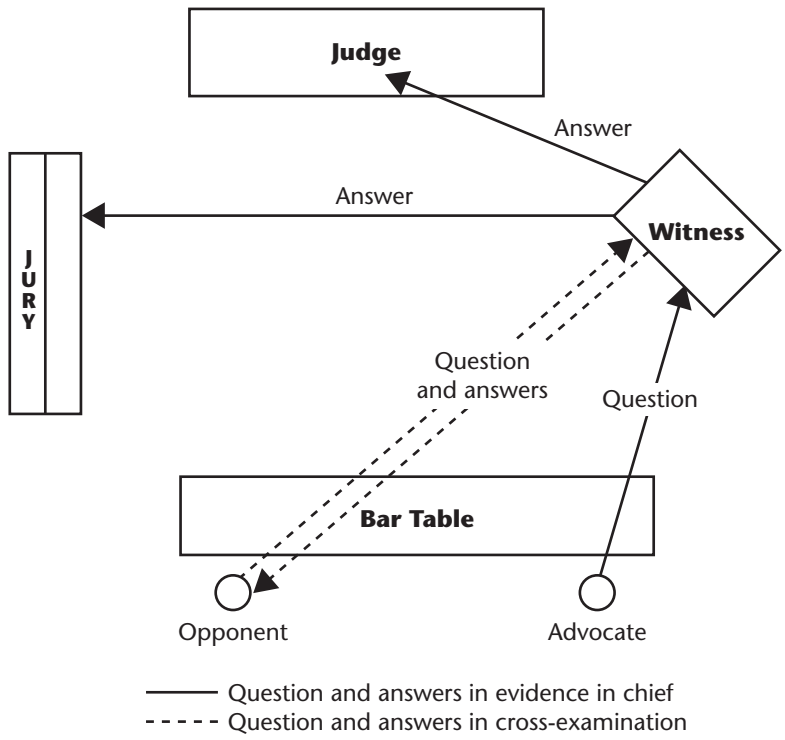
It is important that the advocate 'directs' the communication in the courtroom. In evidence in chief, the advocate asks questions of a witness. The witness's answers should be directed to the judge and/or to the jury, depending on the case. An advocate can help the witness to direct his or her answers to the judge or jury by using a number of techniques:

- saying to the witness '*Tell the jury* what Mr Watkins did after leaving the bottle shop';
- using hand gestures to indicate that the witness should direct his or her answers to the jury; or
- moving eye contact from the witness to the jury towards the end of the question.

Overuse of any of these is distracting; however, a combination of these techniques will keep the lines of communication between the witness and the judge or jury.

In cross-examination, directing communication in the courtroom is more complex. In order to control the witness it is useful to maintain eye contact and occupy the attention of the witness, so that his or her answers are directed to you.

The following diagram illustrates the appropriate lines of communication:



INCLUDING ALL DECISION-MAKERS

Whether it be an appellate bench of three or five judges, or a jury of twelve, it is critical that the advocate involve all decision-makers.

This will mean considering not only how to address the bench or jury as a group, but also how to attend to the needs of each member of the bench or jury as an individual.

For example, in the case of an appeal, it may be apparent that one of the judges is having trouble accepting the advocate's proposition, as revealed by the judge's facial expression. The advocate should take the time to address that judge and reframe the proposition, beginning with 'Perhaps, Your Honour, I can put this another way.'

Making every decision-maker feel involved and valued is an important part of effective communication.

USING POWERFUL, SIMPLE LANGUAGE

Simple language is powerful. It is expressive and easy to understand. Simple words and sentences help to communicate and persuade. It also helps to create images (word pictures) and provide emotive content.

This applies to both speech and writing. For advocates it applies to questioning and arguing.

> *I notice that you use plain, simple language, short words, and brief sentences. It is the modern way and the best way. Stick to it.*
> (Mark Twain in a letter to a friend)

Obstacles to simple expression include:

- unclear thinking
- fear of commitment to a clear idea
- fear of making mistakes
- fear of appearing unprofessional.

Listening, noticing and practising will help to develop the art of simple expression.

ILLUSTRATION

Simple, powerful language which creates images and has a strong emotive content is contained in this excerpt from a speech on an anniversary of September 11:

> 'The memories of September 11 will never leave us. We will not forget the burning towers and the last phone calls. We will not forget the rescuers who ran toward danger and the passengers who rushed the hijackers. We will not forget the men and women who went to work on a typical day and never came home.'

THE PRINCIPLES OF CLEAR EXPRESSION

Write to express, not impress. (Jack Trout, *The Power of Simplicity*)

I like short words. (Winston Churchill)

Empty your knapsack of all adjectives, adverbs and clauses that slow your stride and weaken your pace. Travel light. Remember the most memorable sentences in the English language are also the shortest: 'The King is dead' and 'Jesus wept'. (Bill Moyers, journalist)

When speaking or writing:

- use short and simple words
- use familiar, expressive words

  'After watching Walter Watkins leave the Royal Oak Hotel, Constable Bier got out of his car and walked towards him' *not*

  'After observing Walter Watkins exit the Royal Oak Hotel, Constable Bier alighted from his vehicle and proceeded in the direction of the subject of his observations.'
- don't be pretentious by using Latin terms unnecessarily, such as *per coram*, *contra*, etc.
- avoid clichés (trite stereotypical expressions)
- avoid jargon (language particular to a profession or group).

  This particularly applies when leading evidence from an expert witness. It is essential to ensure that the witness explains any technical terms.
- use direct expression

  'If the prosecution withdraws count 1, my client will plead guilty' *not*

'If the prosecution considers an appropriate step in relation to the first count my client will take a certain course.'

- use identifying names and humanising expressions, not depersonalising terms

  'Daniel Jones' *not*

  'my client'

- use correct grammar and syntax
- use descriptive language to create word pictures
- avoid standard expressions or 'fillers'
- use short sentences
- use the active voice
- use rhetorical questions to 'involve' the audience
- use metaphors
- use appropriately emotive language.

ILLUSTRATION

From a transcript of a trial.

Barrister:	What was the substance of that alleged conversation?
Witness:	What?
Barrister:	What was the substance of that alleged conversation?
Witness:	What was that?
Judge:	What did he say?
Witness:	Oh!

ILLUSTRATION

Examples of simpler words and expressions

in the event that	if
at the present point in time	now
for the reason that	because
reside	live
utilise	use
commence	start
endeavour	try
be desirous of	want
make reference to	refer
proceed	go

subsequent	later
prior to	before
alighted from	got out

ILLUSTRATION

Examples of more effective sentences

Instead of:
'Walter Watkins was arrested by Constable James Bier' or 'Constable James Bier was responsible for Watkins' arrest' (passive voice)
use:
'Constable Bier arrested Walter Watkins' (active voice)

Instead of:
'Section 5 of the Public Order Act was breached by the defendant when the bottle of sherry was provided by the defendant to Walter Watkins' (complex passive voice)
use:
'Daniel Jones breached section 5 of the Public Order Act by supplying the bottle of sherry to Walter Watkins' (simple active voice)

Instead of:
'By reason of the fact that Walter Watkins was released from the police station and can no longer be located he is unavailable to appear as a witness' (padding)
use:
'Walter Watkins cannot be called to give evidence because he cannot be found' (simple positive)

Instead of:
'A barrister must do his best for his client' (sexist language)
use:
'Barristers must do their best for their clients'

Inaccurate phrases such as 'I seek to tender this document as an exhibit' should be avoided. When a document is proved, the advocate should simply say 'I tender the document'.

In examination in chief, you should avoid questions in the following form:

- Are you able to remember who was in the room when you walked in?
- Do you recall what she was wearing?
- Can you describe what she did?

There are two problems with such questions. The first is that the strictly accurate answer to each is 'yes' or 'no' and the advocate must then ask the real question.

The second and more significant difficulty is that by introducing the idea of possible difficulties in recalling or describing, you are calling into question the witness's capacity to recall or describe.

Better and simpler questions are:

- Who was in the room when you walked in?
- What was she wearing?
- What did she do?

NON-VERBAL COMMUNICATION

Appropriate body language helps the advocate to create the desired effect and atmosphere, and to convey appropriate emotional messages and seriousness of purpose.

Where there is a conflict between what is said and the advocate's body language, it is the advocate's body language that will leave the greater impression.

Body language that enhances communication includes:

- stance or posture that conveys confidence and can be either receptive or commanding
- movement designed to have an impact or create a change of mood
- gesticulation used for emphasis
- mannerisms that are natural but not distracting
- facial expressions that are appropriate to the subject matter and atmosphere
- eye contact that creates a rapport.

  Eye contact can be sympathetic and inquiring, or hard and glaring. Eye contact, together with facial expression, should be appropriate to the occasion and to the witness or decision-maker.

It is difficult for advocates to change their natural mannerisms. A person who tends to move and use his or her hands would find it difficult to remain very still. It is important that an advocate remain natural, but aim to ensure that his or her mannerisms do not detract from effective communication.

Some mannerisms that detract from effective communication include:

- unconscious, continuous hand movements
- playing with a pen
- flicking or twisting hair
- constantly shifting weight from one foot to another
- shuffling of papers.

DELIVERY

Effective delivery involves:

- timing and use of pauses

  For example, when bringing out in cross-examination that Watkins paused, or when addressing the jury, describing Watkins' approach to the hotel and stating that he 'paused for a few moments', actually pausing before going on will highlight the pause.

- pace, to enable the decision-maker to absorb the information
- intonation for emphasis, change of meaning, or emotive quality
- volume, to make listening easier
- enunciation, for clarity
- minimal use of notes, to enhance the relationship with the listener.

USE OF NOTES

In performing all advocacy tasks, an advocate who is tied to his or her notes creates a number of communication problems, including:

- lack of appropriate eye contact

  If the advocate is reading notes, he or she is not looking at the decision-maker. The advocate cannot monitor the decision-maker's responses, nor build a relationship with the decision-maker. The advocate may miss an opportunity to reframe a proposition so that it is accepted by the decision-maker.

- inappropriate pace

  Most people read more quickly than they would speak. It is very difficult for a decision-maker to hear what is being said, consider it and evaluate it if the advocate is going at 'reading pace'.

- wasted opportunities for emphasis

  An advocate who is reading is less likely to pause for emphasis, or to use tone and volume for particular effect.

- inappropriate stance

  If notes are on a table or lectern, then the temptation will be to lean forward and look down, rather than standing upright with shoulders back. An advocate who is standing upright and looking at the decision-maker not only appears more confident, but compels the decision-maker to pay attention.

It is unrealistic, however, to expect an advocate to run an entire trial or lengthy matter without a note. The key to using notes so that they do not interfere with effective communication is to ensure that they:

- prompt the advocate's thoughts, and
- do not constitute the substance of what the advocate will say.

When the advocate has finished a particular topic, he or she may look down at the notes to be prompted about the next topic. There is nothing wrong with the advocate pausing to look down to read the prompt, then looking up again and continuing on with the next topic. The decision-maker will most likely be grateful for the pause, which is an opportunity to consider what has just been said.

The key to effective communication in this context is to avoid talking and looking down at notes at the same time.

Useful notes will often be dot points: simple propositions written as a list. They should not be in narrative form. It is also helpful to break the subject matter down into topics, highlighting topic headings.

These useful notes can be produced only after all of the preparation and analysis of the case has been finished. They are part of the performance preparation phase. It is only at this stage of the preparation that the advocate will know what is the substance behind the prompt.

Remember that you prepare to perform. You do not perform your preparation.

THEATRE OF THE COURTROOM

There are useful analogies to be drawn between a theatre performance and the advocate's performance in court. In both places, the audience responds to the performance.

> *There is a kind of invisible threat between the actor and the audience. When it's there, it's stunning. There's nothing to match that.*
> (Maggie Smith)

The famous jazz singer Al Jolson insisted on having all the lights on in the theatre. 'When I sing, I want to see their faces,' he said.

Both of these performers were, of course, talking about reading their audiences, making contact with them, responding to them and getting a reciprocal response.

The advocate's performance in court is organised and intended to affect the decision-maker. Like a good script in a play, substance is important, but also of critical importance is the performance itself.

In a contested case, there is no 'objective reality'. The real events that led to the dispute are not known to the court nor to the advocates, and sometimes not even to the participants. Truth, accuracy, understanding and perceptions vary.

Each party contends for a different reality or a different interpretation of reality. To succeed, a party must persuade the court to accept and act on its interpretation of the objective reality. The interpretation that is better communicated has a greater chance of being accepted and relied on.

In applying the analogy of the theatre to the courtroom, the advocate can be said to have a number of roles:

- producer
- director, and
- one of the actors.

The advocate is not the scriptwriter. In cases where there are disputed facts, each side has instructions in the form of accounts of events from the parties and witnesses. Often there are also documents and objects which form part of the case story. These are all for the advocate what the script of a play is for the actor.

The manner of presentation and performance of this material is up to the advocate.

The advocate's role should not be performed mechanically. It should be measured but creative. A skilled barrister will:

- avoid being overly theatrical
- inject enough theatre into the performance to make the story and the argument come alive in the mind of the listener
- hold the listener's attention and ultimately persuade the listener towards the desired conclusion.

> Any actor with any talent can convince us in the right part: for the great actor, every part is the right part.[2]

In court, the theatre analogy has its limitations because, unlike an actor, the advocate does not assume the character of another person. The advocate relies on performance skills, the use of appropriate language and body language in order to persuade.

Consider, for example, a case involving a car accident, where the advocate wishes to convey the idea of spatial proximity. Here, the word 'close' would be a better choice than the word 'far'. In addition, the advocate's choice of words will be enhanced by the use of body language. A good question would be, 'How close was the car to the crossing when the pedestrian stepped on?' The effect is heightened by moving or leaning forward, placing emphasis on the word 'close', pausing after the word 'close', moving the hands together to indicate closeness, and making direct but not confronting eye contact with the witness. All of this will reinforce the idea of closeness, together with the use of the word 'close' instead of 'far'.

In such a situation, the advocate is clearly performing: he or she is adding to the communication through manner and gestures. However, as an advocate you must also be yourself. The audience knows that you are advocating, and not pretending to be someone else in the same way an actor assumes a role. Your performance needs to stay within the range of your personality in order to be both persuasive and credible. The less the audience notices that you are acting, the better.

DEVELOPING COMMUNICATION SKILLS

Developing communication skills in advocacy as the art of persuasion must be the aim of every professional advocate.

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[2] Peter Lathan, 'What makes a great actor?' (2000), The British Theatre Guide, <www.britishtheatreguide.info>

The skills of effective communication are best developed by critically observing and evaluating one's own performance and performances of others, and practising the specific skills.

Other qualities of the great advocate include:

- commitment
- seriousness of purpose
- the will to persuade
- focus
- energy
- passion.

These are largely the result of a commitment to the role of the advocate in the adversary system, along with well-developed communication skills.

The two lectures on cross-examination by Professor Irving Younger, referred to in Chapter 6, provide an excellent demonstration of communication skills. The lectures themselves are not courtroom performances, but the skills he demonstrates can be appropriately adapted to the courtroom.

Some room, however, must be left for the most elusive: talent and force of personality.