GREENWAY CHAMBERS

ETHICAL ISSUES IN DEALING WITH WITNESSES

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Seminar Notes[1]

Overview

1 Dealing with witnesses involves much more than gathering evidence and determining how to present it. In every case, ethical issues will arise in the evidence-gathering process. These issues can and do arise at any stage of the litigation.

2 This paper discusses some of the main ethical issues that arise in dealing with witnesses, and provides some practical tips for handling these sometime sticky situations.

What is ethical conduct?

3 First, some basics. What exactly *is* 'ethics' in the practice of law?

4 As lawyers, we love rules. Our professional associations have, therefore, published certain rules which set out the types of conduct that, as legal professionals, we should, and should not, engage in. These are the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (**Solicitors Rules**)* and the *Legal Profession Uniform Conduct (Barrister) Rules 2015 (**Barristers Rules**)* (collectively, the ***Rules***). The Rules are detailed guidelines setting out how to act and, relevantly for present purposes, they contain provisions for dealing with witnesses.

5 Being common law lawyers, we can also look to caselaw to supplement the Rules in determining the way in which we are required to act in the practice of law.

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6 However, the Rules are not a complete code, and the caselaw merely provides examples. How, then, do we determine what is right, and what is wrong?

7 The former NSW Legal Services Commissioner, Steve Mark, was fond of a single-sentence formulation, which was capable of providing an answer to any ethical question: "If I did this (or did not do this), would my mother slap me for it?" For particularly astute readers, it will be apparent that the answer to this question depends upon the ethical compass of the mother in question. However, assuming your mother is a reasonable and ordinary mother of the type who frequently catches the Clapham omnibus, the question provides a clear answer to many ethical problems.

8 A less colourful way of explaining this was provided by the Office of the Legal Services Commissioner, in a paper dated 16 February 2017.[2] There, it was said:

> *'One generally accepted definition of the word "ethical" is that it pertains to right and wrong in conduct. Broadly speaking, compliance with relevant rules is necessary to prevent wrongdoing. But the basis of the legal profession's claim to its special place as a profession in our society is based on a good deal more than compliance with rules and laws. Integrity is often said to be a cornerstone of legal professional behaviour. A useful definition of "integrity" is the promotion of behaviour that adheres to moral and ethical principles. So compliance is only a pre-condition to achieving the integrity which our profession strives to attain. Something more is required of lawyers, something in the nature of an obligation to abide by moral and ethical principles… In summary, lawyers have a solemn duty to only ever act for the benefit of their client to the exclusion of all others, within the over-riding duty to the court and the justice system.'*

9 Although all of this makes perfect sense in theory, ethical problems can often give rise to real dilemmas that might appear to involve no good answer. If you ever have such a situation arise, it can help to speak to a more senior practitioner, or even to get advice from the Law Society and/ or Bar Association, which have a system for providing ethical advice to their members.

10 With that background, we now turn to the topic at hand: particular ethical issues that arise when dealing with witnesses.

[2] "Legal Ethics – What Are They Today?", *Office of the Legal Services Commissioner*, presented to Holding Redlich by John McKenzie (NSW Legal Services Commissioner), 16 February 2017.

Preparing written evidence

> *'The courts and the legal system generally rely on scrupulous adherence by practitioners to their ethical obligations to ensure that documents filed in the course of litigation are properly prepared and witnessed.'*[3]

11 The first interaction many lawyers will have with a witness will be when it becomes necessary to prepare a proof of evidence. This might occur, in the case of a client, at the very first meeting, or when taking instructions to prepare a pleading. In other cases, it will first occur when it is necessary to prepare an affidavit. (In criminal cases, it might occur when taking a statement, and otherwise when preparing a witness to give oral evidence – which we discuss below).

12 Preparing evidence is an integral part of a lawyer's role. It can give rise to a myriad of potential ethical issues, from preparing the evidence itself to witnessing the evidence on completion.

13 In preparing written evidence, lawyers have a responsibility to uphold the integrity of the evidence. What does this mean? First and foremost, it means exhorting your witness to only give truthful evidence. Rule 24.1.1 of the *Solicitors Rules* provides that a solicitor must not advise or suggest to a witness that false or misleading evidence should be given, nor condone another person doing so (see also r 69 of the *Barristers Rules*).

14 An example of what not to do: a lawyer swearing or affirming their own affidavit, or witnessing an affidavit of another person, which the lawyer knows contains false evidence. In the matter of Council of the Law Society of New South Wales v Ireland [2017] NSWCATOD 85, a solicitor was found guilty of professional misconduct by affirming an affidavit that he knew contained evidence that was false. The false evidence was contained in a document that had been created and was annexed to his affidavit. The solicitor was struck off. In Ireland, the Tribunal said (at [85]-[86]):

> *'A practitioner swearing or affirming an affidavit containing information that, to his or her knowledge, is false is a glaring example of conduct which undermines the trustworthiness of the practitioner, suggests a lack of integrity, and suggests that the practitioner cannot be trusted to deal fairly with the system of justice in which he or she practices - to quote the views of Thomas JA (with whom McMurdo P and White JA agreed) in* Barristers' Board v Darveniza *[2000] 112 ACRIN R438.*

[3] Victorian Legal Services Commissioner v Dhanapala (Legal Practice) [2021] VCAT 1562 at [1] (Senior Member Smithers).

> *The deliberate making of untrue statements on oath reveals a lack in qualities of honesty and candour that are essential attributes for a legal practitioner.'* [footnotes omitted]

15 Similarly, in Coe v NSW Bar Association [2000] NSWCA 13, a barrister was struck off after he was found to have sworn an affidavit, in Family Court proceedings to which he was a party, that contained information that he knew to be untrue. Mason P held (at [10]):

> *'If (which I doubt) there are exceptional cases where a practitioner who knowingly swears a false affidavit that is filed in court could be regarded as fit to practice, this is not one of them…'*

16 Obvious stuff: your mother would definitely slap you if you told a lie or supported someone else in doing so. But there is more to our ethical obligations than that.

17 Perhaps less obviously, witnesses will sometimes tell you something that you think is wrong, either because you have conflicting instructions, you have heard contrary testimony from another witness, or you have seen an inconsistent document. In such cases, particular care is required. Blindly accepting what a witness says, at face value, is never advisable. You are permitted to test the evidence by, for example, showing the witness the inconsistent document, or asking whether there might be an alternative explanation. But there is a (very big) difference between testing the witness's recollection, and suggesting particular evidence that should be given to support the case.

18 Another difficulty sometimes arises as a result of the particular form rules that apply in NSW and some (but not all) other Australian jurisdictions. When preparing evidence of conversations, they must be in 'direct speech'; that is, within quote marks in a 'he said/ she said' style. However, human memory typically does not work this way. When we recollect a conversation, we usually recall our *interpretation* of what was said, and often reconstruct the course of the conversation in our minds, instead of simply replaying a transcript. Moreover, the likelihood that recollection is accurate declines with time.

19 Witnesses therefore will often tell you that they cannot remember exactly what was said in a conversation they are being asked to recall. In these situations, you should not simply make up a conversation that roughly fits the recalled impression of the witness. Instead, you should explain the particular quirks of the form rules, reassure the witness that no one expects them to remember *exact* words, and then ask them to do the best they can in recalling the conversation in the appropriate form. When placing this evidence into an affidavit, appropriate qualifications can be used, including the ubiquitous formulation 'words to the effect'.

20 In terms of *practical* tips when preparing evidence:

20.1 Don't ever tell a witness what to say;

20.2 Don't ever condone a witness lying;

20.3 Don't change the witness's language to your language. As much as possible, use their style of language and word selection – there is nothing more jarring than reading a perfectly-formed affidavit full of complicated language and then hearing a witness open their mouth in the witness box with a completely different way of speaking. The question will instantly arise: whose evidence is contained in the affidavit?

20.4 Whilst there is always time pressure, make sure you properly review the evidence and associated documentation and satisfy yourself that there is no false, misleading or incorrect material in it;

20.5 If practicable, always meet with the witness (even if it has to be by AVL) to discuss their evidence. Test the evidence in conference, and confirm that it actually accords with the witness's recollection. Put documents to the witness to see if they assist their memory, but do not tell them what to say or suggest what their recollection should be;

20.6 If this process requires multiple conferences, then take the time for the conferences required; and

20.7 Provide the witness with a copy of their draft proof of evidence with sufficient time to review it and correct any errors.

Witness collusion

21 There is often more than one witness giving evidence for a party in the same case. This can include witnesses that are married, are related, or are close friends or colleagues.

22 Two or more witnesses are not permitted to confer with a lawyer regarding their evidence at the same time, if the issue is likely to be contentious at hearing or if the evidence would be affected by such conferral: r 25 of the *Solicitors Rules;* r 71 of the *Barristers Rules*. These latter 'carve outs' are best ignored: it is safest simply to refrain from discussing the evidence with more than one witness at the same time. Witnesses should also be told not to discuss their evidence with anyone else. There is almost never any doubt that witnesses have previously discussed events that end up in litigation, but whatever has occurred previously must cease once they walk through your office door.

23 The reason for this is obvious: the Court wants to receive the *witness's* recollection, and not someone else's recollection, or a blended recollection produced from discussion.

24 In Day v Perisher Blue Pty Ltd (2005) 62 NSWLR 731, the NSW Court of Appeal found that the holding of a teleconference by a lawyer, attended by multiple witnesses who discussed the evidence they intended to give at trial, was improper and 'seriously undermines the process by which evidence is taken': at [30] (Sheller JA, with whom McColl JA and Windeyer J agreed).

25 Taking *practical measures* to minimise any risk of undermining the integrity of evidence can include:

25.1 Advising each witness from the outset not to discuss their evidence with any of the other witnesses in the case, and continuing to remind them of this obligation throughout the course of the litigation;

25.2 Only conferencing with one witness at a time, notwithstanding that the conference may not be likely to involve a discussion of the evidence or any issues that are likely to be contentious at the hearing. In an AVL context, this includes confirming that the witness is alone during the conference; and

25.3 If two or more witnesses share a joint email account, ensuring that there is a mechanism in place to differentiate correspondence to each witness. An example may be to include in the subject line of the email the identity of the intended recipient. For abundant caution, however, especially where draft affidavits are being discussed, we recommend that the witnesses use separate email addresses and that, if necessary, they be assisted in setting them up.

Expert witnesses

26 This paper primarily discusses issues that arise in dealing with lay witnesses. However, there is considerable overlap, in that similar issues also arise with expert witnesses, and much of what we discuss here is equally applicable to those situations.

27 However, it would be remiss of us not to mention one unique ethical issue that frequently arises in dealing with expert witnesses (including interpreters): where the lawyer considers that amendments are required to a draft report.

28 As lawyers, not only do we love rules, but we also are (usually) sticklers for meticulous grammar, formatting, spelling and language use. Accountants generally seem to share this trait. However, without intending any disrespect, many other experts do not.

29 Although it may be your instinct to re-draft the expert's report for them, it must be remembered that the expert's primary duty is to provide an *independent* opinion within the area of their expertise to assist the Court. The expert is not a mouthpiece for the party that retained them (incidentally, nor is an advocate). Unlike a lay witness where (usually) the lawyer's role is to take their oral testimony and reduce it to writing in affidavit form, an expert witness will typically do their own drafting.

30 From a *practical* perspective, this means that a lawyer cannot influence the expert's opinion, nor should they draft the report for them. But the lawyer can:

30.1 test the expert's opinion in conference, including by reference to other expert pronouncements or objective materials on the subject-matter of the report;

30.2 remind the expert of their obligations under the Expert Witness Code of Conduct regarding the content of their report, including setting out the reasoning for their conclusions; and

30.3 propose non-substantive amendments to the report, such as grammatical or formatting changes.

Pre-hearing issues

31 There is no property in a witness: r 23 of the *Solicitors Rules;* r 74 of the *Barristers Rules*. This means that, with one exception, you are free to contact the other side's witnesses and seek a conference with them prior to the hearing. (Of course, in practice, this hardly ever occurs.) The exception is that it is not permitted to speak to the opposing *party* (and, in the case of a company, this would extend to its directors), unless:

31.1 the opponent has previously consented;

31.2 the lawyer believes on reasonable grounds that:

31.2.1 the circumstances are so urgent as to require the lawyer to do so; and

31.2.2 the dealing would not be unfair to the opponent's client;

31.3 the substance of the dealing is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom; or

31.4 there is notice of the lawyer's intention to communicate with the other party or parties, but the opponent has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with contact.[4]

32 Before a hearing, it is common practice for a lawyer and witness to have a conference to discuss the process of what will occur in the hearing, including the process of cross-examination. However, care must be taken in what precisely is discussed with the witness.

33 Just as a lawyers cannot suggest the evidence that should be given during the affidavit-preparation process, witness coaching in preparation for cross-examination is prohibited. In pre-hearing conferences, witnesses frequently ask: 'If I am asked [Question X], what should I say?' The answer should always be, 'You should tell the truth'. You cannot tell a witness what they should say in answer to a particular question: r 24.1.2 of the *Solicitors Rules*; r 69 of the *Barristers Rules*.

34 That said, there is nothing wrong with testing answers, or in drawing out a complete answer from a witness during hearing preparation, so that the witness is properly prepared to give a complete and truthful answer to questions likely to be asked of them. In addition, there is nothing wrong in preparing the witness for the cross-examination process by explaining the nature of closed questions, the types of answers that can be given in answer to them, and the consequences of giving answers that go beyond the questions.

35 Some *practical tips* include:

35.1 Testing the witness's evidence, so you know what they will say before they enter the witness box. This does not extend to suggesting answers for the witness, nor suggesting a different version of events occurred. However, if you know there is an inconsistency, raise it for the witness's attention;

35.2 Although it seems like it goes without saying, advising the witness to truthfully answer the questions asked; and

35.3 Confirming the witness's written evidence is true and correct. This conference is a final opportunity for the witness to raise for your attention any errors in their evidence, which can then be dealt with in examination-in-chief at the hearing.

[4] Rule 33 of the *Solicitors Rules;* similar to r 52 of the *Barristers Rules*.

Oral evidence – issues arising in Court

36 The obligation to uphold the integrity of evidence continues into the hearing. A lawyer is not permitted to discuss with a witness (including the client) any matter related to the proceedings while they are under cross-examination: r 26 of the *Solicitors Rules;* r 73 of the *Barristers Rules*. If the hearing is adjourned, it must be remembered that this obligation continues until the witness's evidence has in fact concluded - including over the weekend.

37 Limited exceptions to this rule apply, in circumstances where:

37.1 the cross-examiner has consented beforehand to the lawyer doing so; or

37.2 the lawyer:

37.2.1 believes on reasonable grounds that special circumstances require a conference;

37.2.2 has informed the cross-examiner beforehand of the lawyer's intention to do so, if possible; and

37.2.3 otherwise informs the cross-examiner as soon as possible of the lawyer having done so.

38 A common exception to the no-communication rule arises where settlement discussions occur during the course of the hearing, and the cross-examiner consents. However, even in these circumstances, you should *not* discuss the evidence; only the potential settlement.

39 The safest approach is to simply refrain from speaking to your witness, about anything, while they are under cross-examination.

What if you know that your client is lying in the witness box?

40 As we all know, a lawyer's paramount duty is owed to the Court; a lawyer must not knowingly or recklessly mislead the Court: r 19.1 of the *Solicitors Rules;* rr 23 and 24 of the *Barristers Rules*. This extends to refraining from presenting a case involving evidence that is false or misleading.

41 So, what do you do if your witness lies in the witness box in relation to a material issue? Rule 20.1 of the *Solicitors Rules* and r 79 of the *Barristers Rules* provide that a lawyer must:

41.1 advise the client that the Court should be informed of the lie and request authority to inform the Court; and

41.2 refuse to take any further part in the case unless the client authorises the lawyer to inform the Court of the lie and must promptly inform the Court of the lie upon the client authorising the lawyer to do so but otherwise may not inform the Court of the lie.

42 There is obviously a layer of complexity added to this situation where the client is still under cross-examination, and the rules preventing communication during cross-examination apply. Exceptional circumstances may permit a conference with the witness under one of the exceptions to communications during cross-examination set out above. However, as already discussed, the safest course is not to communicate at all with the witness during cross-examination.

43 Balancing all of this, the best approach is to ask for an adjournment after cross-examination has concluded: you are permitted to conference with a witness before re-examination. During the conference, you should follow the steps outlined in the Rules, with the intention of having the client retract their false evidence during the re-examination process, or otherwise ascertaining that you can no longer act.

Making serious allegations against witnesses

44 A lawyer must not allege a matter of fact, including in cross-examination, submissions or addresses in Court, unless there is a proper basis for doing so: r 21.3 of the *Solicitors Rules*; r 64 of the *Barristers Rules*. This is particularly important if the allegations are serious, such as fraud or criminality. The lawyer must have some evidence to support such an allegation.

45 In circumstances where a proper basis does not exist, the lawyer may be found guilty of professional misconduct and struck off.[5]

Oral evidence – after the hearing

46 Just because a hearing has concluded, does not mean that ethical obligations have ceased being owed to the Court.

47 If it comes to your attention before judgment is delivered that a witness has lied to the Court, the same rules apply as outlined in [41] above. If this occurs, immediately seek your client's authority to inform the Court of the lie. Of course, as with all communications to the Court, you must also first seek the consent of your opponent.

[5] Clyne v New South Wales Bar Association (1960) 104 CLR 186.

If you make a mistake or do the wrong thing…

48 Own up to it. This is *always* the best approach. Caselaw on ethical matters is replete with instances of lawyers having committed relatively less serious ethical offences, where they gone on to compound the offence by trying to hide it or lie about it to a regulatory body.

49 For example, in Law Society of New South Wales v McNamara (1980) 47 NSWLR 72, a solicitor was the subject of a complaint made against him by a client for not progressing his case and being untruthful about the status of the matter. The Solicitors' Statutory Committee found that the solicitor had engaged in misconduct, concluded that a severe reprimand was the appropriate punishment, and recommended that the Law Society issue a practising certificate (if the Law Society otherwise resolved to issue one) subject to a condition that the solicitor be entitled to practise only as an employed solicitor.

50 On appeal, the NSW Court of Appeal (Reynolds JA, Hutley JA and Mahoney JA) ordered the solicitor to be struck off, not because of the original offence but because of his dishonesty in the investigation and subsequent disciplinary proceedings. Reynolds JA said (at 76):

> *'It is true that he has not taken his clients' money and there is no deficit in his trust account. However, persistent dishonesty of any form is a disqualifying characteristic and the respondent remained dishonest to the last question asked of him on the final day of hearing…'*

51 Similarly, Mahoney JA said (at 83-84):

> *'If that which was to be weighed against Mr McNamara was only that he had been guilty of the matters as specified in the questions before the Statutory Committee, I would be of opinion that the Court should not make an order different in substance from that made by the Statutory Committee…*
>
> *But the question which I find of most difficulty is, what conclusion should be drawn from Mr McNamara's conduct before the Statutory Committee…The significance of this lies, in my opinion, not in its weight as the last straw, but in the fact that, when added to the rest of what has been found against him, it weighs down the balance heavily. It is something which he did at a time when, on his case, the strains which had led to his past misconduct had been removed.'*

52 Honesty is *the* number 1 attribute expected of us as lawyers. Remember this if you ever make a mistake or do the wrong thing, and you might be able to hold on to your practising certificate.

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