



GREENWAY CHAMBERS

Game, set match- tips for helping Counsel both in and out of Court, and how to prepare your witness to give evidence without coaching

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Game, set match

Experts

1. Reviewing expert reports
2. Considering admissibility
3. Working with your expert to improve the report



Game, set match

Experts

1. Sections 76 and 79 of the *Evidence Act 1995* (NSW)
2. *Makita v Sprowles* [2001] NSWCA 305
3. *Dasreef v Hawchar* [2011] HCA 21



Game, set match

Experts

*Harrington-Smith v Western
Australia (No 2)* (2003) 130
FCR 424



Game, set match

Experts

Things that you should do





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Proofing witnesses without coaching witness

A fine line?



Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

24.1 A solicitor must not—

- 24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so, or
- 24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.



Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

24.2 A solicitor will not have breached Rules 24.1 by–

- 24.2.1 expressing a general admonition to tell the truth,
- 24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness, or
- 24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.



Proofing vs coaching

“Whether preparation amounts to 'coaching' is inevitably a matter of degree, and is dependent on the facts”.

Majinski v State of Western Australia

[2013] WASCA 10 at [30]

“Questioning of a witness moves beyond 'proofing' to impermissible 'coaching' when the witness' **true recollection of events is supplanted by another version** suggested by the interviewer or other party”.

Majinski v State of Western Australia

[2013] WASCA 10 at [32]



Proofing witnesses without coaching witness

Re Equiticorp Finance Ltd; Ex parte Brock (No 2)

(1992) 27 NSWLR 391

It is clear that a witness might confer with his or her solicitor or counsel ... during such conference the solicitor or counsel concerned may give the witness advice. That advice may certainly include:

- advice that the witness should refresh his or her memory from contemporaneous documents;
- directing the witness' mind to the point about which questions may be asked;
- giving the witness a sketch of court procedure;



Re Equiticorp Finance Ltd; Ex parte Brock (No 2)
(1992) 27 NSWLR 391

- directing the witness' attention to points in his or her evidence which appear to be contradictory or fantastic;
- reminding the witness to bring to court all relevant documents;
- advising the witness as to the manner of answering questions (for example, 'In cross-examination listen to the question, just answer the question asked with as concise an answer as possible'); and
- giving advice as to appropriate dress and grooming.



Proofing witnesses without coaching witness

Re Equiticorp Finance Ltd; Ex parte Brock (No 2)

(1992) 27 NSWLR 391

A solicitor or counsel should **not** advise a witness as to how to answer a question.



Proofing witnesses without coaching witness

Two specific questions

1. Are you allowed to rehearse cross-examination?
2. When conferring with witnesses to prepare them to give evidence, can you correct witnesses if they say wrong thing?



Proofing witnesses without coaching witness

Final thought

Always exhort witnesses to give truthful evidence.





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Working with Counsel

Tips

