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DRAFTING IN CIVIL LITIGATION

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Introduction

1. The litigation process is about persuasion. This occurs not only at trial but also during the interlocutory phase including at mediation. Indeed, the interlocutory phase is often more important than the trial because:

   (a) the vast majority of cases settle prior to trial; and

   (b) what occurs at trial is, to a large extent, limited by what has occurred at the interlocutory level.

2. Hence, the drafting of relevant court documents is vitally important to the "success" of the case – whether that success is marked by a satisfactory settlement or by a verdict in favour of the client.

3. The particular drafting issues that we consider in this seminar will be:

   (a) Pleadings including:

      (i) statements of claim and defences;

      (ii) particulars; and

      (iii) strike out applications;

   (b) Interlocutory applications, including

      (i) drafting the summons or application;

      (ii) the affidavit in support;

      (iii) although important at all stages of the drafting process, waiver of legal professional privilege will be considered in relation to interlocutory applications;

   (c) Lay witness statements and outlines of evidence including:

      (i) choosing between outlines of evidence or witness statements;

(ii) drafting the statement or outline; and

(d) Expert witness statements including:

(i) who can be an expert;

(ii) expert guidelines;

(iii) instructing the expert; and

(iv) drafting and settling the expert report.

4. There is a particular emphasis on drafting pleadings because that tends to be the area in which solicitors are the least confident.

5. As noted, each of the steps is very important to the outcome of the client's case. As with much in litigation there are no "short cuts" or "tricks" – what is required is a working (if not thorough) understanding of the rules of procedure and evidence and the manner in which they are applied in practice.

Pleadings

Statements of Claim

(a) Principles of Pleading

6. The importance of good pleading is that:

(a) It demonstrates to the court and to the other side that you know your case;

(b) It will highlight for you any weaknesses in your own case;

(c) It will ensure that the issues are kept as narrow in focus as possible and thereby (hopefully) reduce costs;

(d) It lets you know what evidence must be tendered in the presentation of your client's case.

7. This will be achieved if you keep the following goals in mind when pleading:

(a) precision – a pleading should be clear and unambiguous;

(b) intelligible;

(c) short – including the use of short sentences; and

(d) legally effective.

8. The single most important skill of the good pleader is clear and logical thought. If the drafter can maintain clarity of purpose and logic when drafting then they will rarely go wrong.

9. The "genius" of the system of pleading is said to be based on three propositions:

   (a) a party must plead the material facts on which he or she relies to prove his or her case (r 13.02(1));

   (b) unless an allegation is denied or specifically not admitted, it is taken to have been admitted (r 13.12(1));

   (c) a party must plead any matter that makes the other side's claim not maintainable or which would take the other party by surprise (r 13.07(1)).

10. If these rules are followed (and often they are not) once pleadings have closed (r 14.08) the issues in dispute will be clearly defined.

11. In *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] VSC 492 at [3]-[6] Vickery J said this of the principles of good pleading:

> *[3] Matthew E. May wrote in his book The Elegant Solution: Toyota's Formula for Mastering Innovation:*
>
> > In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organisations. An elegant solution is quite often a single tiny idea that changes everything.
> >
> > … Elegance is the simplicity found on the far side of complexity.
>
> *[4] While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.*

[5] Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

[6] Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.

See also:

- *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2008] VSC 77 [1-4];
- *Hoh v Frosthollow Pty Ltd and Ors* [2014] VSC 77 at [13] – [20].

12. In *Wheelahan v City of Casey (No 12)* [2012] VSC 316, Dixon J set out the essential elements of a sound pleading and the principles to be applied on strike out applications (citations removed):

(a) the function of a pleading in civil proceedings is to alert the other party to the case they need to meet (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that the court may conduct a fair trial;

(b) the cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action;

(c) as a corollary, the pleading must be presented in an intelligible form — it must not be vague or ambiguous or inconsistent. Thus a pleading is "embarrassing" within the meaning of r 23.02 (ie the rule permitting the strike out of a pleading) when it places the opposite party in the position of not knowing what is alleged;

(d) the fact that a proceeding arises from a complex factual matrix does not detract from the pleading requirements. To the contrary, the requirements become more poignant;

(e) pleadings, when well-drawn, serve the overarching purpose of the Civil Procedure Act 2010 (Vic);

(f) a pleading which contains unnecessary or irrelevant allegations may be embarrassing — for example, if it contains a body of material by way of background factual matrix which does not lead to the making out of any defined cause of action (or defence), particularly if the offending paragraphs tend to obfuscate the issues to be determined;

(g) it is not sufficient to simply plead a conclusion from unstated facts. In this instance, the pleading is embarrassing;

(h) every pleading must contain in a summary form a statement of all material facts upon which the party relies, but not the evidence by which the facts are to be proved (r 13.02(1)(a));

(i) the effect of any document or purport of any conversation, if material, must be pleaded as briefly as possible, and the precise words of the document or the conversation must not be pleaded unless the words are themselves material (r 13.03);

(j) particulars are not intended to fill gaps in a deficient pleading. Rather, they are intended to meet a separate requirement — namely, to fill in the picture of the plaintiff's cause of action (or defendant's defence) with information sufficiently detailed to put the other party on guard as to the case that must be met. An object and function of particulars is to limit the generality of a pleading and thereby limit and define the issues to be tried

(k) a pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it;

(l) extensive cross-referencing of facts in a pleading may render parts of the pleading unintelligible;

(m) in an strike out application under r 23.02, the court will only look at the pleading itself and the documents referred to in the pleading but note that that it is still important to set out the effect of the document. It is not sufficient to simply refer to the document and then leave the other side to determine what effect the Plaintiff contends for or what portions the Plaintiff relies upon – see *Bolitho v Banksia Securities* [2014] VSC 8;

(n) the power to strike out a pleading is discretionary. As a rule, the power will be exercised only when there is some substantial objection to the pleading complained of or some real embarrassment is shown;

(o) if the objectionable part of the pleading is so intertwined with the rest of the pleading so as to make separation difficult, the appropriate course is to strike out the whole of the pleading;

(p) Rule 13.10, which requires a pleading to contain the necessary particulars of any fact or matter pleaded

(b) The Rules of Pleading

13. It is impossible to plead without a very good working knowledge of Order 13 of the Supreme Court Rules. Order 13, in particular, operates as a code containing almost all of the important rules of pleading.

14. In addition to the Rules of Court, the *Civil Procedure Act 2010* and ethical considerations also impinge upon the manner in which pleadings are drafted. The advocacy and litigation rules in the *Professional Conduct and Practice Rules 2005 (Vic)* are specifically stated to apply to all dealings with the courts including the preparation and filing of documents. The Practice Rules of the Victorian Bar (rr 32-35) deal even more expressly with pleadings.

15. The *Civil Procedure Act 2010* provides (amongst other things) that:

(a) the parties, litigation funders (including insurers) and the lawyers have the following "overarching obligations":

(i) an obligation (referred to as the "**paramount duty**") to the court to further the administration of justice (section 16);

(ii) to act honestly (s 17) and not to engage in conduct that is misleading or deceptive(s 21);

(iii) to ensure that no allegation is made that is vexatious or frivolous and to ensure that all allegations that are made have a "proper basis" (s 18);

(iv) to only take those steps that the person believes are necessary to facilitate the resolution or determination of the proceeding (s 19);

(v) to co-operate with the other parties and the court in the conduct of the litigation (s 20);

(vi) to use reasonable endeavours to resolve a dispute, or to narrow the issues in dispute, by appropriate dispute resolution unless it is not in the interests of justice to do so or the nature of the dispute is such that only judicial determination is appropriate (ss 20, 23);

(vii) to ensure that the costs incurred in connection with the proceeding are reasonable and proportionate to the complexity or importance of the issues in the proceeding and the amount in dispute(s 24);

(viii) to act promptly and minimise delay (s 25);

(ix) to "disclose" the existence of documents that are or have been in their power, possession or control of the person and which are critical to the resolution of the dispute (unless covered by privilege) (s 26).

(b) Litigants in the Victorian courts have to give two types of certificates:

(i) a certificate from the party that they have read and understood the overarching obligations; and

(ii) a certificate from the party's lawyer (or the party themselves if there is no lawyer) that, on the basis of the legal and factual material available, there is a proper basis for each allegation, denial and non-admission in a document.

16. These obligations can, in some circumstances, have a significant effect on the manner in which pleadings are done and, more generally, the strategic decisions parties can take in litigation. In particular, section 18 means that a party cannot now deny or refuse to admit an allegation that it knows to be true. It used to be the case that party was at liberty to put the other side to its proof – that is no longer the case. Further, if a party does make an allegation that is vexatious, there is greater scope (not much realised in practice) for the court to make orders that have serious ramifications for the lawyers (and not just the party). It also

affects the extent to which a party can take strategic pleading points for the purposes of seeking to make the other side run out of money.

17. In the Federal Court it has long been the case that pleadings must be accompanied by a Form 15B statement which requires the legal practitioner to certify that there is a proper basis for each allegation in the statement of claim. This "proper basis" certificate is not unduly problematic for a statement of claim but it does lead to some difficult questions for defences as discussed below.

18. Court practice notes also govern the form and substance of pleadings – for example, see:

    (a) Supreme Court Practice Note No 4 of 2004 in relation to the Commercial List. It provides that evasive pleading of defences will not be permitted;

    (b) Supreme Court Practice Note No 2 of 2001 in relation to Building Cases List. It provides that certain aspects of the rules will be strictly enforced (eg pleading material facts only) and that evasive pleading will not be permitted; and

    (c) County Court Practice Note PNCI5-2007 for the Business, Commercial and Miscellaneous Division in the County Court which provides that the Court may become involved if pleadings are confusing or particulars sought merely as a means of delay.

19. Pleading is an art many lawyers attempt but few have mastered and, although some lawyers understand the concept of pleading, it is a black art to many.

20. Pleading is more (and less) than telling a story in the narrative - it is setting out the material facts that give rise to the cause of action. To do this a pleader needs to be able to distinguish between:

    (a) material facts;

    (b) particulars; and

    (c) evidence.

21. As Gleeson CJ said in *Goldsmith v Sandilands* (2002) 190 ALR 370:

> *The facts in issue in a civil action case emerge from the pleadings, which, in turn, are framed in the light of the legal principles governing the case. Facts relevant to facts in issue emerge from the particulars and the*

> *evidence. The function of particulars is not to expand the issues defined by the pleadings, but "to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial". The function of evidence is to advance, or cut down, the case of a party in accordance with the rules of statute or common law that determine the nature of the information a court will receive.*

22. That is, material facts constitute the basis for the cause of action. The particulars explain how the case is put so that the other side is not taken by surprise. Evidence is how the case - which is set out in the material facts and the particulars - is to be proved. Material facts must be pleaded (r 13.02(1)), particulars are pleaded where necessary to prevent a party being taken by surprise (r 13.02(2)) and evidence ought not be pleaded (r13.02(1)(a)). So, for example, do not plead admissions.

23. The distinction between the material facts and particulars is sometimes a difficult one. However, it is important. Material facts are those facts that are necessary to prove the cause of action. Particulars play a different role – they put the defendant on guard as to the case he or she has to meet so that they are not taken by surprise at trial. Although this is not an excuse for failing to understand the difference between the two, it is less problematic to plead a particular as a material fact than vice versa – that is, if in doubt, it is better to plead the allegation as a material fact than as a particular.

24. Each allegation should be contained in a separate paragraph (r 13.01). The pleading must also contain reference to any section of an Act relied upon and it must state the relief claimed (r 13.02(1)(c)).

25. Conclusions of law may be pleaded but are not required (r 13.02(2)). Most pleaders will plead the legal conclusions as the statement of claim is more persuasive as a form of advocacy when they it sets out its conclusions rather than simply providing a morass of facts.

26. It is sufficient to plead the effect of a document or of any conversation and it is not necessary to set out the precise words (r 13.03). The difficulty, of course, is that if you do not use the exact words, the other side will deny the allegation has the effect for which you are contending. Very usefully, it is sufficient to plead a

contract as a fact and to refer to letters, conversations or circumstances giving rise to the contract without setting them out in detail (r 13.06).

27. A party is not obliged to plead any fact that is presumed true or the burden of disproving it lies on the other party (r 13.04). However, the reality is sometimes not so clear – see, for example, in relation to s 4 of the *Australian Consumer Law*.

28. An allegation of the performance or occurrence of any condition precedent is implied and does not need to be pleaded (r 13.05).

29. Inconsistent allegations can be pleaded within a pleading as long as it clear that they are pleaded in the alternative (r 13.09(1)). However, a party cannot make any allegation that is inconsistent with their own previous pleading (r 13.09(2)). In that case, the appropriate course is to amend the earlier pleading (see r 13.09(3)).

30. Further, the ability to plead in the alternative does not mean that a multitude of alternatives can be pleaded and then wait to see what "falls out" of the allegations. As the High Court observed in *Forrest v Australian Securities and Investments Commission* (2012) 247 CLR 486 at [27]:

> *The task of the pleader is to allege the facts said to constitute a cause of action or causes of action supporting claims for relief. Sometimes that task may require facts or characterisations of facts to be pleaded in the alternative. It does not extend to planting a forest of forensic contingencies and waiting until final address or perhaps even an appeal hearing to map a path through it. In this case, there were hundreds, if not thousands, of alternative and cumulative combinations of allegations. As Keane CJ observed in his judgment in the Full Court:*
>
> *"The presentation of a range of alternative arguments is not apt to aid comprehension or coherence of analysis and exposition; indeed, this approach may distract attention from the central issues."*

31. The rules specifically require that a pleading must contain the necessary particulars of each allegation of fact (r 13.10(1)). That is, it is not appropriate to leave out important particulars on the basis that the other side can make a request for them in due course. The rules specifically provide that particulars

must be given to avoid surprise at trial, define questions for trial and to avoid surprise at trial (r 13.10(2)). The rules also specifically provide that particulars must be given of any misrepresentation, fraud, breach of trust, wilful default of undue influence and any statement of mind including malice, fraudulent intent, knowledge or notice (r 13.10(3)).

32. In any pleading, the pleader has an obligation to ensure that there is evidence to support any matters that are pleaded (Bar Rules r 32). As noted, this is now supported by the *Civil Procedure Act 2010*. Particular care must be taken when pleading fraud – and that is so whether the allegation of fraud is pleaded explicitly or implicitly (and perhaps even unintentionally and, in this respect, pay careful attention when pleading misrepresentation) (see *Professional Conduct and Practice Rules 2005* r 16.2, Bar Rules r 34).

(c) The Federal Court

33. The Federal Court has, for a number of years, had a Fast Track list which permitted a slightly less formal position in relation to pleadings. In fact, the relevant Practice Note provides that there are no pleadings in fast track proceedings but, rather, "Fast Track Statements, Fast Track Responses, Fast Track Cross-Claims and Fast Track Replies". The Fast Track Statement must:

> "must, avoiding undue formality, state in summary form:
>
> (a) the nature of the dispute;
> (b) the issues that the applicant believes are likely to arise in the proceeding;
> (c) the applicant's contentions, including the material facts upon which the applicant intends to rely (which must be stated with adequate particulars), the relief claimed and the legal grounds for that relief."

The requirement to state the material facts with adequate particulars suggests that the Fast Track Statement will look very similar to a pleading – and, typically, they do. However, it appears that, by changing the name of the document, and specifically providing that the documents are not pleadings, the Federal Court is seeking to avoid pleading disputes. Certainly, only the most unintelligible statements tend to be challenged in the Fast Track.

34. The Federal Court has, for the past 18 months or so, been consulting in a range of new practice areas and practice notes that apply to the different national practice areas (NPAs). The new NPAs are:

    (a) Administrative and Constitutional law and human rights;

    (b) Admiralty and Maritime;

    (c) Class actions;

    (d) Commercial and Corporations;

    (e) Employment and Industrial Relations;

    (f) Intellectual Property;

    (g) Native Title;

    (h) Taxation.

35. The way in which the new NPAs are intended to operate is beyond the scope of this seminar but, relevantly, there will be a "Central Practice Note" and practice notes for each of the divisions. Draft practice notes have been circulated for comment and are on the Federal Court website. They provide that procedures set out in the practice note for one NPA can be utilised in an appropriate case for a case in another NPA.

36. This is relevant to pleadings because, the draft practice note for the Commercial and Corporations NPA, provides that Fast Track statements are to be abolished. In their place, when a plaintiff commences a case, they can use a pleading, an affidavit or a "concise statement".

37. The concise statement is not to exceed 5 pages and is to be "plain, concise and direct in every regard". It is said to that it is only necessary to summarise the important facts giving rise to he claim, the relief sought and against whom, the primary causes of action and to set out the harm, including a realistic and conservative estimate of loss and damage if possible. Different judges have given different views about their expectations in terms of how frequently the concise statement method will be utilised.

38. The use of this format will result in an expedited case management conference (2 to 3 weeks after filing), at which time the Court will determine if the proceeding

can continue on that basis or if an alternative method (ie affidavits or pleadings) is required.

(d) The Process of Pleading

39. Many inexperienced pleaders commence to draft a pleading by setting out the court heading, then alleging the incorporation of the relevant parties and then seeking to copy from some precedent. This is a method that will almost certainly lead the pleader into error.

40. A number of steps need to be taken before the process of drafting can commence. The steps that one should take in drafting a statement of claim are as follows:

(a) Simply ask, what happened and what is it that the client is concerned about?

(b) What relief is sought?

(c) What causes of action (if any) are open to achieve that relief?

(d) What are the elements of the relevant cause(s) of action?

(e) What facts are required to prove that cause of action and the right to relief sought?

(It is in this last two areas that most mistakes are made by the inexperienced pleader);

41. The identification of the relevant cause of action and the elements of the cause of action is critical and it is an aspect which pleaders too often assume they know and then make mistakes. Hence, legal research is necessary before drawing anything other than the simplest pleading. Not only will it tell you about potential causes of action, it will identify, or remind you of, the elements of the cause of action.

42. Best practice is to set out a form of spread sheet which sets out the relevant causes of action and, under each heading, in one column specifies the element for each of those causes of action. The next column can contain the material facts relied upon and the third column can contain particulars. (The third column is not strictly necessary but it does help to ensure that facts are not “lost” and that

a pleader is not motivated to include some items which are particulars in the allegations of material fact.)

43. Now (and only now) you can commence to draft the pleading.

(e) Do's and "Don'ts" of Pleading

44. Ultimately, the goal is clarity because the more clear a document, the more persuasive it will be. If headings and definitions assist then use them – if they do not assist in clarifying matters then do not use them.

45. There is no reason that anything other than the English language should be used and that language should not be tortured. Having said that, I personally, am happy to use the word "herein" because it is readily understood and is much shorter than "of this statement of claim" which can become tiresome when repeated consistently throughout the pleading.

46. As with any legal drafting, do not change your language if you do not mean to change your meaning but if you intend to change your meaning then change your language.

47. Do not fall into the trap of unthinkingly pleading in a particular way because that is the way it has been done in the past. An good example of this is the pleading of a contract that "is partly in writing, partly oral and partly implied." This may be pertinent to your case but it may not be. If you simply want to rely on the written terms of the contract then there is nothing to be gained (and much to be lost) by pleading that it is also "partly oral and partly to be implied". In this context, be aware that the proper construction of a written term is different to an implied term.

48. Another common error in pleading documents, is the practice of pleading that the party "will refer to the full terms and effect of the document at the trial of this proceeding". This achieves nothing other than to demonstrate a lack of thought has gone into the pleading. Further, it is not even permissible and is liable to be struck out - *Hoh v Frosthollow Pty Ltd and Ors* [2014] VSC 77 at [39]. Of course, a party may refer at trial to the entirely of a document in order to provide the

context. However, if there is a specific provision, or you allege that a document has a particular effect, then you must plead that provision and effect.

49. Be careful about pleading certain things occurred at "all material times". It may be permissible for uncontroversial aspects (example, the incorporated status of a party) but usually it will be more appropriate to specify the relevant time frame. This may reduce the burden on your client in terms of what it has to prove and it may ensure that the pleading does not get struck out because it is too vague.

50. Again, when pleading a contract, I plead the fact of the contract first and then the pertinent terms of the contract in a separate paragraph (and each term in a separate sub-paragraph). When I refer back to the term I refer to it as "the term of the Contract set out in paragraph [x] hereof." This allows for a consistent approach to pleading. If was to use the actual terms of the contract then difficulty (or at least, inconsistency) may be encountered if you wish to refer back to an oral or implied term or where you have pleaded the proper construction of a term rather than the exact words of that term.

51. Do not plead conclusions without the necessary facts being pleaded as material facts. For example, do not plead "The Defendant engaged in misleading and deceptive conduct on contravention of s 18 of the *Australian Consumer Law"* with details of the representation and its falsity in particulars. Rather, you should plead the following in separate paragraphs each with any necessary particulars:

    (a) The representation that was made by the defendant;

    (b) The fact that the representation was made in trade or commerce;

    (c) How the representation was false

    (d) That loss and damage was suffered

52. Do not plead background facts – for a criticism of such a practice, see *SMEC Australia Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)* [2011] VSC 492 at [29] (Vickery J).

53. Paragraphs must be numbered and there is no problem is using sub-paragraphs. However, the use of subordinate paragraphs should be reduced so as to not make the pleading difficult to follow.

54. Finally, once you have finished the pleading, ask yourself In respect of each allegation – what difference will it make if this cannot be proved? If the answer is, “no difference” then, almost certainly, the paragraph can be removed. The less experienced the pleader tends to include much unnecessary material.

Defences

55. There is a mistaken impression, in some circles, that drafting a defence is a simple process. However, the process that one undertakes for drafting a defence is the same as for a drafting a statement of claim. One must ask:

(a) What outcome does the client want?

(b) What positive defences (if any) are open to achieve that relief?

(c) What are the elements of the relevant defences?

(d) What facts are required to prove that defence?

56. Once these questions are answered, the process of pleading is largely the same as for the statement of claim save that each paragraph of the statement of claim needs a specific response. It is not sufficient to generally deny the allegations in a statement of claim.

57. When it comes to pleading to particular paragraphs, a defendant has a number of choices:

(a) expressly admit the allegation (r 13.12);

(b) deny the allegation (r 13.12);

(c) expressly not admit the allegation (r 13.12);

(d) confess and avoid (r 13.02(b)) (eg, admit an assault but allege it was in self defence);

(e) raise a question of law (r 13.02(2); or

(f) raise a cross-claim by way of set off or counterclaim (rr 10.02, 13.14).

58. In all pleadings after the statement of claim, a party is obliged to plead any facts that:

(a) make the other side’s claim not maintainable;

(b) might take the other side by surprise;

(c) raise questions of fact not arising out of earlier pleadings;

(r 13.07(1)).

59. A party is able, in tis pleading, to raise a point of law or plead a conclusion of law if the material facts supporting that conclusion are pleaded. An example of raising a point of law would be to plead, in a defamation case, that s 37 of the *Defamation Act 2005* (Vic) precludes the plaintiff from recovering punitive damages. An example of pleading a conclusion of law would be to plead that by reason of the matters referred to in paragraphs [x] to [y] the plaintiff ought be estopped from denying that he did not enter into the relevant contract.

"Truth in Pleading"

60. A document that simply denies or does not admit allegations is not a powerful piece of advocacy. These days, the potential to keep the arguments "up the sleeve" of the party are all but over. This is specifically provided for in certain practice notes referred to above and in the *Civil Procedure Act*. Having said that, unless you wish to rely upon additional material facts, a bare denial will be sufficient where your instructions are that the client does deny an allegation or does not know whether it is true or not.

61. Traditionally, a denial and refusal to admit have had the same effect – it was only a question of style. Typically, where a defendant was putting the other party to their proof, rather than specifically denying something, the "do not admit" formulation was used. However, as noted above, it is now no longer acceptable to put a party to their proof if you know the allegation is true. If your client knows an allegation to be true then it must admit that allegation. If a party does not know if an allegation is true then the "do not admit" formulation is used while "deny" is used where there is a specific challenge to the allegation. However, it remains the case that the practical outcome is the same – the plaintiff must prove that allegation which is either denied or not admitted. (This is not true of the Magistrates Court where a denial must be accompanied by a reason – that is, evidence – of the denial and if a party uses the "do not admit" formulation then they will be prevented from leading evidence about that issue at trial other than through cross examination of by leave of the Court).

62. You should only plead to those paragraphs that raise allegations against your client but, in any doubt, the paragraph ought be pleaded to because, if it is not, then it is taken to be admitted.

63. While admissions should be made where appropriate and where the instructions are clear, they ought not be made unless the matter is clear beyond doubt because, once made, they can only be withdrawn by leave. It can be embarrassing for a solicitor to have to explain that it was their error (and even worse if the error was that of the client).

Particulars

64. The purpose of particulars is to:

(a) inform the other side of the case they have to meet and allow them to plead;

(b) prevent the opponent being taken by surprise; and

(c) define the question for trial which enables a party to know what evidence to collect and to limit discovery.

(r 13.10(2)).

65. Particulars do not fill in gaps in the pleading – if an allegation of material fact is made then that should be in the body of the pleading.

66. Particulars are specifically required in all any allegation of misrepresentation, fraud, breach of trust, wilful default, undue influence, knowledge or notice (r 13.10(3)). If particulars of debt, damages or expenses are to exceed three folios then they are to be set out in a separate document (r 13.10(6)).

67. Particulars ought be provided in the relevant pleading at the outset. This helps to demonstrate that you know your case and do not have “make it up as you go along”. As a tool of advocacy, a fully particularised statement of claim or defence is very powerful.

68. As noted above, the role of particulars is to prevent the other side being taken by surprise at trial as to how the case is being put. In this way they narrow the width of the pleading. A Request for Further and Better Particulars of a statement of

claim or counterclaim ("cross-claim" in the Federal Court) is almost always served in commercial litigation matters. More often than not, further and better particulars of a defence are also sought.

69. However, such requests should not be made without thought especially where a paragraph already contains some particulars. If no further particulars are sought then, ordinarily (and subject to the right to amend or add particulars) a party will be restricted to those particulars. If, however, you seek additional particulars, then you may simply be alerting the other side to the possibility of bolstering or expanding its case. However, if no particulars of a paragraph are given then a party can adduce any evidence that supports the allegation - *Hewson v Cleeve* [1904] 2 IR 536.

Amendment

70. Parties will frequently seek to amend their pleadings during the course of litigation. This can even happen during the trial or after the closing arguments. Until recently, amendments were usually allowed unless permitting such an amendment would have been pointless (because it has no prospects of success) or it would have unfairly prejudiced the other party in a way that cannot be fixed by an award of costs (*State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146*)*. However, the position has changed significantly, in light of the High Court decision in *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175. Now, if the proceeding has been set down for trial, or the amendments would otherwise result in significant delays that could have been avoided had the matter been pleaded properly in the first place, the amendment may not be permitted. Ultimately, the question is now a matter of weighing up whether the issues caused by the amendment are greater than those caused by not permitting it and the courts will no longer see an order for costs are an answer to all of the ills created by an adjournment.

71. Amendments to pleadings should be marked be marked up to show how they are different from any previous pleading – r 36.05(4).

Strike Out Applications

72. Strike out applications have, historically, be taken for strategic reasons. It is now impermissible (at least under the *Civil Procedure Act 2010* and possibly in the Federal Court too) to bring a strike out application as a strategic device with the purpose of depleting the other side's funds. Further, the courts are less likely to grant an application where the complaints are technical or "pedantic and pettifogging in nature" (*Barclay Mowlem Construction Ltd v Dampier Port Authority* (2006) 33 WAR 82 at [9]) or have the hallmarks of "opportunistic, self-serving incomprehension" (*Australian Securities and Investments Commission v Cassimatis* (No 2) (2013) 96 ACSR 272, 305 at [100])

73. In *Barclay Mowlem Construction Ltd v Dampier Port Authority* (2006) 33 WAR 82; [2006] WASC 281 Martin CJ described the contemporary purpose of pleadings and their role in modern litigation as follows (at [7] – [10])

> *[7] In my view, it follows that provided a pleading fulfils its basic functions of identifying the issues, disclosing an arguable cause of action or defence, as the case may be, and apprising the parties of the case that has to be met, the court ought properly be reluctant to allow the time and resources of the parties and the limited resources of the court to be spent extensively debating the application of technical pleadings rules that evolved in and derive from a very different case management environment.*
>
> *[8] Most pleadings in complex cases, and this is a complex case, can be criticised from the perspective of technical pleading rules that evolved in a very different case management environment. In my view, the advent of contemporary case management techniques and the pretrial directions, to which I have referred, should result in the court adopting an approach to pleading disputes to the effect that only where the criticisms of a pleading significantly impact upon the proper preparation of the case and its presentation at trial should those criticisms be seriously entertained.*
>
> *[9] In this case, I have reviewed the statement of claim and the objections to it and I have done so in the case management context to which I have referred. It is my view, that many of the objections which have been taken*

are pedantic and pettifogging in nature. In many cases, elucidating and resolving the objection would consume an amount of time and resources, which is entirely disproportionate to the benefit to be derived from that process in terms of the identification of the true issues which have to be met in the case.

[10] In many cases, consideration and determination of each objection would give rise to precisely the type of time and resource wasting forensic exercise which the Commercial and Managed Cases List was created to discourage. That is not to say that buried within those voluminous objections there might not be a criticism that should properly be seriously entertained, but having looked myself at the statement of claim, it is my view that any lawyer looking at that pleading, genuinely interested in knowing what issues are to be tried and the case that has to be met, would have no difficulty in ascertaining those matters.

74. However, if the pleading is poorly drawn or is ambiguous then the Court will simply say that the objections in the particular case do not fall within that category.

75. If you receive a poorly drafted pleading then you must determine whether or not you wish to complain or seek to strike it out. This can be a difficult strategic decision because a complaint may simply lead the other side to improving their pleading. Often it is better to let the other side proceed to trial with a poorly pleaded case. As long as you generally understand the allegations amendments made late in the piece will usually cause the amending side more difficulty that it will cause your side if you have identified the problems with the pleading. Of course, if you do not understand the case or are able to dispose of the case prior to trial then that it is a different story and you should pursue the strike out.

76. The one thing that should not motivate your strike out application (or even your letter threatening it) is a desire to demonstrate how clever you are – either to your client (who is unlikely to care or understand the niceties) or to the other side.

77. Fundamentally, you need to “play a straight bat” when it comes to strike out applications – if you understand the other side’s case then do not make the

application. If you genuinely cannot understand or it is ambiguous, seek clarification and if it is not forthcoming then a strike out may be required.

Interlocutory Applications

78. Interlocutory applications can cover a large range of matters but, whatever they entail in each case there must be:

(a) a summons (or "notice of motion" as they called in the Federal Court) setting out the relief sought;

(b) an affidavit setting out the evidence upon which the application is based;

(c) consideration of any material in response from the other side; and

(d) an appearance in court – either before an Associate Judge (Registrar in the Federal Court) or the Practice Court (or docket judge in the Federal Court)..

79. Often, none of these stages are given sufficient consideration and it is rare that all of these stages are given sufficient consideration in relation to any one application.

<u>The Summons</u>

80. The summons is, perhaps, the most neglected part of the interlocutory application. Frequently, on applications for further discovery, I am provided with a summons that simply seeks an order that, "The defendant provide further and better discovery." This is inadequate. It does not say what orders the applicant is seeking and leaves it up to someone else (whether it be counsel or the court) to determine what, in fact, is sought. This gives the impression that the drafter of the summons did not know what they want or could not be bothered specifying it. As such it is bad advocacy and renders you less likely to obtain the relief sought and, further, makes it less likely that you will obtain a costs order in your favour. This is true even if the correspondence makes it clear what documents were

sought particularly since the Registrar or Associate Judge will often not be provided with the exhibits until the hearing of the matter.

81. Further, the problem is not overcome by making an ambit claim and leaving it up to counsel to narrow the request to an acceptable request when the matter is before the court. If the first thing that a barrister has to do is admit that his or her client is not entitled to much of the relief sought it reflects badly upon the solicitor and makes it less likely that the relief actually sought will be granted. It is much easier for the Court to simply dismiss a summons than to try to draft the relief that ought be granted – which is a job the drafter of the summons ought to have done at the outset anyway.

82. Another important issue in drafting the summons is to determine that it is listed before the relevant judicial officer and in the relevant court. To that end:

(a) in the Federal Court have reference to section 35A of the *Federal Court of Australia Act 1976* for a consideration of the applications that go to a registrar and those that go to a judge;

(b) in the Supreme Court, determine if the matter is to be heard by a judge or master by reference to order 77 (77A in the County Court)– if you get it wrong it is likely that the application will be dismissed and not simply referred to the appropriate court (see Practice Note (No 2 of 1988) [1988] VR 240 and para 77.01.85 of Williams);

(c) in the County Court, have reference to Consolidated Practice – Operation and Management of the County Court Civil Lists (Melbourne Registry (at para 1950D of Williams) which sets out which applications go before the judge in the Directions Court and which ought be before the Practice Court. The role of Master no longer exists in the County Court; and

(d) even in the Melbourne Magistrates Court there are now judicial registrars whose powers are set out at in the *Magistrates Court (Judicial Registrars) Rules* 2005.

<u>The Affidavit</u>

83. At the outset the drafter of the affidavit needs to determine what it is they are trying to achieve and what they need to prove in order to obtain the relief they are seeking. The affidavit should seek to prove only that and nothing more. Why attempt to prove something that does not need to be proved? Again, it is not appropriate to include everything in the hope that it will include everything that is relevant even if much irrelevant information is included.

84. As such, the first question that needs to be addressed is whether an affidavit is required. The court is unlikely to determine questions of disputed fact so, unless it can be proved conclusively that the other side is wrong, there may be little point in going on affidavit to simply dispute what has already been deposed to.

85. The next question is who should swear the affidavit. There is often an obvious but unpalatable answer to the question – the client. It may be unpalatable because it may (although this is generally unlikely) lead to the client being subjected to cross examination prior to the trial. More importantly, it will mean that great care needs to be taken so that the client does not say anything that they may contradict later. They may also need to ensure that they do not fail to say something that they think of later as this will also damage their credibility at trial. Sometimes, therefore, the solicitor swears the affidavit but, unless a good reason can be proffered as to why this was done, it will mean that the affidavit is less persuasive.

86. Further, and even more so than in a trial, on an interlocutory basis some arguments are more readily accepted than others. For example, if your client's application can be successful simply by proving that the other side has not done something that they should have done then there is no reason to impose the infinitely higher obligation on your client of proving that the other side has been fraudulent (regardless of whether this will make your client feel better or not).

87. Affidavits should:

(a) include relevant information only;

(b) include only admissible material in an admissible form; and

(c) tell a story in a clear and concise manner and, in order to do that effectively, should ordinarily be in chronological order.

88. It has been said that affidavits should be drafted by the witness and not by the lawyer. In my experience, the people who say this (particularly of lay witnesses) have never attempted the task. Inevitably when a lay witness drafts an affidavit it contains almost no admissible material and can be very difficult to follow. This is not surprising – why should the client be able to become an expert in the laws of evidence which most lawyers do not understand? However, it *is* good practice – although sometimes difficult to achieve - to retain the witness' words as much as possible.

89. The procedural requirements for affidavits in the Supreme Court and County Court are set out in Order 43 (order 14 in the Federal Court). Affidavits to be used in interlocutory applications can include (first hand) hearsay material as long as the source is identified and the deponent states that they believe the information to be true (r 43.03(2); *Uniform Evidence Acts* s 75 where the belief does not need to be attested to). However, this exception does not justify ignoring all other laws of evidence as often occurs with affidavits. While this may not matter in many cases because no objection is taken (or, if it is, whether much attention will be paid to the objection) it is poor practice and when it becomes particularly important you can be sure that the point will be taken and upheld.

90. On questions of evidence changes brought about by the introduction of the *Evidence Act 2008* (Vic) (in state courts) and the amendments to the *Evidence Act 1995* (Cth) (in Commonwealth courts) must be understood and borne in mind.

91. For example, under the uniform evidence legislation (such as the *Evidence Act 1995* (Cth) and the *Evidence Act 2008* (Vic)), implied assertions are admissible to prove the truth of the assertion in any event. Consider the following example::

> A boat captain is seen thoroughly inspecting his ship before a voyage and then he gets on it with his family. The boat subsequently sinks. The issue arises as to whether the ship was seaworthy. Can evidence be led by the person who witnessed the captain's inspection as evidence that the ship was seaworthy when it went out to sea?

Under the uniform evidence acts (UEA's) the boat owners could rely on the captain's implied assertion that the boat was seaworthy when he inspected it but at common law it would be considered hearsay (although other rules may apply to allow the evidence to be admitted in any event.) The reason for this is that s 59 of the UEAs, evidence of a previous representation is not admissible to prove the existence of a fact that the person "intended to assert" but it does not prohibit the introduction of the statement for any purposes that the maker of the statement did not intend to assert (*Minister for Immigration v Capitly* (1999) 55 ALD 365).

92. Therefore, the starting point for drafting an affidavit is that the solicitor must have a working knowledge of the laws of evidence. (This is necessary for more reasons that the affidavit – in order to determine a client's prospects of success it is only the admissible material that ought be taken in account but often this is overlooked.) The basic rules of evidence are not something that can simply be left to the barrister to work out at a later point in time.

93. While drafting an affidavit is a form of advocacy it is, first and foremost, about evidence. It is not an outline of argument. An affidavit is more persuasive when the evidence is well organized and the persuasion subtle than when it makes assertions which are clearly inadmissible and is overtly argumentative. For example, because it is about evidence it is not appropriate for a deponent to say that he or she does not admit an allegation that he or she knows to be true (*Re Thom* (1918) 18 SR (NSW) 70.

94. Hence, it is good practice in an injunction application (for example) to include a section on the arguable cause of action and another section on the balance of convenience, each with a heading to that effect. If the cause of action is breach of contract then the contract should be exhibited and the body of the affidavit should set out the important provisions being relied upon. The conduct that is said to have breached the contract should be set out in as much detail as possible but the facts, not conclusions, should be stated. Hence, phrases such as "The defendant then breached the contract by doing [x]…" or "The parties agreed that …" should not be used. If there is a breach or an agreement it ought be apparent from the affidavit and it is the court's role, not the deponent's, to

determine the legal conclusion. Indeed, the deponent's view that there is a breach of the contract is not relevant or admissible and its inclusion will put some judicial officers offside.

95. Further, the affidavit should be in direct language as far as that is possible. Use the term "I said …", and "she said …" rather than "indicated", "intimated", "suggested" or the like. Say "I sent a fax ..." rather than "I corresponded" because then it is clear what was actually done.

96. Similarly, the knowledge of another party ought not be asserted. The facts that lead to the conclusion that the other party had such knowledge can, of course, appear in the affidavit.

97. Similarly, if an affidavit is set out to follow the various arguments that are to be made – rather than chronologically – it gives the impression that it is engaging in argument rather than providing the evidence. The outline of argument is the place to arrange the arguments in a coherent fashion - the affidavit is the place to arrange the evidence in a coherent – and as I say, usually chronological - fashion.

98. However, in the case of the injunction, the arguments in favour of balance of convenience will not necessarily come out in a chronological fashion. In such circumstances the only way to arrange them is in the form of one reason after another because, in effect, they are all referring to what may happen in the future. Nonetheless, once again, attention must be paid that the affidavit deals only with evidence and does not descend into argument.

99. The use of headings in a long affidavit is not only acceptable but to be encouraged.

100. Of course, time limits should always be respected - generally the affidavit must be filed a "reasonable time" before the hearing in the Supreme Court (r 46.05) and 3 days in the Federal Court (O 19 r 3) although even in the Supreme Court certain application have more definite time limits (eg applications for summary judgment (see rr 22.03(4) and 22.04(3) – the applicant must serve its material 14

days prior to hearing and respondent must serve its material 3 days prior to hearing)).

101. Further, order 43 (in the Supreme and County Courts) and order 14 (in the Federal Court) set out the matters that must be complied with when drafting and serving affidavits.

Waiver of Legal Professional Privilege

102. Another important distinction between proceedings in the Federal Court and the state courts is when legal professional privilege (LPP) is waived.

103. Under the common law, the question used to be whether it was "fair" for a party to disclose the legal advice but then seek to maintain the privilege (*AG for NT v Maurice* (1986) 161 CLR 475). The test was tweaked by the High Court in *Mann v Carnell* (1999) 201 CLR 1 to focus upon whether the conduct of the client was "inconsistent" with the maintenance of he confidentiality of the communications. One may query whether it actually resulted in a substantive change.

104. In any event, under the uniform evidence legislation (s 122) LPP is waived if the client acts in a way that is inconsistent with the client objecting to the disclosure of the advice. Two example of this are provided – where the substance of the legal advice has been disclosed with the implied or express consent of the client and where a party knowingly and voluntarily discloses the advice to another party.

105. In this context one should also note the potential to waive LPP if a party pleads reliance (such as under a section 52 claim). It is unclear whether this can amount to an immediate waiver or whether any questions of waiver should wait until trial (*Telstra v BT Australasia* (1998) 85 FCR 152 cf *John Tanner Holdings v Mortgage Management* (2001) 182 ALR 201)

Lay Witness Statements and Outlines of Evidence

106. In most cases in the Supreme and Federal Courts, parties will be required to file and serve lay witness statements or, at the very least, outlines of evidence.

Where the evidence is likely to be in dispute the evidence ought be given *viva voce* which means that outlines will be preferred to statements. Whereas a few years ago, witness statements were almost always ordered, they have now become far less fashionable. In fact, in some cases (such as in the Commercial Court) outlines may be ordered but parties will be prohibited from referring to them at trial. Further, it is now common for judges to order that at least parts of evidence be given *viva voce* even where the parties agree that it will dealt with via witness statements.

107. Evidence given in the County and Magistrates Courts is almost always given *viva voce* without outlines of evidence being exchanged (although note r 16.02 of the MCR which allows the use of affidavits).

Outline or Witness Statement?

108. The witness statement stands as the evidence in chief of the witness whereas the outline of evidence gives the substance of the evidence that the witness is expected to give. The (Supreme or Federal) Court will determine whether outlines or statements are to be served and the decision ordinarily rests upon whether serious questions of credit will be in issue. As noted where credit issues are likely to arise or where key evidence is in dispute outlines will be preferred to witness statements so that the judge has a better opportunity to make an informed judgement on the credibility of the witnesses.

109. There are various arguments both ways on whether a client is better served by having witness statements or outlines of evidence. The considerations are as follows:

(a) Witness statement save court time but cost more to prepare. These costs can be significant and wasted if the matter settles (although the witness statements may encourage settlement);

(b) If the client has a poor memory then witness statements ensure that all the evidence can be obtained;

(c) On the other hand, giving evidence-in-chief *viva voce* can allow a witness to become comfortable with the process of giving evidence

during a trial before facing hostile cross examination. Other witnesses feel "worn out" by the process even before cross examination begins.

110. There is no one "answer" to the question of whether outlines or statements are to be preferred and, in any fact situation, it can be very difficult to determine which is likely to be of greatest benefit. Given these difficulties, I play a "straight bat" and simply ask whether credit is likely to be in issue or whether key evidednce is likely to be in dispute and, if so, outlines should be preferred (at least in relation to controversial material).

Drafting the Witness Statement or Outline

111. The only substantive differences between drafting an affidavit and drafting a witness statements are that:

(a) The rules of evidence are applied much greater rigour with witness statements. Hearsay evidence cannot be used;

(b) All matters must be dealt with in the witness statement or outline; and

(c) Documents are not normally annexed to the witness statement or outline – rather the court book number is referred to. If the court book has not been complied at the time that witness statement is being drafted, the relevant page number can be left blank. For example, "A copy of the contract is at page [ ] of the Court Book". Once the Court Book is compiled you can then return and fill in the page numbers.

112. Whether drafting a lay witness statement or preparing a witness to give *viva voce* evidence some general rules apply.

113. When preparing a proof of evidence only one witness ought be present with the lawyers (*Professional Conduct and Practice Rules 2005* r 17.3). The witnesses ought be told not to discuss the evidence between themselves.

114. The lawyer ought not suggest the evidence to the witness nor state what evidence would be most helpful. The use of open, rather than closed, questions is preferred although if some evidence appears questionable it is entirely appropriate to "test" the evidence by (sometimes vigorous) questioning and drawing the witnesses attention to inconsistencies or other difficulties in their evidence (*Professional Conduct and Practice Rules 2005* r 17.2)).

115. A lawyer must not prevent or discourage a witness or potential witness from talking with an opponent (or their lawyers) or being interviewed by them (*Professional Conduct and Practice Rules 2005* r 17.5). However, this does not apply if the witness is the client. Further, it is quite appropriate to tell the witness that they are under no obligation to speak with the other side or to advise them about relevant obligations of confidentiality. Hence, it you act for a company, and an employee of that company is a potential witness, that employee will owe obligations of confidence to the company that he or she must not breach even while talking to a party in readiness for litigation. Indeed, it is highly questionable whether it is ever appropriate for a lawyer to speak with the employees of another lawyer's client and it is certainly not appropriate to interview the chief executive officer or any other employee of the corporation that can make admissions on behalf of the organisation (see *Guidelines on Interviewing Witnesses* from the Ethics Section of the Law Institute of Victoria.)

116. Lawyers otherwise have obligations of honesty and you should never mislead a witness as to who you act for or the reason for your contacting them.

117. For witnesses who are about to give evidence in the witness box, my practice is to tell them that there are three rules and three rules only:

    (a) listen to the question that is being asked;

    (b) answer that question and not some other question; and

    (c) be truthful (including on the question of whether they know the answer to a question of not).

118. If you provide any more instructions, clients will get confused and spend more time thinking about the rules than answering the questions. From time to time, it

is suggested that there be a “practice” cross examination – I do not approve of such a venture because (a) it is likely to lead to coaching of the witness in terms of the substance of their answers and (b) it is of very doubtful use in any event because it will just lead to practised answers to specific questions when, in fact, the witness should be focussing on answering the questions that are being asked.

119. Of course you should explain the process to witnesses, many of whom will never have given evidence before and will be quite anxious about it. You should explain the difference between the types of non-leading questions that they will be asked in evidence in chief and leading type questions that will be asked in cross-examination. You should explain also that there will be the chance for re-examination.

120. If the client is anxious to be given a further suggestion, it is a good idea for the witness to direct their answers to the bench rather than to the cross-examiner. While this is not strictly necessary, it does tend to lessen the likelihood that the witness will engage in a verbal brawl with the cross-examiner which helps no-one.

121. Once a witness who you have called is under cross examination then you must not speak with that witness until the cross examination is over unless the cross-examiner consents or special circumstances (such as the need to get instructions on a proposed settlement) exist and you have told the cross examiner either before speaking to the witness or as soon as possible after speaking to them.

122. Ordinarily, a witness statement will be filed unsworn. When the witness gets in the witness box they are provided with a copy of the statement and confirm that it is true or if they wish to make any amendments to it. They will then sign and date the document and the witness statement is tendered subject to any objections as to admissibility. The witness will then be available for cross examination.

123. If witness statements have been ordered but a witness refuses to give a statement then it is acceptable to provide an outline of the evidence that the

witness is expected to give and advise the other side that leave will be sought at the trial to call *viva voce* evidence from the witness.

124. As noted above, outlines of evidence do not stand as the evidence in chief of the witness and, therefore, do not have to be as exhaustive as the witness statement. Further, issues of admissibility are not technically relevant but it is good practice not to include material that is clearly inadmissible.

125. It is not sufficient with an outline to state that the witness will give evidence "about" a topic. The substance of the witness' evidence about that topic must be provided.

Expert Evidence

126. The technical distinction between expert and lay evidence is that an expert is permitted to provide opinions but the lay witness is only permitted to give evidence of the facts.

Legal Standards for Experts

127. There are a range of rules that apply to expert evidence that can be summarised as follows:

(a) the witness must be an expert;

(b) the evidence must relate to an acknowledged area of expertise;

(c) the basis of the opinion must be proved by admissible evidence.

128. Prior to the introduction of the UEAs, there were two other common law rules:

(d) the evidence had to be founded on the expert's expertise and not be a matter of common knowledge;

(e) the evidence could not determine the ultimate issue.

129. These two rules have formally been abolished by the UEA (s 80). However, it is still a good idea to avoid transgressing those rules where appropriate because

many judges form the view that opinions that do transgress those rules are of no value even if they are technically admissible.

130. Whether a person possesses the relevant expertise is a question of fact which depends on training, study and experience and not just qualifications. It is important to ensure that the expert does not express opinions outside his or her area of expertise which, at worse, will render the evidence inadmissible and, at best, will adversely impact on the witness' credit. This is particularly true when a person with a "general" level of expertise (for example, an accountant or a general practitioner) is asked to provide evidence in relation to matters that should be directed to a person with particular expertise.

131. In recent years there has been a shift away from the need to demonstrate that a theory has general acceptance in a field and now it is sufficient if the theory has scientific validity. This has come about due to a fear that scientific orthodoxy could stultify the admissible evidence - see case of *J* (1994) 75 A Crim R 522 in the Victorian Full Court.

132. The expert's task is to express an opinion on an assumed substratum of facts and not determine whether those facts are true or not - *Forrester v Harris Farm Products Pty Ltd* (1996) 129 FLR 431. It is then up to the party to prove the substratum of facts by admissible evidence. If they are unable to do so then the opinion, of course, is rendered worthless and this is a very common method of attacking expert testimony.

133. Finally, as noted, it was the rule that an expert witness was not permitted to adjudicate on a legal standard - that being the court's role - they witness was not permitted to express an opinion on the ultimate issue. Again, it has been abrogated by the Uniform Evidence Acts but it survives in practice as to breach the rule is likely to simply alienate the judge if not have it rendered inadmissible or of limited or no weight because its prejudicial value outweighs its probative value.

<u>Instructing the Expert</u>

134. In all Courts and tribunals, expert reports are required before an expert is permitted to give evidence. In almost all jurisdictions there are guidelines that have to be provided to expert witnesses which set out their role - in particular, the fact that their duty is to the court and not the party that is calling them (see, for example Form 44A in the Supreme and County Courts). This is a matter that must remain at the forefront of the minds of all involved in the proceeding at all times. The fact that they have read and understood the guidelines must be stated in the report.

135. Further, it should be assumed that all instructions given to the expert, and all draft reports, will have to be shown to the other side and to the court. Certainly any instructions that are relied upon by the witnesses are not covered by legal professional privilege and, in fact, they ought be set out in the report. However, at this stage matters can become somewhat difficult because often an expert serves two roles - for provide expert testimony and to provide advice (for example, on the defects in other reports, on the background detail, on the proposed areas for examination and the like). Confidential communications with an expert that are used for the purposes of the litigation, and which do not form part information upon which the expert has based their opinion, remain privileged. However, distinguishing between such information and assumptions upon which an expert has relied can be a difficult task.

136. Similarly, where a draft report is different in substance from a final report, the draft report may be discoverable (*Cobram Laundry Services Pty Ltd v Murray Goulburn Co-operative Co Ltd* [2000] VSC 353). Unless there is a good reason for the change this can be devastating to the credit of the witness.

137. For these reasons, and due to the increasing complexity of some of the expert evidence that is being called in the courts, parties sometimes brief two experts - a so called “dirty” and “clean” expert. The “dirty” expert will be given all the information and will be asked for their advice on the areas for further investigation and the matters that need to be placed before the “clean” expert. The “clean” expert will be the one who ultimately gives the evidence.

138. Regardless, extreme care needs to be taken in determining what documents, facts and assumptions are provided to the expert, what questions that expert is asked to answer and what documents are to be provided. The expert themselves ought not be involved in drafting their own brief or determining the questions they are to be asked although there is nothing wrong (indeed, it may be advisable) to have a preliminary discussion to determine if the expert would be able to the answer the types of questions that will be asked. Often the involvement of counsel at this stage can be worth the expense.

139. If the questions asked are too wide then the expert may stray outside their area of expertise and may be giving irrelevant and inadmissible evidence (at great cost). If they are too narrow (which is a much less likely flaw in practice) then they simply will not answer the question. Similarly if the expert is given too many documents then it will increase the cost but if they not provided with sufficient documents then this may impact on the reliability of their evidence.

Drafting Expert Statements

140. Where possible, experts ought draft their own statements rather than having them drafted by the lawyers. Although there is some suggestion that lawyers ought play no part in drafting process, the preferred view is that although the lawyer should not impact the substance of the report they may have reference to the form to ensure that it meets the tests for admissibility discussed above.

141. If the expert has understood that their role is to provide unbiased evidence then the report ought not be too argumentative. However, all too frequently, expert reports are argumentative. This is counter-productive as it lessens the credibility of the expert. Indeed, I do not mind where the expert notes the points in favour of the other side (as long as they do not destroy the case) – this highlights the fact that the expert ought be accepted when they comment on the important issues.

142. It is very important that you understand the expert evidence - if the evidence is “over your head” then there is a very real likelihood that it may go “over the head” of the judicial officer as well. You may need to have the expert explain their

reasoning in more detail or to spell out their assumptions or background knowledge at greater length.

143. Finally, the clients ought not have contact with expert - it ought all be done through the lawyers to prevent the impression of the expert being part of the "team". As Brooking J said in *Phosphate Co-operative Co of Australia Pty Ltd v Shears* [1989] VR 665:

> "*The guiding principle must be that care should be taken to avoid any communication which may undermine or appear to undermine the independence of the expert*."

Conclusion

144. Written court documents are more important than ever in determining the outcome of legal proceedings. The drafting of those documents, while often seen as s tedious process (and often it is) is of utmost importance in achieving a good result for the client.

1 September 2016

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