Preparing expert witnesses

A search for ethical boundaries

By Hugh Stowe

> Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated. Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guidelines, and scholarship has created significant uncertainty about the permissible types and methods of witness preparation.[1]

This article does not purport to provide an authoritative statement of the ethical boundaries of expert witness preparation. Its ambitions are limited to highlighting issues, and raising tentative suggestions. Those suggestions are offered with an acknowledgment that they are unquestionably contestable, and with a hope that they might trigger further debate. That debate is needed. Straw polling undertaken during the preparation of this article has demonstrated a stunning divergence in both practice, and attitudes as to ethical limits. This subject matter is too important to be left in its present state of ethical uncertainty.

For the purpose of this article, 'witness preparation' is used neutrally to mean 'any communication between a lawyer and a prospective witness - ... that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing.'[2]

This article does not address the wider question of preparing lay witnesses. The strategies and ethics of witness preparation will differ as between lay and expert witnesses, reflecting differences in the nature of the evidence: lay evidence relates to a witness' perception, whereas expert evidence relates to a witness' intellectual reasoning. There are differences as to the nature and extent to which those different forms of evidence are vulnerable to distortion (and amenable to elucidation) through witness preparation.[3]

Although this article is focussed on barristers, similar considerations apply to all legal practitioners.

Inherent importance of witness preparation

Bar Rule 16 provides that a 'barrister must seek to advance and protect the client's interests to the best of the barrister's skill and diligence... and always in accordance with the law including these rules'.

Consultation with (and preparation of) experts is an important part of the discharge of that ethical duty. It may be necessary to test whether the expert has appropriate expertise; to ensure that any expressed opinion is within the scope of that expertise; to ensure that the assumptions upon which any opinion is based are appropriate; to exclude irrelevant material from a report; to ensure that the opinion is expressed in admissible form; to test the soundness of the reasoning process upon which an opinion is based; to test whether any unfavourable expressions of opinion are reasonably grounded; to facilitate the persuasive articulation and presentation of opinion evidence in support of a party's case; to understand fully the expert issues, for the purpose of cross-examination of opponents' experts, re-examination the party's expert, and submission; to limit the likelihood that cross-examination will unfairly diminish the probative force of the expert testimony; to assess the court's likely perception of the strength of the expert evidence, in light of the personal presentation and demeanour of the witness; and to assess the prospects of success in light of the strength of the expert evidence.

The ethical importance of witness preparation is reinforced by a consideration of the adversarial nature of our justice system. In an adversarial system it is presupposed 'that the truth will best be found by the clash of two or more versions of reality before a neutral tribunal'.[4] 'The very foundation of the adversarial process is the belief that the presence of partisan lawyers will sharpen the presentation of the issues for judicial resolution.'[5] Witness preparation is an integral aspect of the partisan case development upon which adversarial justice depends, because at least some degree of witness preparation is 'essential to a coherent and reasonably accurate factual presentation'.[6]

Inherent dangers of witness preparation

> 'For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend ... to espouse the cause of those instructing them to a greater or lesser extent'.[7]

That is a reflection of 'adversarial bias': i.e. a 'bias that stems from the fact that the expert is giving evidence for one party to the litigation'.[8] That bias may arise from 'selection bias' (being the phenomenon that a party will only present an expert whose opinions are advantageous to the party's case), 'deliberate partisanship' (where an expert deliberately tailors evidence to support the client), or 'unconscious partisanship' (where an expert unintentionally moulds his or her opinion to fit the case). The NSW Law Reform Commission recently observed that: 'Although it is not possible to quantify the extent of the problem, in the commission's view it is safe to conclude that adversarial bias is a significant problem'.[9]

Aspects of witness preparation unquestionably have the capacity to facilitate 'deliberate partisanship' and exacerbate the insidious process of 'unconscious partisanship'. Signals as to what opinion would assist the case will be communicated by the barrister, will be absorbed by the expert, and may influence the expert's stated opinion. Those processes of communication, absorption and influence may be entirely unintended. Regardless of intention, the signals may generate 'subtle pressures to join the team - to shade one's views, to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster'.[10]

However, there are a number of considerations which limit the likely extent that witness preparation of experts will contribute to adversarial bias.

1. Pursuant to the *Makita* rules for the admissibility of expert evidence[11], an expert is required to set out the assumptions and reasoning process upon which the opinion is based. Consequently, an expert can not swayed by suggestion beyond a position which can be coherently justified.
2. The recent introduction of the expert codes into court rules will presumably counteract the process of adversarial bias, 'by requiring experts and those who instruct them to give careful consideration to the problem of unconscious bias and deal with it as best they can'.[12]
3. The inevitability of cross-examination, the possibility of adverse judicial comment, and possibility of face-to-face interactions with peers in 'joint conferences', may all further constrain an expert from deviating beyond that which can be reasonably justified.

Tension between conflicting policy objectives

There is a fundamental ethical tension in this area. Witness preparation is both an essential tool for the elucidation of truth in an adversarial system, but also a possible tool of truth's distortion. 'Witness preparation presents lawyers with difficult ethical problems because it straddles the deeper tension within the adversary system between truth seeking and partisan representation.'[13]

Ideally, any framework for defining the ethical boundaries in expert witness preparation should:

- reflect (and balance) the tension between the possibly conflicting objectives of facilitating the presentation of advantageous opinion evidence, and preventing the corruption of opinion evidence through adversarial bias; and
- embody sufficient certainty to provide practical guidance; and
- retain sufficient flexibility to reflect the reality that the 'ethical balance' in this area will be crucially context-sensitive.

Bar Rules

Bar Rule 43 provides that: 'A barrister must not *suggest* or condone another person *suggesting* in any way to any prospective witness (including a party of the client) the content of any particular evidence which the witness should give at any stage in the proceedings'.

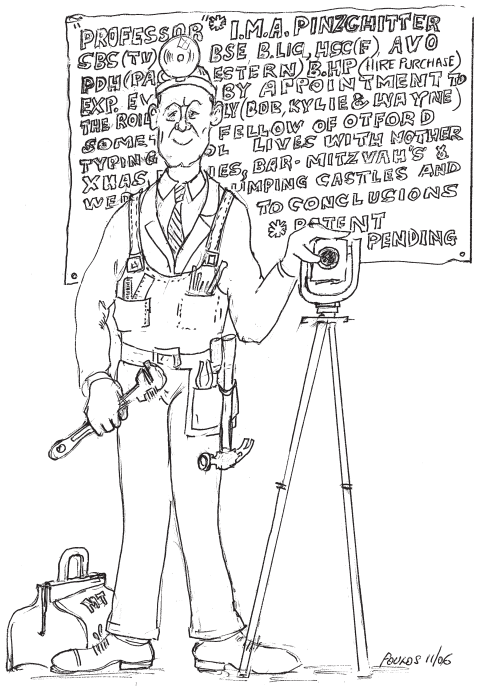
Bar Rule 44 provides that: 'A barrister will not have breached Rule 43 by expression a general admonition to tell the truth, or by *questioning and testing* in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not *coach or encourage* the witness to give evidence different from the evidence which the witness believes to be true'.

These rules provide some guidance, but within the rules lurk uncertainties.

1. Does the prohibition on 'suggesting' in Rule 43 focus on the subjective intent of the lawyer, or the objective effect of the lawyer's conduct? If the latter, how great must be the objective risk of suggestion before the Rule is breached?
2. What are the meaning and limits of legitimate 'testing' under Rule 44?
3. Does the right to 'test' under Rule 44 truly qualify (or merely elaborate the natural limits of) the prohibition on 'suggestion' in Rule 43? Does the prohibition on 'coaching' truly qualify (or merely elaborate the natural limits of) the liberty to 'test' in Rule 44?
4. What constitutes the conduct of 'coaching' prohibited by Rule 44?

These are questions to which there are no obvious answers. I suggest that:

- the prohibition on 'suggestion' in Rule 43 should not be construed as turning exclusively on the subjective intention of the barrister. The legal system must protect itself from conduct which has the objective effect of causing 'suggestion', irrespective of the intention to cause that outcome;



- the liberty conferred on 'testing' under Rule 44 should be construed as truly qualifying the prohibition on 'suggestion' under Rule 43, in the sense that 'testing' should be permitted notwithstanding that it possesses some objective capacity to cause 'suggestion';
- the prohibition on 'coaching' under Rule 44 should be construed as nonetheless truly qualifying the legitimate scope for 'testing', in the sense that conduct comprising 'coaching' should be prohibited (notwithstanding that it might also constitute 'testing');
- in the context of expert evidence, the expression 'coaching' should be construed as meaning conduct which objectively creates an undue risk that evidence will be corrupted by adversarial bias. Two considerations support that construction.
  - *First*, the expression 'coaching' seems often to be used simply to denote the conclusion that (for unspecified reasons) witness preparation has 'crossed the line' (which seems simply to reflect the conclusion that the relevant conduct creates an undue risk of corruption of the evidence).[14]
  - *Secondly*, the construction facilitates the explicit articulation and balancing of the competing policy considerations underlying witness preparation, which is inherent in the notion of '*undue* risk'.

On that construction, the scope of the prohibition in Rule 43 and 44 significantly turns upon the scope of the prohibition on 'coaching' (which turns on an unarticulated balance between policy objectives). The advantage of that construction is that it permits flexibility, and an explicit consideration of policy considerations relevant to the proscription of conduct. The disadvantage is that it reduces the capacity of the rules to provide firm guidance.

I suggest that the assessment of 'undue risk' requires a balance between the conflicting policy objectives referred to above. Factors relevant to that balance might include:

- The inherent capacity of the conduct to facilitate the presentation of expert opinion advantageous to the party's case;
- The inherent capacity of the conduct to corrupt expert opinion through the operation of adversarial bias;
- The extent to which the legitimate objectives of facilitating the presentation of advantageous opinion can be achieved through strategies with less inherent capacity to corrupt expert opinion;
- Specific contextual considerations relevant to the extent of the risk of corruption of opinion through adversarial bias. These may include:
  - the experience and stature of the expert, within the expert's discipline and relative to the barrister;[15]
  - whether the course of dealing with the expert has demonstrated a willingness or tendency of the expert to be unduly swayed by suggestion;
  - whether the subject matter of the opinion is one in which there is significant scope for 'judgment calls', such that modified opinions can be plausibly rationalised;
  - the nature and extent of any incentives for the expert positively to assist the instructing party.[16]

The strategic dimension

Strategic considerations may overlay ethical considerations when considering the appropriate limits of expert witness preparation.

There is presently significant judicial concern about maintaining the appearance and reality of expert impartiality. Notwithstanding that particular strategies of witness preparation might satisfy a theoretical test for ethical propriety, the strategies may be strategically imprudent if they *appear* to compromise impartiality.

Two considerations provide particular reason to give careful consideration to the prudent strategic limits of witness preparation (in addition to ethical limits). First, there is a significant risk of privilege being impliedly waived in relation to all dealings with an expert: ie, a significant risk that the details of witness preparation will be exposed.[17] Secondly, cross-examination and submissions by a skilful opponent may cause ethically legitimate witness preparation strategies to be (unfairly) ethically tainted, and the perceived impartiality and credit of the expert to be (unfairly) compromised.

There is unquestionably a strategic advantage in minimising the role of lawyers in the process of witness preparation (and thereby protecting the appearance of impartiality). This needs to be balanced against the countervailing strategic advantage that may be generated by implementing various witness preparation strategies. That balance will be context-specific. Before implementing any strategy of witness preparation, a barrister should ask: 'Firstly, is it ethically appropriate? Secondly, does the potential strategic advantage of the strategy outweigh any risk of strategic disadvantage that might arise if the conduct is disclosed and becomes the subject of cross-examination?'

Both to promote the spirit of expert impartiality, and to limit vulnerability to claims that the expert's impartiality has been compromised, prudence dictates that there should be frequent exhortations to the expert (in conference and in writing) to adhere to the expert codes.

Practical questions

Set out below is a consideration of some ethical and strategic considerations relevant to some selected aspects of witness preparation.

'Expert assistance' v 'expert evidence'

> A practice has grown up, certainly in Sydney, perhaps elsewhere, in commercial matters, for each party to arm itself with what might be described as litigation support expert evidence' to provide assistance in 'analysing and preparing the case and in marshalling and formulating arguments.[18] 'That is the legitimate, accepted and well known role of expert assistance for a party preparing and running a case'.[19]

By contrast, 'expert *evidence* in which a relevant opinion is given to the court drawing on a witness' relevant expertise is quite another thing'.[20]

The better view is that there is no ethical problem in using the same expert to provide both 'assistance' and 'advice', 'as long as that person and the legal advisers understand and recognise the difference between the two tasks, and keep them separate'.[21] However, there are significant strategic considerations which militate against using the same expert for both roles.

First, the nature and extent of involvement by the expert in the partisan process of case formulation and development might be the subject of cross-examination,[22] and may tend to diminish the expert's apparent impartiality. While an inference of partiality should not render the opinion inadmissible on the grounds of bias,[23] the 'bias, actual, potential or perceived, of any witness is undoubtedly a factor which the court must take into account when deciding issues between the parties'.[24] The degree to which perceptions of partiality affect the weight of an opinion 'must, however, depend on the force of the evidence which the expert has given to the effect that, by applying a certain process of reasoning to certain specific facts, a particular conclusion should be drawn'.[25]

Secondly, there remains a risk that the evidence of the expert will be excluded in the exercise of the court's discretion, if the court considers that the probative force of the opinion has been sufficiently weakened by reason of the expert being exposed to (and unconsciously influenced by) inadmissible evidence in the course of the expert's immersed involvement in case preparation.[26]

Thirdly, 'expert assistance' may lead to an unpleasant operation of waiver of privilege. The process of expert assistance may involve the expert being privy to many sensitive and privileged communications. It is appropriate to assume that there is a very significant risk that waiver may extend to all such communications.

In light of the strategic dangers associated with using an expert for both 'assistance' and 'evidence', a well-funded litigant in a complex

case will frequently engage different experts to provide the 'assistance' and the 'evidence', respectively.

Briefing the expert

Assistance in the formulation of instructions

There is no ethical difficulty in consulting with the expert in relation to the formulation of instructions. However, such consultation is in the nature of 'expert assistance', and is subject to the strategic dangers described above.

Preparation without formal instructions

Occasionally experts are not formally instructed until the report is being finalised. This creates no ethical difficulty. However, the deferral of formal instructions will increase the prospect of privilege being waived in relation to communications between the lawyers and the expert. This is because the absence of instructions during the period of preparation of the report raises the question as to the basis upon which the report was prepared, and supports a waiver of privilege in relation to associated materials to facilitate that question being answered.

False or incomplete instructions

It would be unethical to present a case on the basis of an expert report, when the expert was briefed on assumptions which contradict material facts known by the party (or where facts known to be material have been omitted from the instructions).[27]

Preliminary conferences

There is no ethical problem with extensive conferring to discuss and test the preliminary opinions of experts, prior to the preparation of a first draft. Some practitioners recommend this, to prevent the generation of a paper trail of draft reports which disclose the meandering evolution of the final opinion. I suggest that any conferring should be consistent with the guidelines suggested below under the heading 'Substance of the expert opinion'.

Minimising the prospects (and prejudice) of waiver

In the article in this edition titled 'Expert reports - waiver of privilege in associated materials', there are outlined some suggested strategies to minimise the prospects (and prejudice) of a waiver of privilege in relation to materials associated with the preparation of the expert report.

There is no ethical impropriety in such a strategy. The objective of protecting privilege requires no significant justification. Briefly, however, the justification includes promoting 'free exchange of views between lawyers and experts'; [28] preventing experts being inhibited from changing their minds by fear of exposure of working papers and drafts; preventing the integrity and strength of an expert's final opinion being attacked through cross-examination on an expert's working notes and drafts (which have potentially been taken out of context); and avoiding the hearing being distracted and lengthened by 'what is usually a marginally relevant issue':[29] i.e. the nature of (and reasons for) the evolution of the expert's opinion.

If a barrister proposes to raise propositions for consideration by the expert in relation to the substance of the expert opinion, there are very finely balanced strategic considerations as to whether the propositions should be raised orally in conference, or in writing. If the matter is raised orally in conference and without written record, there is no paper trail concerning the evolution of the opinion. This has both advantages and disadvantages if the expert modifies the opinion, and privilege in associated materials is later found to have been waived.

The advantage of no paper trail is that the lawyer's role in the evolution of the opinion may not be disclosed (thereby avoiding the chance that the probative force of the opinion will be discounted by reason of the lawyer's role).[30] On the other hand, the existence of a paper trail will immediately focus a line of cross-examination on the role of the lawyer.

The disadvantage arises from the fact that any waiver in respect of written communications will extend also to oral communications between the barrister and the expert. A skilful cross-examination of an expert about extensive oral dealings with lawyers is dangerously unpredictable. On the other hand, the existence of a paper trail will provide a crisp and clean description of those dealings which can demonstrate the propriety of the dealings.

Reasonable minds will unquestionably differ on this strategic question. Whether the communications are oral or written, the communications should be laced with emphatic exhortations to the expert to abide the letter and spirit of the expert codes; and should be undertaken on the assumption that privilege may be waived.

Disclosing case theory

It appears to be a matter of general practice that barristers provide to the expert an explanation of the nature of the proceedings, the instructing party's position in the proceedings, and the instructing party's case theory. The provision of such contextual information has significant benefits for case formulation and presentation. If an expert possesses a broad contextual understanding of the case, he or she may be able to provide significant assistance in the identification of the key issues in the case on which expert opinion is required. It is not uncommon for instructions to be refined following a consultation with the expert which illuminates the 'real issues'. Further, an expert's understanding of the factual and legal significance of his or her testimony is likely to focus the expert's analysis on relevant issues.

However, the appropriateness of outlining case theory is not without ethical and strategic uncertainty.

Ethical considerations

There is no doubt that the disclosure of the instructing party's case theory significantly increases the risk of adversarial bias, by clarifying what opinion is in the instructing party's interests. The best way to prevent adversarial bias is to cause the expert to prepare a report in ignorance of the instructing party's partisan interests in the litigation. It is clearly debatable whether the advantages of disclosing case theory described above can justify the associated increased risk of adversarial bias. However, one matter which significantly weighs against any general prohibition on disclosing case theory to experts is the practical unreality of such a prohibition. There will be many cases where the position of the instructing party in proceedings (and

the nature of their partisan interests) is obvious from the very fact of engagement of the expert.

Strategic considerations

The disclosure of case theory is effectively a procedure to facilitate the expert providing 'expert assistance' of the type described above. It is important to bear in mind that utilising a witness for 'expert assistance' has the strategic dangers previously identified in relation to that practice. To protect the appearance of impartiality (and thereby protect the credit of the expert), there is great strategic value in minimising the extent of partisan influence to which an expert is exposed.

Drafting the expert report

The propriety of involvement by lawyers in drafting the form of the expert report has received explicit judicial endorsement in Australia. Lindgren J has held that:

> Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed.[31]

It appears to be a common (but certainly not universal) practice in Sydney for lawyers to be involved in the actual drafting, either during or following a conference with the expert.

This position is to be contrasted to the position in the United Kingdom. In what remains a leading UK case on the ethical limits of lawyer's involvement in the preparation of expert reports, Lord Wilberforce held: 'Expert evidence presented to court should be, and should be seen to be, the independent product of the expert, *uninfluenced* as to form or content by the exigencies of litigation'.[32] In a subsequent case, Lord Denning relied upon that statement to conclude that lawyers must not 'settle' the evidence of medical reports.[33]

The ethical and strategic limits to the role of barristers in drafting expert reports are controversial. There are compelling considerations weighing for and against lawyer involvement.

The general considerations in favour of a barrister being involved in the actual drafting are as follows.

1. Compliance with the demanding requirements of form and structure under the *Makita* rules may sometimes necessitate a lawyer's substantial involvement in the drafting.
2. As with any form of communication, the persuasiveness of an expert report will depend not just upon the substantive content of the opinion, but also the method of its presentation. The expertise of many experts may not extend to the skills of persuasive written communication. Lawyers may be able to provide valuable assistance in the persuasive presentation of the expert's substantive opinion, both in relation to structure and verbal expression.
3. If the lawyer is participating in the drafting process, the lawyer is able to test any tentative opinions expressed by the expert, before that opinion is incorporated into the draft report. This is likely to prevent the creation of any documentary record of ill-considered opinion. Such a record might subsequently be (unfairly) exploited in cross-examination to undermine the credibility of the expert's final opinion, if privilege is subsequently waived in relation to draft reports.
4. If the barrister conducts him or herself with integrity, intellectual rigour and care, the draft will faithfully reflect the detailed instructions of the expert. If so, there is logically very limited scope for the draft to corrupt the expert's opinion through 'suggestion'. This is particularly so if any draft is presented to the expert with exhortations to review the draft in light of the expert's obligations under the expert code.
5. The scope for corrupting 'suggestion' is diminished further if the drafting is done in conference with the expert. This necessitates the focus of the expert on the crafting of each word, and eliminates the suggestive effect of the presentation by the barrister to the expert of a polished and completed draft.
6. The scope for corrupting 'suggestion' is diminished further in relation to subsequent drafts. This is because the expert will likely feel a protective ownership over the substance of the opinion expressed in the first draft which the expert has prepared.

The ethical considerations weighing against a barrister personally drafting a report on instructions are as follows.

1. There is significant scope for a draft prepared by a barrister to diverge from instructions provided by the expert. This may be a product of carelessness in the recording or reproduction of instructions, the influence of adversarial bias on the barrister, or the simple fact that within the framework of an expert's instructions there will remain scope for significant nuance in the final expression of written opinion.
2. To the extent that the draft diverges from (or embellishes) the expert's instructions, the draft has a substantial capacity to corrupt the expression of the expert's actual opinion. A draft report will have a powerfully suggestive effect on an expert, if it is persuasively expressed, well structured, and crafted by a respected authority figure (such as a barrister). Further, there is a significant risk that a busy expert will simply adopt a draft for expedience, without proper consideration.
3. If the expert prepares the first draft, it is thereby possible to avoid the corrupting suggestiveness inherent in presenting the expert with a first draft prepared entirely by the lawyer, without precluding the lawyer's subsequent legitimate role in refining the form and expression of that first draft.
4. In light of the above considerations, it is arguably justifiable to impose a general prophylactic prohibition on barristers preparing the first draft.
5. The endorsement by Lindgren J of lawyers' 'involvement' in drafting should not be construed as an ethical carte blanch to all forms of involvement (including independent drafting of reports).

There are also weighty strategic considerations against the substantial involvement of the lawyers in the drafting process.

First, irrespective of the integrity of a barrister's involvement in the preparation of a draft, and the coherence of the finally expressed opinion, the mere fact that a lawyer has crafted the words of the report may cause an irrevocable stain on the credit of the expert in the eyes of a judge.

Secondly, as Justice McDougall has observed extra-judicially:

> 'it is not desirable to fiddle too much with the actual phraseology of the expert. For better or worse, we all have our own individual modes of expression. Evidence - whether lay or expert - speaks most directly when it speaks in the language of the witness and not in the language of the lawyer who has converted it from oral into written form'.[34]

Thirdly, the possibility of ill-considered adoption by an expert of a lawyer's terminology creates the risk of the credit-crushing spectacle of an expert stumbling over or disowning the wording of a report during cross-examination.

Fourthly, requiring the expert to prepare the draft will likely increase the expert's engagement with the issues on which the expert is briefed.

Set out below is my personal suggestion as to where the line should be drawn in relation to various aspects and stages of drafting.

Template for report

An effective (and ethically sound) strategy is to provide to the expert a detailed template to assist the preparation of the first draft. The template might set out the structure of the report, the assumptions the expert is instructed to make, and detailed instructions as to what must be addressed in which section of the report. The template should be accompanied by detailed instructions as to the requirements of form and structure of an expert report under the *Makita* rules.

Preparing first draft

If a barrister acts with careful integrity on the basis of detailed instructions, it is strongly arguable that there is no ethical impropriety under the present rules in the barrister preparing the first draft (in conference or alone). However, strategic prudence strongly dictates that the expert should typically prepare the first draft.[35] This may properly occur after extensive conferring with the expert, in which the expert's preliminary opinion is discussed and tested.

Comments on first draft

It is common and acceptable for barristers to submit to experts a 'marked up' version of the first draft, which contains queries of the type described in the section below ('Substance of the expert opinion - Testing an unfavourable opinion'), and requests for the elaboration of reasoning in the draft, and which invites the expert to prepare a further draft in light of those queries and requests.[36]

Preparing subsequent drafts

I suggest that the ethical and strategic balance may swing in favour of active participation of the barrister in the drafting process, when the substance of the opinion is effectively settled and recorded in a draft, and the focus is on the refinement of form and expression.

As a proposed balance between facilitating the presentation of advantageous opinion, and avoiding the reality and perception of adversarial bias, I suggest the following guidelines:

- it is desirable to undertake the drafting in conference with the expert (rather than for the barrister to produce a further draft independently following conference);
- it is appropriate for the redrafting to address the clarification of ambiguous expression, the comprehensive and coherent articulation of the reasoning process, and the amendment of wording which significantly detracts from the persuasive communication of the substantive opinion.[37] It is otherwise strategically imprudent to seek to refine or otherwise amend the expert's own words;
- unless clearly obvious or inconsequential, any amendment of expression should generally be on the basis of specific and detailed instructions from the expert, and should reflect the expert's own words. The barrister should only suggest a mode of expression when open-ended questioning of the expert has failed to elicit wording which communicates with reasonable clarity the substance of relevant opinion;
- to the extent that the drafting process traverses substantive amendment to a previous draft, it may be strategically prudent for the drafting not to be done in conference with the barrister. Rather, the matter requiring substantive redrafting should be identified (possibly by some notation in the draft being worked on), and the expert should be invited to attend to the redrafting independently in a further draft.

Notwithstanding the ethical propriety of involvement by lawyers in the process of preparing subsequent drafts, there will remain significant strategic advantage in avoiding or minimising a barrister's involvement. The appropriate role of a lawyer may depend upon the capacity of the expert to craft an opinion in admissible and persuasive form without assistance from lawyers.

Substance of the expert opinion

Exclusion of irrelevant opinion

It is ethically permissible for a lawyer to propose substantive amendments to a draft report, which relate to deletion of evidence which is irrelevant, or beyond the expertise of the expert. Beyond that point, the ethical consensus and clarity breaks down.

Testing an unfavourable opinion

I suggest that the clearly better view is that the lawyers are entitled to test rigorously any unfavourable opinion contained in a draft report (in a manner which may lead to the modification of the unfavourable opinion). This testing may relate to the appropriateness of assumptions, and the soundness of reasoning. This is effectively endorsed by Bar Rule 44 which authorises 'testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies and other difficulties with the evidence'. Consistent with the general ethical proviso that witness preparation strategy should seek to minimise the

risk of opinion corruption, the process of testing should proceed by way of open ended questions, which simply direct attention to an issue: eg, 'What are the assumptions and reasoning process which support that conclusion?' 'How is that assumption consistent with X, Y, Z?' 'Why do you discount the relevance of A, B, C', 'What is the basis for that reasoning process?'. It should not proceed by way of closed questions which explicitly suggest a response: e.g. 'That line of reasoning is clearly wrong, wouldn't you agree', 'Do you agree that the assumption is obviously flawed?'

The practice of open-ended questions is not only ethically appropriate, but also strategically prudent for the following reasons.

1. In view of the (proper) sensitivity of experts to maintaining an independent and impartial stance, there may be a natural defensiveness to modifying an opinion in response to direct suggestion.
2. All communications with experts should be conducted on the basis that privilege in the conversation may be waived. The more suggestive and leading is the question which preceded a modification of opinion, the greater the risk that the final opinion will be discounted by reason of perceived adversarial bias (if the question is exposed following the waiver of privilege).

Raising propositions for consideration by the expert

Can the lawyer raise propositions for consideration by the expert, which are inconsistent with an opinion already expressed by that expert? This might involve a statement to the following effect: 'An alternative proposition to the one stated in your draft report is X. Why is X wrong? To what extent (if at all) do you consider X is supported by matters A, B, C? If not, why not?'. I suggest that this practice should be regarded as ethically permissible (and strategically prudent), if the following procedure is followed:

1. The barrister has first undertaken the open-ended 'testing' described above, and the expert has not independently expressed an opinion consistent with the proposition;
2. Before engaging in the practice, the barrister emphatically exhorts the expert to abide by the spirit of the expert codes;
3. The barrister does not engage in conduct which has the intention or consequence of pressuring the expert to adopt the proposition;
4. If the expert purports to adopt the proposition, the barrister rigorously tests the basis for it, to ensure that the expert is capable of reasonably justifying the proposition.

The conclusion that this practice should be regarded as ethically permissible is supported by the following considerations.

1. It may facilitate the articulation by the expert of opinion favourable to the client's case, which supports the legitimacy of the practice unless it gives rise to an undue risk that the expert's opinion will be corrupted through adversarial bias.
2. The mere fact that a change in an expert's opinion was triggered by a suggestion raised by a barrister does not reflect that the modified view is not genuine or not reasonable. Barristers will often acquire substantial expertise in a field relevant to a case. In light of that expertise, the barrister's familiarity with the case, and the analytical capacities barristers will (hopefully) bring to bear on the matter, it is unsurprising that barristers might be able to raise valid propositions which an expert might reasonably and genuinely adopt.
3. If the practice were not permitted, a client would face the equally unattractive alternatives of proceeding to trial with expert evidence weaker than the case might reasonably justify, or incurring the expense of shopping around to find an expert who might articulate the proposition without prompting.
4. In light of the factors outlined at the last paragraph of the section above titled 'Inherent dangers of witness preparation', the risk of corrupting the expert's opinion would appear very low if the suggested guidelines set out above are followed.

The better view is that the practice does not breach Bar Rule 43, which prohibits 'suggesting in any way....the content of any particular evidence which the witness should give at any stage in the proceedings'.

First, the better view is that putting alternative propositions to the expert is part of the process of 'testing' evidence, which is expressly permitted by Bar Rule 44.

Secondly, there is a profound ethical distinction between 'suggesting' the evidence that the expert 'should give' in proceedings in breach of Rule 43, and merely raising a proposition for consideration.[38]

The better view is that the practice does not even breach the authoritative statement of UK principle in the decision of *Whitehouse v Jordan*, that: 'Expert evidence presented to court should be, and should be seen to be, the independent product of the expert, *uninfluenced as to form* or content by the exigencies of litigation'.[39] As Justice Callinan observed:

> 'For the legal advisors to make suggestions is a quite different matter from seeking to have an expert witness give an opinion which is influenced by the exigencies of litigation or is not an honest opinion that he or she holds or is prepared to adopt'.[40]

All that said, it is obvious that the mere fact of a barrister raising a proposition for consideration has inherent suggestive capacity, which generates the possibility of the corruption of opinion through adversarial bias. It is therefore obvious that there is scope for divergent views about the ethical propriety of such a practice.

'Crossing the line'

There are certainly ethical limits to the legitimate scope of a barrister's involvement in the formulation of the expert's substantive views.

First, consistently with Bar Rule 43, a barrister must never (directly or indirectly) suggest (or condone someone suggesting) the content of evidence which the expert 'should give' in proceeding. This is to be contrasted with merely raising a proposition for consideration, as described above.

Secondly, as noted above, I suggest that an appropriate ethical limit on 'raising propositions for consideration by an expert', is the proviso that the barrister must not seek to 'pressure' the expert to

adopt the proposition (or engage in conduct which might have that consequence). By way of admission, this is a frustratingly question-begging limitation.[41] By way of defence, it is difficult to draw a brighter line. By way of (some) elaboration, factors which may be relevant to determine whether there is 'pressure' include the extent to which any question is expressed in a leading manner; the extent to which the question is repeated; the extent to which the barrister personally advocates the merits of the proposition; the extent to which the barrister highlights the strategic importance of the proposition to the case; the extent to which the barrister seeks to argue with the expert about the proposition (as distinct from testing the expert's opinion by open-ended questioning); and the relative stature of the expert and barrister (which may affect the power dynamic between the two).

General advice about the process of giving evidence

It is standard practice for barristers to give witnesses general advice as to court room procedure, courtroom demeanour, and methods for the presentation of testimony (in examination in chief, and cross-examination).[42]

There is generally no controversy as to the ethical propriety of such conduct.[43] This is because it relates to procedure and the form of evidence, rather than substance. It is therefore relatively innocuous in terms of distorting testimony.

However, instructions as to demeanour and presentation may be ethically inappropriate if they have the intention or effect of causing an expert to express an opinion more decisively than the expert's personal views warrant. On that basis, it would be inappropriate to say: 'Express all your opinions decisively and confidently'. On the other hand, it would be appropriate (in the alternative) to say: 'Express your testimony as confidently and decisively as your personal opinion permits. Don't give wishy-washy, equivocal answers like 'possibly,' 'probably,' and 'maybe' when your personal opinion permits you to be more confident and decisive in your response'.

Rehearsal of cross-examination

Rehearsal relates to the process of practising the presentation of testimony to be given in court. In light of general requirement that expert evidence 'in chief' be provided by way of written report, the issue of the 'rehearsal' of experts only arises in relation to cross-examination.

In the UK, barristers 'must not rehearse practise or coach a witness in relation to his evidence'.[44] In the USA, there is no prohibition on rehearsal, and among witness preparation techniques it is described as 'the most strongly advised among trial lawyers'[45]. In Australia, there is uncertainty.[46]

The question of rehearsal raises particularly difficult ethical issues.

Arguments for rehearsal of cross-examination

A compelling case can be made for the propriety of mock cross-examination of experts. First, for a number of reasons, the practice has the capacity to facilitate the presentation of testimony that does justice to the inherit merits of the opinion. The mere experience of formulating and articulating opinion under the pressure of cross-examination will likely improve the general quality of the presentation of testimony during cross examination at trial. More specifically, it will facilitate the development of strategies to combat the following techniques of cross-examination, which might otherwise cause the testimony of an expert to appear weaker than is warranted by the inherent merits of the expert's opinion.

1. Techniques of cross-examination might be employed to engender a tendency of acquiescence, which leads to the extractions of concessions contrary to an expert's genuine considered opinion. These techniques may include: inducing confusion through complex and rapid fire questioning; inducing submission through aggression or overbearing demeanour; provoking the witness to anger, in a way which compromises the expert's rational deliberations; encouraging a co-operative and trusting relationship with the expert through flattery and respect; creating a habit of acquiescence through a pattern of 'Dorothy Dixers'; weakening confidence by embarrassing the expert on collateral matters; trapping the expert in a logical corner which demands a concession, when the trap has been created by extracting the expert's agreement to flawed assumptions (which the expert might carelessly have provided, oblivious to the logical consequences of his concession).
2. The cross-examination might damage the credibility of the expert by creating the impression that the expert is unduly defensive and evasive, by a conscious strategy of provocation;
3. The cross-examination might probe the expert opinion to expose flaws and inconsistencies (real or imagined). If confronted with those contended flaws for the first time in cross-examination, the expert may be unable properly to address them (and the expert's testimony might be correspondingly weakened). However, the expert might have been able readily to explain them away (on reasonable grounds), had the expert had adequate time to reflect upon them.

The strategy of mock cross-examination has the capacity to alert the witness to the strategies that might be used to attack him or her, to alert the witness to his or her vulnerability to those techniques, and to facilitate the witness developing defences against them. By educating the barrister as to how the witness responds under cross-examination, a mock cross-examination also produces the advantages of facilitating preparation of re-examination and an informed assessment of the strength of the case.

Secondly, rehearsal of the cross-examination of experts does not have the same inherent distorting tendencies as rehearsal of lay witnesses. The susceptibility of lay evidence to suggestion is exacerbated by the inherent vulnerability of memory to unconscious reconstruction.[47] The extent to which expert opinion can be distorted by the rehearsal of answers in a mock cross-examination is (or can be) limited by a number of considerations.

First, an opinion is substantially anchored by the necessity to justify the opinion by reference to assumptions and a coherent process of reasoning. This constrains the extent to which the expert's opinion

can be swayed by possible suggestion. Secondly, the pre-trial mock cross-examination will be conducted after the final report has been long since served. Any tendency to be swayed by suggestion will be counterbalanced by the fact that the expert is already 'locked in' to a publicly communicated position. Thirdly, the scope for distortion through suggestion can be further reduced if the mock cross-examination is conducted on the proposed basis set out below. Fourthly, the process of mock cross-examination will substantially revolve around challenging (rather than rehearsing) the expert's evidence in chief.

Arguments against rehearsal of cross-examination

There are a number of considerations weighing against the ethical propriety of cross-examination rehearsals:

- notwithstanding that mock cross-examination is aimed at 'challenging' the expert's evidence, the reality is that discussion and rehearsal of answers to cross-examination are integral aspects of the process;
- the inherent vulnerability of witnesses to suggestion during the rehearsal of evidence on the eve of trial: 'rehearsal has a greater potential for suggestiveness than other preparation techniques. A witness naturally feels apprehensive about an upcoming appearance. The inclination to welcome a script is strong. Furthermore, repetition of a story is extremely suggestive.'[48]
- the legitimate objectives of mock cross-examination can be substantially achieved without the risks associated with that process. Testing and probing the expert report can be readily undertaken in conference. General advice as to the techniques and traps of cross-examination can also be provided in conference. The experience of the actual rigours of cross-examination can be created by a mock examination on a subject matter unrelated to the proceedings;[49]
- the conduct of mock cross-examination is arguably contrary to the spirit of the expert code. Any 'mock cross-examination' will presumably seek to employ all the tricks of cross-examination. The likely consequence is to instil in the expert a defensive wariness of cross-examining counsel. That defensiveness is antithetical to the process of open-minded and impartial engagement by experts in litigation, which is the intention of the expert codes. This has strategic considerations as well. A defensive or partisan demeanour will weigh heavily against the credit of a witness.

Conclusion

It is a finely balanced and controversial question. As a purely ethical matter, I tentatively suggest that mock cross-examination on the actual case should generally be ethically permissible, subject to the following parameters:

- the barrister should emphatically exhort the expert to abide by the witness codes;
- on no occasion should the barrister during the session give any direction or suggestion as to the substance of any answer which the expert should provide to any question;
- it is reasonable to discuss answers given in the mock cross-examination, for the purpose of:
  - exploring and testing the basis for any stated answer;
  - exploring whether any answer (on further reflection) truly accords with the considered opinion of the expert;
  - if not, exploring why the expert gave the answer in the mock cross-examination;
  - discussing strategies to facilitate the expert responding to questions in a manner which accords with the expert's considered opinion;
- there should be no more than limited repetition of cross-examination on each subject matter.

However, reasonable minds will differ as to the strategic prudence of the practice of mock cross-examination. Because there does not appear to be universal support for the ethical propriety of the practice, some judges might perceive the rehearsal of cross-examination as tainting the credit of the expert.

Reform in regulation?

It may be useful to consider whether amendments to the Bar Rules might provide more practical and clear guidance on witness preparation. Any such consideration might address the following issues:

- the general question of the appropriate nature of ethical regulation in this area. There is often contrasted two types of ethical regulation: 'codes of ethics' (which prescribe high level principles to provide loose general guidance), and 'codes of conduct' (which prescribe specific binding rules consistent with the high level principles). Those different forms reflect the often conflicting goals of regulation: the retention of sufficient flexibility to permit ethical discretion which is sensitive to individual circumstance; and the provision of sufficient certainty to give firm practical guidance (and to facilitate enforcement);
- the relative priority of the conflicting policy objectives in this area;
- whether there should be recognised an ethical duty to take positive steps to promote the spirit of independence and impartiality that underpins the new expert codes;
- whether conduct should be proscribed merely because it creates an appearance of expert partiality.

Expert testimony plays a critical role in litigation. Witness preparation plays a critical role in the presentation of expert testimony. A framework of rules and principles to provide effective ethical guidance in the area is needed. That framework does not presently exist.

To facilitate the development of such a framework, it might be helpful to undertake the following steps:

- organise a working party through the Bar Council to address the issue. It would be desirable that the Law Society and the judiciary also be represented;
- survey existing practice in relation to expert witness preparation, across the Bar and within law firms;

- survey judicial attitudes as to the impact on expert credibility of various methods of expert witness preparation;
- survey practice in different legal cultures;
- circulate a discussion paper through the working party, setting out proposed guidelines;
- in light of responses to the discussion paper, produce guidelines for practice for approval by Bar Council.

I am interested in exploring this topic further, and welcome comments.[50]

[1] Applegate, 'Witness Preparation' (1989) 277 *Texas Law Review* 277, at 279.

[2] Applegate, supra fn 1, 278.

[3] For a recent general considerations of the ethics of witness preparation for lay witnesses, see *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 731 (CA); *R v Momodou* [2005] 2 All ER 571 9CA).

[4] Applegate, supra fn 1, 327.

[5] Zacharis and Martin, 'Coaching Witnesses' (1998-98) 87 *Kentucky Law Journal* 1001, at 1006.

[6] Applegate, supra fn 1, 352.

[7] *Abbey National Mortgages Plc v Key Surveyors Nationwide Limited and Others* [1996] 3 All ER 184; see also *Fox v Percy* (2003) 214 CLR 118, per Callinan J at [151].

[8] NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70.

[9] NSWLRC, Report 109, supra fn 8, page 74.

[10] Quoted in J Langbein, 'The German Advantage in Civil Procedure' (1985) 52 *University of Chicago Law Review* 823, at 835; quoted in NSWLRC Report 109, supra fn 8, page 73.

[11] *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705.

[12] NSWLRC, Report 109, supra fn 8, page 75. As to the expert codes, see Uniform Civil Procedure Rules, Schedule 7: 'Expert Witness code of Conduct'; Federal Court Practice Direction: 'Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia'.

[13] Applegate, supra fn 1, at 350.

[14] It is also apparently used with more precision to describe the process of rehearsal of evidence, or direct suggestion of answers.

[15] Suggestibility will be influenced by the 'power dynamic' between expert and the barrister.

[16] Eg, contingency fee.

[17] See my other article in this edition: 'Expert reports and waiver of privilege'.

[18] *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171, per Allsop J at [676], [678].

[19] ibid.

[20] ibid.

[21] Ibid., [678].

[22] *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454, per Pagone J at [9]; *Aitchison v Leichhardt Municipal Council* [2002] NSWLEC 226, per Talbot J at [21]; *ASIC v Rich* [2005] NSWCA 152 (CA) [167].

[23] *Fagenblat*, supra fn 22, [7].

[24] *Fagenblat*, supra fn 22, [7].

[25] *ASIC v Rich* [2005] NSWCA 152 (CA) [167].

[26] *ASIC v Rich* [2005] NSWSC 650, per Austin J at [40].

[27] see Bar Rule 36; *Bush* (1993) 69A Crim R 416 at 431.

[28] NSW Bar Association Response to the NSW Law Reform Commission Issues Paper 25 - Expert Witnesses, [33].

[29] ibid.

[30] There is no obligation to disclose the process of the evolution of an expert opinion.

[31] *Harrington-Smith v Western Australia* (No 7) [2003] FCA 893, at [19]; quoted with approval in *Jango v Norther Territory* (No 2) [2004] FCA 1004, per Sackville J at [9], and *R v Coroner Maria Doogan* [2005] ACTSC 74 (Full Court, ACTSC), at [118].

[32] *Whitehouse v Jordan* [1981] 1 WLR 246, per Lord Wilberforce at 256-257.

[33] *Kelly v London Transport Executive* [1982] 1 WLR 1055, per Lord Denning at 1064-1065. However, Callinan J has pointed out *Whitehouse v Jordan* does not support 'as far reaching a proposition as that propounded by Lord Denning': *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575, at [279].

[34] Justice McDougall, 'Commercial List Practice: Expert Evidence', College of LAW CPED Seminar, 28 July 2004.

[35] Urgency might create a necessary exception to this guideline.

[36] Some practitioners would prefer to organise a conference to discuss the matters raised, before a further draft was prepared.

[37] Eg, the amendment of wording which is convoluted.

[38] However, it could be contended that merely raising the proposition is indirectly suggestive of what the witness 'should say' in proceedings.

[39] *Whitehouse v Jordan* [1981] 1 WLR 246, per Lord Wilberforce at 256-257.

[40] *Boland v Yates*, supra fn 33, per Callinan J at [279].

[41] What is sufficient to constitute 'pressure'?

[42] For a good example of such guidelines, see Freckleton & Selby, 'Expert Evidence: Law, Practice, Procedure and Advocacy' (2nd Edn, 2002), at 706-713.

[43] See Re *Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395; *R v Momodou* [2005] 2 All ER 571, at 588 (CA).

[44] Code of Conduct of the Bar of England and Wales, Rule 705(a); see also *R v Momodou* [2005] 2 All ER 571, at 588.

[45] G. Bellow & B. Moulton, 'The Lawyering Process: Preparing and Presenting the Case' (1981), at 357-8; see Applegate, supra fn 1, at 281 fn 13.

[46] There are some authorities against the practice: eg, Re *Equiticorp Finance Ltd; ex part Brock [No 2]* (1992) 27 NSWLR 391, per Young J at 395. However, the practice nonetheless appears widespread.

[47] *Goodrich Aerospace Pty Limited v Arsic* [2006] NSWCA 187, per Ipp JA at [19].

[48] Applegate, supra fn 1, 323.

[49] This was endorsed by the Court of Appeal in *R v Momodou* [2005] 2 All ER 571, at 588.

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