LAW SOCIETY OF WESTERN AUSTRALIA

Wednesday, 20 March 2019

BRIEFING A BARRISTER

Geoffrey Hancy

B.Juris (Hons), LLB (Hons), B.Ec (UWA), LLM (Melb)

geoff@hancy.net
www.hancy.net
www.cloudbrief.com

INTRODUCTION

1 My paper is about briefing a barrister for litigation. The focus is on cases in the courts that might go to trial. I will not cover briefing counsel in other contexts.

2 My theme is that in order to understand when and how to brief a barrister you must understand the litigation process and how to brief yourself. I will therefore speak about topics other than the mechanics of preparing and providing a brief.

3 Litigating a legal dispute is like a travelling on a journey. Unlike life it is not simply about the journey. The destination is all important. Taking instructions from the client is the point embarkation. The destination is resolution by settlement or trial outcome. Briefing a barrister might occur at intermediate points along the way.

4 Travelling the litigation road requires a road map. The questions of when and how to brief counsel are best understood against a background of advice on how to road map and what to do during the litigation process irrespective of whether counsel has a role. When required, usually the role of a well briefed counsel will be as driver rather than passenger, and should add value to the service provided to the client.

5 I will address two very important areas:

5.1 Managing information. Road mapping is an integral element;

5.2 Preparing witness statements. Well prepared witness statements will remain relevant and important in the context of the new Supreme Court requirements for witness outlines and oral evidence in chief. They should facilitate leading evidence in chief and enhance the reliability of oral evidence.

6 In my experience, both areas are not well understood or managed by many lawyers. First, often litigation seems to be run in an *ad hoc* manner, lacking demonstrable planning structure and order. This has the potential to adversely affect the quality of a brief and the course and outcome of the litigation. For example, there may be delayed or mistaken appreciation of the prospects of success of a claim. This may result in delayed resolution, a lost opportunity to settle for a reasonable amount, or legal costs may be incurred that are out of proportion to the value of a claim.

7 Secondly, witness statements that are not well prepared may not reflect the actual and clear recollection of the witness of that person's personal experience (what he or she saw, said, heard or did). Adverse outcomes may be that trial counsel may reach a point of difficulty in leading oral evidence in chief and after oral evidence has been given the apparent reliability of the witness may affected.

8 Another important area, but I will not cover it, is obtaining expert advice. It is a sub-set of obtaining witness statements.

MANAGING INFORMATION IN LITIGATION

Introduction

9 The core work of litigation lawyers is resolving legal disputes. In many cases questions for determination include liability for loss, causation, and value of loss. These broad issues in turn lead to numerous sub-issues that must be considered and determined.

10 The process of resolving disputes produces information. Much of that information will be found in documents that were not created by lawyers – insurance documents, contract

documents, invoices, claim documents, investigators' reports, and correspondence. In addition lawyers will play an important role by obtaining statements from witnesses and opinions from experts. The amount of information that is generated might range from comparatively minimal to thousands of documents.

11 An organised approach to management of information aids timely and appropriate resolution of a dispute; preferably by a settlement.

12 This section of my paper offers suggestions on steps to take to manage information with the objective of enhancing the prospects of timely resolution or success at trial. These are practical solutions that I recommend and apply in my practice as a trial lawyer.

13 I discuss separately, and later in the paper, the topic of preparation of witness statements. Well prepared witness statements will continue to have a key role in well conducted litigation. They will facilitate preparation of witness outlines.

Look forward to the trial

14 I use the expression "look forward to the trial" in the sense of looking to the future rather than as an expression of joy at the prospect. Assume from the outset that the dispute will go to trial, but hope that it will not. Ask yourself what you, or trial counsel, will be saying to the court at trial about:

14.1 What order the court should make;

14.2 Why that order should be made.

15 In a few sentences you should articulate what the case is about, what you want from the court, and why the court should make the orders you want. This is the "case concept".

16 Case management should start by thinking about the potential end point of a dispute and working backwards. Almost all disputes do not go to trial. However if we act as if the dispute will go to trial we are likely to improve the quality of case preparation work. I have started with the end of the litigation process because what you do and the decisions

you make about managing information will be controlled by what may happen in the future.

17 At the outset you must road map what you are going to do, bearing in mind the potential future final destination is a trial. At a trial your views of the factual and legal relevance of the evidence will be put to the test. Will you pass that test or not? Whether your assessment before trial was right or wrong will be decided by someone else. How can you maximise the probability that that you have made a correct assessment and the Court will agree with you? Will your client win or lose? Should your client avoid a trial and settle the dispute?

18 Better knowledge of what can be proved improves our understanding of the relevant facts and strengthens our ability to resolve a dispute or make a better judgment about prospects in the event of a trial.

Process drivers

Case concept and case strategy

19 The **case concept** expresses what the litigant wants the court to do and why. It should be capable of being formulated in a sentence or two.

20 It is essential that you formulate a case concept as soon as you can. It will drive what you do. Your view of the case concept should be flexible. It should be kept under review as the litigation progresses. It will guide you as to the evidence you must look for and collect – both for and against relevant factual propositions. As further evidence is acquired you may find it is necessary to change your case concept. That may lead you to change direction.

21 The **case strategy** is the methodology that you apply to implement the case concept. I will mention key elements of that process. Later, I identify key documents that should be produced as you put the case strategy into action.

Knowledge, analysis, simplification and structure

22 The key process elements are:

22.1 Knowledge;

22.2 Analysis;

22.3 Simplification;

22.4 Structure.

Knowledge

23 In order to make sense of dispute information you must know the law and the relevant facts. Invariably the "facts" are conclusions about what has happened in the past and those conclusions derive from the evidence that has been left behind. That evidence will take the form of documents that were produced in the past, the recollections of witnesses, images of scenes and objects, or the actual objects. You must have and know your evidence.

Analysis

24 The application of the case concept through the case strategy entails accumulation and review and analysis of evidence. That review includes an assessment of the legal significance of evidence as it is acquired and what further work must be done to find additional relevant evidence if required. Let your case concept guide your evidentiary enquiries but modify the case concept, or even abandon a case concept for another one, where that is necessary to explain the accumulating evidence. Your ultimate responsibility is to find out what is true rather than to build up a case to support pre-determined conclusions or presumptions.

Simplification

25 The process of analysing the accumulating evidence is enhanced by simplifying the information. Simplification occurs through summarising evidence. This should take written form. Analysis entails forming a view about what the summarised evidence

means in terms of issues of liability, quantum and indemnity and the need for any further evidence.

Structure

26 The quality of your analysis will be enhanced by having a structured brief, reducing the analysis to written advice, and giving structure to the written advice.

Process drivers in action

27 All of this leads to the key requirements for and production of:

27.1 A **Brief**;

27.2 **Written opinions**.

28 The brief is your library of the knowledge that is relevant to the dispute. It contains evidence and other documents that aid analysis, such as pleadings, and documents that set out or summarise the relevant law. Its contents are likely to change over time as additional information is identified or acquired.

29 Written opinions simplify the knowledge and provide and record analysis of the legal relevance of the information in a structured manner. Advice is easier to comprehend, and it is easier to evaluate the strength of the advice, if it is structured. Structured advice will be easier to produce if you start by structuring your information. In order to produce structured advice you should imagine yourself both as instructing lawyer and counsel and brief yourself to provide that advice.

30 Commit yourself at the outset to create a brief. That is a commitment to organise your information so that you keep it under control and give yourself a mechanism to know what it is and what it means. Give the brief structure. A structured brief will help you prepare structured written advice.

31 The brief should change over time as new evidence is collected, or new court documents are created. Similarly it is important to review and revise written advice on an ongoing basis.

Collecting evidence and preparing witness statements

32 In order to give advice properly, evidence should be collected at the earliest possible stage. This will consist of documentary material, plans, objects, photographs and any other items of real evidence, and witness statements. A barrister could give some direction. It is better to prepare proper witness statements as early as possible, rather than "proofs of evidence" that cannot or will not be used in court.

33 Witnesses should be located and statements taken. It is important that each witness statement is signed and witnessed. There are various reasons for that requirement. Witnesses can disappear or die, or change a story. A signed statement may be capable of being used at trial. It is also important that the significance and relevance of each document, plan, photograph or item of real evidence is explained by a witness statement.

34 I recommend that statements for use at trial, in every case, are prepared by lawyers rather than investigators or loss adjusters.

35 I will address the topic of witness statements in more detail in a separate section of this paper.

Key documents

36 As you travel the journey from instructions through to trial a **Brief**, **Written advice** and **Closing submissions** are essential.

37 The process that generates the brief, written advice and the closing submissions should also result in creation of:

37.1 A **Brief index;**

37.2 In all but the most simple cases, an **Evidence chronology** (a summary of evidence);

37.3 A **Written opinion, or a series of opinions** (eg on liability, causation, or quantum issues);

37.4 **Advice on evidence;**

37.5 Written **Opening submissions.**

38 You should view as mandatory the creation of each and every one of these documents before trial. If any one of these documents is not produced there must be a very good reason. One good reason, for example, might be that the journey ended with a settlement so that advice on evidence and opening submissions were not required.

39 In a large case you may wish to prepare an **Action list** (a "to-do" list) that sets out tasks that lawyers and others are required to do. This will resemble your recommendations for future action in your written advice. It should include sections for task, person responsible, whether outstanding and completion date.

The Brief

40 The brief should be made from the documents that may be used at trial. It is important therefore that you have an understanding of what happens at a trial, what documents will be required to support written and oral submissions, what documents may be tendered in evidence, what copies are needed, and how counsel at trial will have most convenient physical access to relevant documents.

41 Many, if not most, of the documents that are accumulated for a case will not be necessary for the trial. In the case of some documents it may be obvious that they are potential trial documents. They include pleadings (primarily, statement of claim and defence), documents that were produced in the past that evidence factual allegations in the pleadings, witness statements, and expert reports.

42 The process of preparing and maintaining a brief requires that you decide whether each document is or is not a trial document. Each document, or a copy, that you decide is a trial document should be placed in the brief. Only documents that contain information that is likely to be used at trial should be put in the brief. The process of thinking about whether a document should or should not be included in a brief should start as soon as

you have your first relevant document. You should start preparing the brief at the outset of the case.

43 The process of deciding whether to include a document in the brief will be assisted if you ask yourself whether the document contains information that may be used at trial and, in the case of a possible exhibit, what would counsel say about the document at trial and what it means to the case.

44 The brief should have a structure. That structure should equate with the structure of your likely submissions. Documents should be placed in the brief according to relevant identified categories.

45 Submissions at trial often commence by referring to the admissions and issues that are identified from the pleadings. Typically the first category of documents in a trial brief is the pleadings.

46 Trial submissions will then address questions of anticipated evidence, including documentary material by category and identification of proposed witnesses, and may cover some aspects of relevant law and a summary of the case concept. It is convenient for the brief to be organised so that documents are filed in categories and that it includes sections for witness statements, the law, written submissions, and for other categories of relevant material.

47 Your task of preparing a brief will be aided by first preparing a **brief index**. This index is a list, in order, of the relevant categories of documents that are to go into the brief. You should take time to identify and articulate the categories of documents that you have, or should have, for the matter. Next, create a numbered list of categories in the order that you consider is the order in which the documents should be filed in the brief. This produces your brief index.

48 Each category in the brief index then becomes a heading for a tab in the brief. In my experience numbered tabs are unhelpful. The tabs in a brief should state in words the category of documents that will be found after the tab. Documents are easier to find in the brief if tabs use words and category descriptions rather than numbers.

49 In cases where there is a substantial number of documents that require numerous lever arch files it may be appropriate to colour code the brief files. It may be easier to find pleadings when you know that they are in, for example, the red file. Colours can be given to a file by coloured paper inserts for the front of the file and the file spine. The contents of the file should be indicated by the cover sheet and the spine.

50 A properly prepared physical brief reinforces the commitment to know what your case is about and where it is going.

51 Briefs often include photographs and reports that contain colour images. It is essential that the copies that go onto the brief are in colour and good quality. Preferably they should be duplicates rather than colour photocopies. Black and white photocopies of coloured photographs should never be put on a brief. Nor should poor quality colour reproductions be put in the brief. For an electronic brief digital copies are preferable.

52 Before the trial you should re-evaluate your brief structure. You may then create another brief in reduced form that includes only the documents that you have decided are needed to run the case in the court room at trial. A number of documents that were in the brief before trial may not be admissible documentary evidence or you may have decided you do not need to use or refer to them at trial.

Written opinions

53 Written advice will summarise and analyse the relevant aspects of the evidence and law. For example, in a case of injury or loss the opinion should address, in a structured manner, wherever possible:

53.1 The nature of the loss and when and how it occurred;

53.2 What is being claimed and by whom;

53.3 Summary of the evidence and what are the factual conclusions from that evidence. This may include expert evidence;

53.4 Summary of the applicable legal principles;

53.5 What the legal outcome may be when the legal principles are applied to the factual conclusions from the evidence;

53.6 What further action may be required and by whom; for example, to find further evidence or better understand the law that applies to the anticipated factual conclusions from the evidence;

53.7 A summary of conclusions about likely or potential legal outcomes and recommendations for future action. This last element tells you where you are taking the case.

54 Use topic headings. They give the advice structure. The can include, for example, at the outset "Nature of Dispute" and at the end "Summary of advice and recommendations". Between the beginning and the end you should include topic headings and sub-headings.

55 The significance of the ultimate destination highlights the need for your advice to be in a form that is capable of being translated into closing submissions at trial. It does not matter that initially it may merely resemble a draft that contains tentative conclusions. You are creating a road map for yourself.

56 At the outset you are likely to have a limited amount of information. Your advice should not be confined to advice about what you have. You must think about, and try to articulate, other issues that might be relevant. This will enable you to formulate ideas for enquiries to obtain further information that will make those issues relevant or rule

them out. As an obvious example, if you have material that is relevant to a liability question you obviously need, in addition, material about quantum.

57 Performing the task of identifying and listing categories of documents or evidence that might be relevant should lead you to form conclusions about steps to take along the pathway from instructions to trial. Particular kinds of disputes generate the same or similar categories of documents. You need to identify the patterns that emerge from your experience of cases. This will aid you to make decisions to look for relevant types of information that you do not have.

58 The written advice may be provided by a series of letters or memoranda. A substantial written advice might emerge in time and follow preliminary advice documents. The substantial form might be followed by a series of documents that contain updated advice.

59 A written opinion should be done periodically. An updated opinion will summarise the past position and conclusions, subsequent developments, the present position, and what action if any is required for the future. The commitment to prepare periodic advice ensures that you continue to know where you are, and where you are going, with the case. The periodic opinion is your ongoing, and flexible, road map. It keeps you on track. You keep yourself on track. It enables you to decide whether additional or improved evidence is required. It helps you to decide whether the dispute should be settled or allowed to go to trial.

Evidence chronology

60 An important technique for summarising and simplifying evidence, so as to facilitate the process of analysis, is the preparation of what I call an "evidence chronology". This is not a chronology of the type that is commonly required by a Court in litigation. It is a summary of the important aspects of the evidence. Although it is a summary, it sets out the evidence in considerable detail.

61 The summary is in date order. It sets out information that is obtained from the relevant documents in a summary form about events that have occurred in the past. An event is something that has happened – something that a witness did, saw, heard, read or wrote.

62 Every event has these features:

62.1 Time;

62.2 Place;

62.3 Action (what a person did, saw, heard, read or wrote).

63 The evidence chronology contains:

63.1 The date of the event;

63.2 Author (of the document that contains information that evidences the "event");

63.3 A description of the event (what a person did, saw, heard, read or wrote. It paraphrases the material contained in the document from which the detail of the event is extracted);

63.4 Detail of the document from which the summary is obtained, the party's discovery number for the document or some other document identifier;

63.5 Provision for recording a comment about the "event";

63.6 Provision for recording the name of a witness who may be required to give evidence or cross-examined about the event.

64 It is important, wherever possible, that the summary of the event is described by reference to human perception. This is important because one use of the evidence chronology is as an aid to preparing witness statements.

65 Witnesses give evidence about clear recollection of past experience of events and not merely by description of outcomes. For example, if the relevant event was the creation of a contract a useful description of the event might be "individual X of company A contracted with individual Y of company B to …" rather than "a contract was made

between company A and company B". A better summary would be "At [place] individual X of company A said to individual Y of company B [words comprising offer]. In reply individual Y said [words comprising acceptance]". An appropriate summary of the evidence increases the chance that work will not have to be re-done when witness statements are prepared.

66 The comment section enables you to record any pertinent thought you have when you read the document. Comments may include, for example, that a particular person should be asked to comment on the document, further enquiries should be made about evidence that may exist, or the legal significance of the document or the information in it. The advantage of the comment section is that any thoughts about a document (and irrespective of whether ultimately it proves to be an important comment or not) can be recorded and not lost. This may result in reduced double handling in the future by avoiding the need to re-read the document to retrieve or recall your earlier thought or comment. Your thoughts might benefit someone who in the future has to consider the evidence. They will not have the benefit of your memory but will have your record.

67 The witness section enables you to record (and again not lose the relevant information) your view about potential witnesses or potential cross examination. An evidence chronology may be used as an aid to preparing witness statements. Another potential use is preparation of cross examination.

68 The importance of putting a document identifier (such as the document discovery number and party, or trial bundle number) in the evidence chronology is that it facilitates locating the document. This is a vital requirement is cases with many documents. It will aid preparation of witness statements and witness outlines.

69 The evidence summary can be prepared document by document and later sorted into time order. This can be done easily using a table in Word or spreadsheet software. The

process of preparing the evidence chronology enables you to summarise documents in whatever order they are presented to you and you can later use the capability of a computer and software to order the material from earliest in time to most recent.

70 The evidence summary makes the information in the documents more comprehensible by reducing the quantity of the information that you have to digest and putting it in time order. Every evidence summary tells a story, and stories are easier to understand if the relevant events are told in the order in which they happened. An evidence chronology often reveals issues and questions that were not apparent to you in the past. In my experience it is an essential document for any major case that will be going to trial.

71 An evidence chronology facilitates preparation for trial by:

71.1 Identifying gaps in evidence;

71.2 Identifying required witnesses and documents;

71.3 Aiding preparation of advice and submissions;

71.4 Aiding preparation of witness statements, witness outlines and cross examination.

Lead up to trial

72 Before trial the following are essential documents:

72.1 Evidence chronology.

72.2 Written opinion on relevant issues and potential outcomes of the trial;

72.3 Advice on evidence;

72.4 Opening submissions.

73 Advice on evidence is essential to ensure that bases are covered and you know what is admitted, whether your evidence is admissible, and what can and will be proved by the evidence.

74 The written opinion should address relevant liability and quantum issues, pertinent factual and legal conclusions, and likely or potential outcomes from a trial.

75 Opening submissions should derive from the content of the most comprehensive written opinion and any later updates. The comprehensive written opinion forms the foundation for opening submissions. As the trial progresses, day by day, the opening submissions should be modified into draft closing submissions. The closing submissions should largely resemble the opening submissions, and the opening submissions in turn should largely resemble the comprehensive written opinion that was given some time before trial.

76 Ideally, the bulk of the closing address should have been written months before the commencement of the trial. If you achieve that result it will show that you knew where the case was going well in advance of trial, during the trial and at the conclusion of the trial.

WITNESS STATEMENTS

77 A witness statement must contain truthful and reliable evidence, according to the clear recollection and personal experience of the witness. Its contents should tell the trial lawyer what the witness recalls, and do so in a way that can be translated into questions that extract from the witness in court admissible, honest, and reliable answers.

78 These objectives may be achieved if a number of rules are followed when the statement is prepared.

79 The new Supreme Court requirements of witness outlines and oral evidence in chief do not reduce the value of well prepared witness statements. In my view their value is enhanced by these changes. Well prepared witness statements will better reflect what the witness clearly remembers and will assist trial counsel when leading evidence in chief. Failure to follow the rules that I outline may create difficulties during a trial for the witness and trial counsel.

Tell the story as a series of events

80 A witness statement is a story told by the witness about a series of events that the witness experienced in the past. The events follow in a time sequence.

81 Each event usually can be described in the words of the witness against a background of a time and place. Against this background the witness states what the witness experienced.

82 For the most part the relevant personal experience is described by:

82.1 Something the witness saw;

82.2 What the witness did;

82.3 A meeting or telephone conversation with someone and what the witness said or heard;

82.4 A document that the witness prepared and sent off;

82.5 A document the witness received, read and acted on.

Describe by reference to the sight, sound, and action

83 Each event is part of the witness' personal experience. The description of the event should be what the witness saw, said, heard, or did. When another person forms part of the experience of the witness then the description of the event should refer to what that other was heard to say or seen to do.

84 A witness statement that is prepared in this way becomes a written version of what otherwise might be imagined to be a script for a film of the described events. If an event cannot be imagined as image or sound then it is likely that the witness statement is not in the correct form.

Recollection of events

85 In my view the witness should be told that the witness should only say in court what the witness clearly recollects and knows to be true. That knowledge comes from recollection of personal experience of events. The witness should be confident about

that recollection. The witness should not speculate or guess. If not confident about whether an event occurred then the true answer to a question about it may be that the witness does not have a clear recollection, does not know or does not remember.

86 If the witness is "pretty sure", is "90% certain", "thinks it is so", says "I would have done", says "it would have been", says "I imagine" or prefaces a description of an event with a like expression then there is risk that what is being said is not true. In these cases the witness is not confidently saying what he or she knows to be true. Documents created at the relevant time or other objective evidence might be available to disprove the evidence. If this occurs at trial an adverse light might be cast on what the witness has said about other events.

Past events

87 Most evidence concerns events that occurred in the past. Witness statements should therefore use past tense. The problem of incorrect use of present tense often arises when a witness describes a scene, or talks about a relationship between things, system, practice, or state of affairs.

88 Examples of incorrect use of present tense when past events are in issue include "The site is surrounded by trees ...", "Every worker who comes on site is given instructions to ...", "The company has standard terms of exclusion on its contract documents", "Smith is managing director of the company and has authority to ... ", "Orders for supplies are placed by ...".

89 Use of present tense disguises the true evidence about the state of affairs at the relevant time in the past.

State the words spoken

90 Frequently witness statements set out conclusions about the nature or the subject of what was said rather than state the words used. This is not evidence. Usually it is a

conclusion about or evaluation of personal experience that has not been set out in the statement. The specified substance of the words spoken constitutes the evidence.

91 Forms like "He talked about ...", "I informed her ...", "I related to him my concern about ...", "We discussed ..." do not set out what happened according to the personal experience of the witness. They tend to identify the label given by the witness to the topic or issue that was discussed without properly saying what was said. They cannot evoke an image of what happened. The safe form is "I said" or "he/she said" followed, as best as can be done, the substance of the words that were used. If topics of discussion are identified they should be followed, where relevant, by evidence of what was said.

92 I do not agree with standardised use of quotation marks for recollection of something that was said, unless the witness has a clear memory of the precise words used. Usually human memory is not that good and a recollection is about the substance of the content of words used rather than word for word what was said. More often the truthful answer is that the witness can only state the substance of what was said. In that event placing language in quotation marks is not only unhelpful but it is not the true evidence.

Avoid lawyer speak

93 The language used in the statement should reflect the way people talk and not legalistic equivalents. People "see" rather than "observe" things. They "say" rather than "inform" or "advise". They "read" and do not "peruse" and they "send", "post" "fax" or "email" rather than "forward" documents. The witness "went" rather than "proceeded" somewhere. Most people drive "cars" rather than "vehicles" (although sometimes the best description is "vehicle").

Use the active form

94 Most sentences should identify the actor (usually the witness) and if another person is involved should identify that person. The sentence should then say what the witness

saw, said, heard or did. The actor may however be revealed by the context provided by the statement.

Avoid passive forms

95 A passive expression simply describes an event without identifying the individual concerned and that person's personal perception of the event (what the witness saw, said, heard, or did). They should be avoided. For example "The side of the house was where the man came from" does not reveal anything about what the witness experienced. The sentence should reveal that the witness saw the man come from the side of the house. Unless it is clear from the context the form should be "I saw the man walk from the side of the house". This is the active form.

Avoid "collective" expressions

96 The individual experience of the witness is usually relevant and not some form of collective or corporate experience. The witness should talk about what "I" saw, did, said or heard rather than what "we" or some corporate entity saw, did, said or heard.

97 Likewise where another individual said or did something the individual should be identified and not "they" or the name of some corporate or collective entity. Corporations do not talk or act. Only people do and hence they must be identified. A sentence that links conduct to a corporation is a conclusion about who the individual represented rather than a statement about what happened.

98 It is rarely helpful or admissible to state in a witness statement what "we agreed" or what "we discussed". These are expressions of conclusions from words spoken that have not been stated.

Avoid stating the state of mind

99 In most cases the state of mind of the witness is not relevant. It may be relevant where an allegation is made that there was a common intention in a contractual context that was not correctly recorded in the final written contract and a claim is made for rectification.

It might also be relevant in the context of foreseeability and the actual knowledge of the defendant when an allegation of negligence is made. In most cases however the state of mind of the witness is not relevant. It is not a description of the personal experience of the witness. It is not what the witness saw, said, did or heard.

100 There are numerous expressions that reveal an irrelevant state of mind and should not be included in witness statements. They include "I understood", "I thought" or "I intended".

Avoid interpreting documents

101 A related problem is interpreting a document. In most cases what the words used in a document mean is an issue to be decided by the court. The author's interpretation is not admissible. A sentence in the form "When I wrote this letter I meant in paragraph 2 ..." is not likely to be admissible. The same applies to conversations. "When I said to her [words spoken] I meant ..." and like forms should not be used. Again, interpretation usually is not a description of what the witness saw, said, heard or did.

Avoid repeating contents of documents

102 Metaphorically the document speaks for itself. Oral evidence is usually only necessary to prove relevant active conduct such as preparing, sending, reading or acting on the document.

103 In most cases it is not necessary to repeat the contents of a document identified by the witness. It is sufficient for the witness to say that a document was prepared and what was done with it or that a document was received and read and then acted on and to describe the action. If the content of the document is admissible then a document identifier can and should be included or the document should be and can be annexed as a potential exhibit. Sometimes a portion of the content of the document might be appropriately inserted in the witness statement if there is some good reason to do that; for example, to emphasise a particular point. Repetition of large slabs of document content should be avoided.

Structure

One sentence per paragraph

104 In my view it is better to have only one sentence per paragraph in a witness statement. This serves to remind counsel that there should be only one question on one piece of information at a time. More than 16 years ago, when I first wrote about preparing witness statements, it was common for solicitors to draft witness statements with numerous sentences per paragraph. It still is the case.

Number paragraphs

105 In cases where witness statements are exchanged paragraphs should be numbered.

Exhibits

106 The relevance of a document that is to be tendered through the witness should be explained by reference to the personal experience of the witness. Clearly identify a potential exhibit at the point where its relevance is explained in the statement.

BRIEFING A BARRISTER

What is a barrister?

107 A barrister is an independent lawyer. Barristers work individually and not in firms. However most form chambers which have some shared facilities and services. The barrister must be free to accept work from all who request it within the constraints of his or her competence, expertise and experience.

108 The advocate barrister performs "paper" functions and advocacy functions. The former include preparing opinions, pleadings (the material facts of claim or defence), interrogatories (formal questions seeking to elicit admissions from the opponent) and advice on evidence (how to prepare for trial). The advocate barrister's skill set will be extended to preparation of witness outlines in courts where they are required. Advocacy work might be carried out in chambers interlocutory hearings, at trial, or before a court of appeal.

109 Not all barristers are trial or appeal advocates. For example, some might provide commercial advice. In addition some lawyers who practise as barristers may have had a great deal of past experience as litigation solicitors preparing cases for trial but limited advocacy experience.

Why brief the bar?

110 An instructing lawyer may have one of a number of reasons for choosing to brief a barrister. The solicitor may be too busy to do the work connected with preparing for, or appearing in, court. More often the barrister is briefed because the solicitor needs help and the barrister has expertise in a particular area or is a specialist advocate.

When do you brief a barrister?

Advocacy focus

111 Immediate thought should be given to engaging a barrister where a client has an issue that might end up in court in the future. Advocacy is a specialist skill. Hence, the important role of the specialist advocate.

112 The focal point of litigation is advocacy. Advocacy entails communicating ideas to a court. Communication is best facilitated by keeping ideas clear and simple. Achieving that result requires time to master issues and facts and work preparing evidence that establishes the facts. The relevant material must be summarised, and the summary must be organised. Good advocacy in court is preceded by and requires much preparation work.

113 The advocacy task begins when the client first seeks advice and not at the much later stage when the matter is listed for hearing in court.

Key documents in litigation management

114 A barrister may be most helpful in preparing the following key documents that I identified in the section on Managing Litigation:

114.1 **Written opinions** (eg on liability, causation, or quantum issues);

114.2 **Advice on evidence;**

114.3 Written **Opening submissions.**

115 A barrister can also help with drafting pleadings, settling draft witness statements and witness outlines, or drafting or settling letters requesting advice from an expert.

Advice on evidence

116 If it is thought that a matter will warrant the skill of an advocate at trial then the barrister should be briefed at the earliest stage so that the barrister can advise on the nature of the issues, the search for evidence, the prospects of success in the matter, and the desirability of settlement negotiations.

117 If counsel is briefed only after a matter has been entered or listed for trial, then this may be too late for optimum resolution of the dispute. Evidence may not have been collected or it may no longer exist. Witnesses may have disappeared or died. Memories of witnesses who can be found may have faded. Documents may have been lost or destroyed. Real evidence may no longer exist.

118 Advice on evidence should have been given well before a matter is entered or listed for trial. All relevant documents should have been obtained and relevant witnesses should have been located and statements obtained from them. Written advice should have been given to the client on liability and quantum and the desirability of negotiations for settlement.

Court documents

119 In the course of litigation it will become necessary for pleadings to be drafted, interrogatories to be drafted, and advice on evidence to be prepared. The lawyer or client may wish to brief a barrister to perform these tasks or to provide advice connected with these documents.

Pre-trial hearings

120 A number of hearings (chambers appearances or pre-trial hearings) will occur before trial and it might be appropriate to brief counsel. This may be so where a matter is of sufficient difficulty or importance to the client to warrant using an advocate who has appropriate experience and skill.

121 Each hearing may require its own brief.

Trial

122 This is the stage of the litigation process usually associated with use of a barrister. However a barrister should have been engaged, and a trial brief commenced, at a much earlier point in time. By trial stage a full brief should be in existence with exhibits ready for tender. A barrister can give advice about the form the trial brief should take and what must be done to control the use and organisation of documents and evidence during the trial.

123 Key components of a trial brief will be the Papers for the Judge containing pleadings, opening written submissions and lists of legal authorities, and files or bundles of documents for potential tender at trial.

How to brief a barrister?

Obtain the client's instructions

124 It is important that the client knows and has agreed that the solicitor will brief a barrister. The issue should be discussed with the client and the solicitor should obtain a general authority to brief or specific instructions to brief on a specific matter. The basis upon which the barrister will charge should be discussed and agreed.

Obtain and agree terms of retainer

125 It is important that the client knows and has agreed to the terms of the barrister's retainer. The barrister should be asked to provide an estimate of the fees that are likely to be charged.

Form and content of the brief

126 There is no set formula for briefing a barrister, but the ease or difficulty of the barrister's task will depend on the quality, form and content of the brief. The quality of the brief may affect the quality of the product that the solicitor receives back from the barrister and the time taken for the barrister to complete the task. The form of the brief should follow the form I have suggested you adopt for your own ongoing brief.

127 The solicitor should give the barrister a summary of the facts from which the problem emerges, a concise statement of the problem and a statement of what the barrister is asked to do. Observations on the law may be helpful.

128 A brief in a matter that might end up at trial should provide relevant factual material, documentary material and reference to any cases or statutory provisions that the solicitor considers to be relevant. Where there is doubt about relevance, material should be provided rather than omitted. It is much easier for a barrister to ignore material than to begin reading a brief only to discover that material that should be there is missing. If material is missing the barrister must ask for further information or documents. This is time wasting and inefficient and may create unnecessary delay in the progress of the case.

Geoffrey Hancy

B.Juris (Hons), LLB (Hons), B.Ec (UWA), LLM (Melb)

geoff@hancy.net
www.hancy.net
www.cloudbrief.com