

# ADVOCACY

## Prior Inconsistent Statements

"It took man thousands of years to put words down on paper, and his lawyers still wish he wouldn't."

Mignon McLaughlin

**A common, and effective, method of attacking the credibility of a witness is to do so with the use of prior inconsistent statements made by the witness. Such statements are likely to be found in evidence given in committal proceedings, statements made to police, answers to interrogatories, in written witness statements produced in the course of preparation for trial and in correspondence passing between the parties prior to the commencement of proceedings.**

Before deciding to use such a statement you must first ensure that what appears in the document is inconsistent with what is being said by the witness in the course of his or her evidence. It must be clear that there is in fact a material inconsistency. It may not be sufficient if there is a mere discrepancy in the expressions used by the witness to describe an event. For example, there may not be a sufficient difference where a knife is described as a "kitchen knife" in one statement and as a "table knife" in another. However, if the description varies between a "flick knife" and a "table knife" the position will be different. When you have determined that there is a material inconsistency between the evidence given in court and that in a prior statement, you will need to proceed with care. You should first lock the witness in to the statement that is made in court and under oath before seeking to contradict the witness. This may involve taking the witness back over the evidence already given to confirm with the witness that he or she is very clear as to what was said. You may do this by questions that draw the attention of the witness to the oath they have taken, the importance of truth and accuracy in the giving of their evidence and so on. The process may end with questions such as: "You told us X, that is

something you clearly remember?" Your questions should leave no room for the witness to subsequently claim that he or she was misunderstood or had employed imprecise language or acted in any other way that would permit the witness to subsequently explain away the inconsistency.

When you are satisfied that the witness is locked into a clear and concrete position in the evidence before the court you may then move to the document which is to be used to contradict him.

The first matter to establish is that the statements in the document are those of the witness. In the event that the witness does not admit that he made the statement, you may need to prove that he did. Section 19 of the Evidence Act is in the following terms:

19. Proof of contradictory statements of witness

If any witness, upon cross-examination as to a former statement made by him, relative to the subject-matter of the case before the Court, and inconsistent with his present testimony, does not distinctly admit that he made the statement, proof may be given that he did in fact make it; but, before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he has made the statement.

In relation to a signed document proof may be achieved by firstly showing the witness the signature and having him admit that it is his signature. He may then be asked whether he recalls the occasion of making the statement and to then confirm that on that occasion he was not departing from his normal practice of truthfully and accurately recording events.

Before taking the witness to the contents of the statement it is desirable to obtain from the witness some evidence that the witness is a truthful and careful person. You may wish to ask questions along the lines of: "You



Hon Justice Riley

are an honest person?"; "You would not sign a document knowing it to be false?"; "You are careful to ensure that documents you sign are truthful and accurate?"; "You would not sign a document without reading it?" and further questions in that vein varying to suit the circumstances.

In circumstances where a document is not signed, for example transcript from a committal proceeding, you should take the witness to the time and place the statement was made and have him acknowledge that he gave evidence on that occasion and he did so truthfully, being under oath. You will again employ questions designed to establish that the witness was an accurate and truthful witness on that occasion.

In a very useful article entitled "Cross-Examination on Documents"<sup>1</sup> MH McHugh QC (now McHugh J of the High Court) outlined a useful technique for cross-examining on documents. He recommended that advocates first "close the gates" before taking the witness to the contradictory material. This involves eliminating possible explanations before using the document to contradict the witness.

Before going to the contents of the document, you will ensure that you clarify with the witness anything that may be ambiguous or provide an escape route for the witness. For example, if an unusual word is used to describe an event then you may wish to clarify the meaning of that word before you go to it in the document.

You should carefully consider the circumstances surrounding the making of the document and make sure that you deal with, and close, all avenues for the witness to explain away the inconsistencies between the two statements. McHugh QC

Continued over

## Advocacy

Continued from page 17

expressed the approach in this way:

"Every document creates its own problems; it is up to you to think how can this witness explain this away; and long before you obtain the admission, cut off those gateways and explanations. In practice you will find a witness will say that he has changed his view since the time that letter was written, he did not have all the information in his possession at that time, he relied on other persons, and so on. They are common explanations, and you have to frame your questions so that you cut off those explanations, until finally when you put that particular part of the document to him there is no way out.

Another way a witness will sometimes seek to avoid the effect of documents is to say, "Oh, somebody told me to write it", or "I really didn't know what was in it", or "I was seeking to get some advantage" or something of that nature. You need to get his admission that when he wrote the document he was not setting out to deceive anybody."

When you have locked the witness into his evidence under oath before the court and you have closed the gates in relation to the earlier statement, it is then time to put the contradictory material to the witness. In so doing you will maintain control of the situation by putting to the witness only that material upon which you wish to rely and you will do so item by item. When the contradictory material is placed before the witness he should be invited to acknowledge that it is inconsistent with what he told the court under oath. Depending upon the circumstances you may wish to pursue him by establishing which version of events is untrue, what he said under oath on this occasion or what he said under oath or in his carefully prepared statement on the earlier occasion. Alternatively, you may wish to leave the contradiction unexplained. However, you must remember that re-examination on this topic may follow. Much will depend upon the circumstances of the case.

If you use a document to contradict a witness in this way you must be conscious of the fact that you may be required to tender the document. I refer you to section 20 of the Evidence Act.

1 MH McHugh QC (1985) 1 ABR 51

# AROUND THE NT BAR

This column is supplied by the NT Bar Association and features profiles of barristers working in the Northern Territory.



**David Alderman**

**David Alderman is a barrister at William Forster Chambers in Darwin, Northern Territory.**

David was first admitted to practice as a solicitor in South Australia in 1979. He moved to the Territory in January 1980 to work for Darwin firm Ward Keller where he became a partner 1986.

David joined the Independent Bar on 1 February 1995.

David's main area of practice is commercial litigation but he has a healthy balance of common law work as well. His work in the commercial area includes problems relating to contracts, construction law, partnerships, banking, the Trade Practises Act, insolvencies and administrations, workmen's liens and corporations. His common law practice includes personal injuries, insurance law, professional negligence, motor accident's and crimes compensation. He has also dealt with problems relating to discrimination, work relations and coronials.

**Sally Gearin**

**Sally Gearin is a barrister at William Forster Chambers in Darwin, Northern Territory.**

Sally was first admitted to practice in New South Wales in 1983. She moved to the Northern Territory in 1986 to work as a senior lawyer with the Northern

Territory Attorney-General doing mainly major commercial litigation.

Sally was admitted to the Independent Bar in 1990, the first woman in the Northern Territory to do so. In 1992 she was awarded the Northern Territory Women's Fellowship for contributions made towards advancing the status of women in the Territory. She was a foundation member of the Northern Territory Women Lawyers Association and president for five years. Sally was also a steering committee and foundation member of the National Women Lawyers Association.

Current appointments include: Vice President of the International Commission of Jurists (NT Branch), Executive Member of the NT Bar Association, member of the Family Law Section of the Law Council of Australia and Australian Women Lawyers Association.



Sally's area of practice includes: both trial and appellate work in all civil jurisdictions including the High Court, Supreme Court, Local Court, Federal Court and Family Court and various tribunals and commissions.

Particular areas of interest include torts (personal injury including medical negligence), workers compensation, building and construction and general contract, family law and de facto, administrative and discriminative law.

Sally's interests are her family, including her grandchildren, sailing, yoga, overseas travel and Aboriginal and South East Asian Art.