CONDUCTING CONFERENCES WITH CLIENTS CHARGED WITH OFFENCES

Cairns Judiciary CPD Series 2017/2018, 12 December 2017 – Henry J

INTRODUCTION

1. The effective conduct of lawyers' conferences with clients is critical to effective legal representation. Misunderstandings between lawyer and client in conference, and failures to adequately communicate or elicit relevant information in conference, are anathema to effective legal representation in any jurisdiction. Their potentially grave consequences for the liberty of the citizen in the criminal jurisdiction explain the specific focus of this session upon conferences with clients charged with offences.

2. Mr Feeney has focussed in particular upon the conference conducted with the client to prepare for the appearance for the presentation of the indictment and provided some specific practical advice. In this paper I take a more general focus, dealing with some overarching concepts of general relevance to conducting conferences with clients charged with offences. I begin with the topic of layering and variability, before turning to conference method and content and finishing with the pre-trial client witness conference.

3. Some of what I cover will be conceptually relevant even in simple matters, where there might only be one conference before disposition. Contextually however, my observations relate to those cases where multiple conferences are likely, as tends to occur as an indictable matter proceeds through the Magistrates and Superior Courts.

PART A - LAYERING AND VARIABILITY

1. It is essential to appreciate that such cases involve a lengthy process. Even when indictable matters which must be finalised in the superior courts are approached expeditiously it is rare for them to be finalised within a year of arrest.

2. Think about the stages of thinking the client will go through in that process. First, in other than the career criminal, there will be the shock and confusion following arrest. Whether wholly or partly guilty or innocent it is unlikely the client is psychologically and mentally prepared for the flurry of immediate concerns such as bail, the first appearance and finding a lawyer, let alone longer term concerns.

3. After shock and confusion may come anger and quite possibly poor reactive decision making. The genuinely innocent client may foolishly and possibly illicitly try to correct things, his or her way. The guilty client in denial may be more concerned with why a co-offender was not charged or what the content of the news article about the arrest was, than with objectively considering the reality of the case against him or her.

4. There then follows frustration at the duration of the process and unrealistic expectations about bringing the case to a quick end.

5. Eventually, hopefully, the client may accept the reality of what is being faced, how long the case will take to deal with and the need to trust, engage with and assist his or her lawyer.

6. The capacity of each client to cope with and adjust to this process will vary.

7. Thus, at the first conference with you one client is likely to be a very different person to deal with than another. Just as the same client will become easier to deal with by the time of, say, the conference after the client has perused the brief of evidence. At the former conference, you will know little of the detail of the case against your client and some clients will too pre-occupied to truly absorb much of what you do say. At the latter conference, you have a better idea of what your client's trial and sentence prospects are and most clients will be less distracted and more focussed on grasping what you have to say.

8. It follows that while you should you convey information about the legal process at the former conference, you will likely need to explain much of it again at the latter conference, when the client has calmed and become more receptive to properly understanding it. So it is that from conference to conference you should layer the information you give to the client about the legal process, re-visiting and reiterating topics in that process, particularly as such topics become more directly relevant to the stage the proceeding has reached.

9. Equally it follows that at the first conference there may be much less point than at the conference after the client has perused the prosecution brief of evidence in taking detailed instructions about your client's version of events. Cases vary. A grievous bodily harm case may involve a single event which your client will likely have some understanding of and capacity to provide a reasonably detailed version of long before seeing the prosecution brief. That will likely be a helpful version to obtain promptly, with a view to refreshing the client's memory in the future and to identifying whether there exist potential investigatory leads into exculpatory or mitigatory evidence which you should pursue before the evidentiary trail runs cold. This will not preclude you revisiting the client's version of events later, revisiting and layering in more detail to the client's version as specific issues of fact emerge.

10. On the other hand, it will be difficult for a client to provide a version of any particular detail in a case of, say, carrying on the business of trafficking in dangerous drugs based on text messages in the client's mobile telephone seized by police. Such detail cannot be given without knowing the detail of the texts the prosecution will rely upon. In such

a case, there can be a much more significant layering in of detail to the client's version once you are armed with the specific factual issues requiring specific attention.

11. It is important in your approach to conferences with the client to bear in mind this concept of layering, both of the legal information you provide the client and the factual information the client provides you. The nature and progress of that layering will inevitably vary, depending on the nature of both the client and the case.

12. Despite their similarities every case and every client is different. The need to consider your approach to each with a fresh and open mind is as relevant in your approach to client conferences as it to your role generally.

PART B - CONFERENCE METHOD

1. Confer early

- Confer as soon as practicable.
- The sooner you and the client discuss the case, the more effectively you and your client can prepare to deal with the case.
- Part of that preparation inevitably includes establishing the client's trust, explaining the legal process, finding out about your client's background and enquiring after your client's knowledge of potential evidentiary trails before they run cold. These are all tasks which can be usefully commenced from the outset.
- If it is the type of case in which the events attracting the charge are recent and it is practicable to obtain a detailed version of events then do so, before time takes its toll on memory. A nearly contemporaneous record of what a witness says is as advantageous for a defendant as it is any other witness.

2. Prepare for the conference

- Even for your first conference with a client you should turn your mind in advance to whether there are documents such as a notice to appear or a police form QP9 which can be acquired and considered by you in advance.
- If you are preparing for a second or further conference with the client, ensure you double-check the file to check you have tended to any tasks you undertook to perform at the first conference.
- Plan the conference, identifying what information you need to convey to the client and what information you need to extract from the client at the conference.
- Note the matters you need to tend to and the sequence it is best to tend to them in.
- Prepare copies of documents you intend to give to the client at the conference.

- If you have made arrangements for the conference to be away from your office, for example at a barrister's chambers, watch-house or jail, check there are no outstanding logistical tasks required to implement those arrangements.
- If the conference is to be at your firm prepare the relevant room, particularly if it is your own office, to remove distractions such as other clients' files and to set up aids such as computer screens to view recordings.

3. ***Time management during the conference***
   - Your conference time is finite – explain that to the client. It will promote an atmosphere of focus and efficiency.
   - Planning the conference allows you to stay on track and ensure the essential tasks are tended to efficiently during the conference.
   - Keep control of the progress of the conference. Stay on topic. Keep the client on topic. If the client raises an unassociated topic, note it and explain you will return to it at the end. Chances are it will have been addressed by then as part of your plan.
   - If the conference is lengthy take breaks – your client is unlikely to have your practised capacity for sustained attention in these circumstances.

4. ***Avoid distractions during the conference***
   - Give the client your full attention – no interruptions, no calls, no texting.
   - Your full attention should be engaged regardless of whether the conference is also attended by the barrister you have briefed. That is not merely because your professional role obliges you to continue to value add after a barrister is briefed. It is also because you will likely have a helpful contribution to make, particularly about matters the barrister will have little understanding of, such as matters personal to your client and logistical issues.
   - If a distraction occurs, be it a secretary walking in to fetch a file or a loud prolonged sound in the watch-house, pause until it is over. If you continue while the unwanted distraction is ongoing your client is unlikely to properly absorb what you are saying and vice versa.
   - If you allow your client's supporter, such as a spouse or parent, to be present for the conference (and explain privilege if you do), do not allow interruptions by them to distract from the task at hand.

5. ***Patience, courtesy and respect***
   - Be patient, courteous and respectful.
   - Your client may not reciprocate but he or she is not a legal professional.
   - In the power dynamic between the two of you, you hold the power. It is you who is in control, providing your expertise. The fact your client does not behave like a professional is no excuse for you to lose control of your standards.

- If your client's language or conduct goes beyond reasonable bounds do not reciprocate with such language or conduct and instead explain you are not prepared to act for your client if such behaviour continues.

6. ***Deploy effective communication skills***
    - Remember your client may not grasp or remember everything you say.
    - Do not overload your client with information in trying to explain the legal process confronting him or her nor expect it will all be remembered on a single telling. Use layering over a number of conferences.
    - Use clear simple language, which the client will understand. Avoid technical language.
    - Use concrete rather than abstract concepts. Use simple examples from everyday life.
    - One concept at a time.
    - Speak slowly and clearly.
    - Use non-leading questions.
    - Maintain eye contact. Watch the client. Monitor the client's apparent attention and reaction.
    - Check client understanding by having the client explain his or her understanding of important information or advice you give.
    - Practise active listening – hear, understand and acknowledge what is said by the client.
    - Avoid interrupting unnecessarily.
    - Wait for the answer. Some clients will need longer than others, perhaps even uncomfortably longer.
    - Give the client the opportunity to talk. Keeping your dialogue on track and relevant does not equate to you doing all the talking.

7. ***Consider the possibility your client is illiterate or developmentally or psychiatrically disadvantage or disabled***
    - Most clients are unlikely to be as literate and knowledgeable as you, but some may be at an even greater disadvantage.
    - Specifically ascertain whether your client is literate.
    - Enquire whether your client suffers from a developmental disability.
    - Double-check whether your client has any psychiatric or psychological issues – this may bear not only upon your manner of communication, but also upon more substantive issues, such as fitness to plead.

8. ***Make a record of the conference***
    - At the very least you should make a file note of what is covered in the conference, including any advice given by you, any instructions given by the client and any action decided to be taken. This not only protects you against

future wrongful complaints by disgruntled clients, it is also essential to effective legal service delivery. You will not remember everything you canvassed at the conference and at the very least will need an aide-memoire of it to refer to when working on the file later. Moreover, if another lawyer in your firm has to assist in or take over the case it is imperative that the file contains adequate information about what occurred at the conference.

- Because of the ease with which conversations can be digitally recorded and saved, an increasing number of solicitors digitally record their conferences. While not essential, this is a prudent safeguard, particularly in respect of difficult clients. That said, a digital recording is no substitute for a file note because it will not provide the same ready assistance in managing the case as a file note will.
- Some solicitors incorporate their file note or a summary of the material matters canvassed in the conference in correspondence or some other document forwarded to the client after the conference. This is also a useful safeguard against wrongful complaints about you. It may also be of use as an aide-memoire in enhancing your client's memory and understanding of the conference and of the actions resolved to be taken.

9. Conference in person, by appointment

- Conferences in person are inevitably preferable to conferences by way of video-link or telephone.
- In other than exceptional circumstances, avoid embarking upon a conference with a client who drops in without notice – succumb and you will compromise the time management of your day generally and encourage similar disruption by the client in the future. Instead, insist the client make an appointment and properly identify what the purpose of the proposed conference is, in order that you can plan for it.
- Discourage unsolicited phone calls from your client.
- Remaining in control of the terms upon which you will confer with your client about the case will not only facilitate properly prepared and efficiently conducted conferences, it will also allow you to maintain a proper professional distance from your client.

PART C - CONFERENCE CONTENT

1. Focus on purpose

- The content of the conference is invariably dictated by the purpose of the conference.
- The purpose or purposes will ordinarily have been identified in your planning for the conference.

- However, particularly for the first conference, it may be difficult to identify a purpose in advance. If so it is fundamental that you enquire and identify at the outset of the conference what it is the client is seeking to confer with you about. For example: Has the client been charged or are the police still wanting to interview the client? What charges does the client faces? How many separate matters does the client have? What stages are they at? Which of those matters is the client asking you to act in? What is the next appearance date?
- Two ever present purposes of any conference are:
  (a) for the lawyer to convey information to the client, and
  (b) for the lawyer to extract information from the client.

  If these purposes are properly met, rapport and trust building will follow.
- The pre-trial client witness conference has a sufficiently different purpose to warrant specific separate attention in Part D.

2. The information to be conveyed to the client

- Information about the legal process in which the client is involved. This information may range from dealing with police investigators, first appearances and committal mentions through to indictment presentations, legal argument, burden and standard of proof, defences, trial and sentence.
- Information about what will happen in the next stage of that process. This includes mundane logistical information about that appearance, for example, when and where to meet, what to wear, how to behave in court, how to behave in and near the precincts of the courthouse, etc.
- The tasks which the client must tend to. This may, for example, include providing the contact details to your office of a potential defence witness, delivering to your office relevant social media screenshots and printouts before they are blocked or deleted, dropping off to your office copies of documents like the notice to appear or the bail undertaking.
- Advising the client on prospects of success in contesting the charge.
- Advising the client of likely sentence ranges in the event of a plea of not guilty and a plea of guilty.

3. The information to be extracted from the client

- What the client's legal problem is. For example: What is the client being investigated for? What has the client has been charged with? What are the client's bail conditions? When is the client's next appearance?
- Personal background, i.e. antecedents.
- The client's version of events.
- The client's instructions on the versions given by other witnesses.
- The evidentiary trails and sources of information the client can think of for the defence to investigate and gather to help in answering or mitigating the case against the client.

- The client's decision and instructions (in response to your advice) on the course to be taken generally or at least in the next step of the matter. For example: make a submission to the prosecution, seek an adjournment, apply to cross-examine at committal, run a legal argument about joinder, list the case for trial, inform the court your client is pleading not guilty and list the case for trial, plead guilty.

4. ***Take antecedents early***
   - Killing two birds with one stone. You need to build rapport with the client. Discussing your client's personal background with him or her is an easy way to build rapport. At the same time it is information you are going to need. Purportedly rapport building conversations about irrelevant information like the weekend's sporting results do not have the same dual advantage.
   - The benefit is obvious if you think about the process from the end. You are going to need your client's antecedents in the event of a conviction. If your client goes to trial you will need to have taken your client's antecedents as part of preparing your client for the possibility of giving evidence as well as part of ensuring you are ready for sentence in the event of a guilty verdict. However, long before then it will be useful for you to know about your client's background because it will inform how you best go about communicating with and advising your client.
   - Information about your client's standard of education and any developmental disabilities or physical or mental illnesses will inform how you deal with your client in conference and may well bear on how the litigation should be conducted.
   - Information about your client's family, marital and relationships background is likely to prove useful in a host of miscellaneous ways as the matter progresses. For example: deciding whether loved ones should or should not be present for conferences or supporting the client at court.
   - Your client's employment and financial position is also likely to be relevant in a host of miscellaneous ways as the case progresses. For example: funding the retainer, the timing of conferences (eg. at a time when your client is not working), the need for your client to take leave to stand trial, the procuring of work references for a sentence.

5. ***Advising about the legal process***
   - Remember you are familiar with legal process but your client is not and some explanations may need to be repeated and/or explained in simpler language.
   - If your client is literate, consider preparing a simple client handout about the legal process to provide as an aide-memoire to your client. Remember the clearer your client's understanding of the legal process, the simpler it will

subsequently be in conference to focus the client's mind on the particular task at hand.

- You do not have to do it all at once. Start with the basic stages and layer in more information about each stage when it is drawing nearer or when it bears specifically upon your decision-making.
- Forewarn your client about the potentially duplicitous players your client may encounter in the process and how to behave in relation to them, for example, journalists, police officers, nosey acquaintances, co-accused, watch-house police agents and prison snitches.

6. *The myth that the client's version should not be obtained early*

- There exists or at least existed a school of thought that you should not seek your client's version of events to any extent until after your client has had an opportunity to peruse the full prosecution brief of evidence against your client.
- This erroneously treats eventual decision making as mutually exclusive of working on your client's case in the meantime. It is not clever. It is lazy. Your client is entitled, if he or she wishes, to delay deciding what course to take until advised of the strengths and weaknesses of the prosecution case, including in respect of potential defences. But obtaining some indication of your client's version of events at an early stage and promptly identifying exculpatory or mitigatory leads before the evidentiary trail runs cold is not inconsistent with that right.
- As explained when discussing layering in part A above, the degree of detail into which you can initially descend will depend upon the circumstances of the case. Bear in mind you do not need to obtain every last detail of your client's version of events from the outset. But at least some elementary indication of what has occurred will be needed to identify further action required by you.

7. *Recording the client's version*

- Even allowing for the prospect of the client giving his or her version of events in varying layers of detail with varying attention to aspects of it in the course of more than one conference, it is prudent to record that detail, at least by way of file note if not also by digitally recording or signed statement.
- It is good practice to transpose the version given into statement form as a word document. Then you will not be starting from scratch when you re-visit the client's version as time goes on. The existing word document can gradually be added to and fine-tuned, evolving into a proper witness statement. Likewise it is good practice to date, print and, ideally, have your client check, add amendments and sign a hard copy of each word version, progressively adding a copy of each to the file.
- Bear in mind a defendant accused of recent invention at trial, generally accompanied by an allegation of concocting a story to meet the prosecution

evidence, will be able to provide a particularly compelling response if a digital recording or signed and dated record of his or her version can be produced to the court demonstrating the client's account was given before he or she was aware of the prosecution's evidence.

8. The need for a client witness statement

- A signed client witness statement should always be taken.
- Even if it is brief and adds little, even if the client is pleading guilty, it will at least protect you from wrongful complaint later that you ignored a potential defence or denied your client the chance to tell you his or her version of events.
- A client witness statement is plainly vital if the case is going to trial. It is useful as the proof of evidence the client will be refreshing memory from to prepare to give evidence and the client's advocate will be working from in preparing to lead that evidence. Such preparation should occur even if it seems unlikely the client will give evidence because that decision can never be finalised until during the trial, when it will be too late to start taking a statement.
- The client witness statement is also needed for use by the client's advocate at trial in guiding how prosecution witnesses ought be cross-examined.
- Even if the case is to be a sentence the statement will be helpful in guiding the client's advocate as to any mitigatory circumstances and as to the factual minutiae of the prosecution case which the client does not concede. It will also be useful in the event that the sentence degenerates into a contest where consideration needs to be given to calling your client as a witness.

9. The need for a client witness statement to be signed

- The client statement should be signed and accompanied by an endorsement confirming that in signing the statement the client acknowledges it is the client's truthful account.
- This obviously protects you against wrongful allegations later that the statement was not truly based on what the client told you.
- However, it is also a useful device in focussing the client on the gravity of the moment in committing to an account and the importance of that account being accurate.

10. How to take the client's witness statement[1]

- A witness statement is, as the name suggests, a statement of the evidence your client would give if called as a witness in the matter. It is sometimes referred to as a "proof of evidence" for that reason.

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1. Much of the content of this section duplicates observations made by me in the paper "The affidavit as a tool of persuasion : drafting an effective affidavit and using an affidavit effectively" Cairns Judiciary CPD Series 2014/15, available on the Courts website.

- You draft the witness statement, not your client. Your client does not know what the legal purpose of the document is, your client does not know what is relevant or irrelevant, admissible or inadmissible, and your client will not know how to sequence the document appropriately.
- It may assist to encourage your client to note down his or her recollections in advance but once such notes are received by you they ought not be merely transcribed by a secretary with a view to them becoming your client's witness statement. You need to exercise quality control over the content of your client's statement. You will no doubt be assisted by his notes, but invariably there will be more questions for you to ask to ensure that you give rise to a proper witness statement.
- Approach the task of taking the statement much as you would the process of evidence in chief. Begin by letting your client tell his or her story and then tighten your questioning to focus on and clarify the relevant evidence your client can give, following up on detail, ensuring that relevant potential evidence is not missed.
- Record this process, whether by making notes or typing or dictating as you go, giving rise to a working draft.
- Then tidy your working draft into a draft which you are satisfied with. If you are not satisfied that it is adequate, if you are concerned that issues have been overlooked, then continue the process until you are satisfied with the draft witness statement.
- Then have your client check the statement, reading it thoroughly to ensure it is correct and emphasising the importance of identifying any changes which need to be made before finally signing it.
- Use your client's words, not your language. A statement in the words of the client as a witness is less likely to involve error through misunderstanding and will provide a much more effective aide-memoire to your client in preparing to give evidence.
- Use direct speech – indirect speech creates ambiguity and blurs whether the content is a statement of fact or only an opinion.
- Word the statement in the first person – it is simpler to understand and also reduces the risk of ambiguity.
- Be as specific and precise as possible.
- Include contextual details such as location, time and persons present.
- Where reference is being made to exhibits, ensure they are clearly identified.
- If your client provides information relevant to the content of the statement which would help explain the sequence of events but which is technically inadmissible as evidence of your client as a witness, for example because it is hearsay, then include the information in italics. This signifies it is included only for the purpose of the reader, such as your counsel, better understanding the statement. Your client will find it simpler to grasp that the information has a

different status from the rest of your client's statement if it is set apart by the use of italics.

- Refer to the prosecution's witness statements and exhibits to double-check that all relevant evidence your client can give is canvassed. Emphasise to your client the importance of accuracy and equally the importance of not overstating the limits of his or her recollection and how that only heightens the risk of inaccuracy.
- Include the whole truth. If a relevant feature of your client's account is unhelpful to your client's cause, but apparently does not feature in any of the evidence against your client, it would be foolish not to include it. To omit relevant evidence in the statement is dishonest and improperly signals that your client should not disclose that information if asked about it when giving evidence. It will also mislead the barrister if one is briefed, quite possibly undermining the effectiveness of counsel's forensic approach to the case.
- Before the statement is signed ensure your client has read through it. If there is any doubt about your client's literacy, read the statement to your client and record the fact you have done so in your own signed notation at the foot of the statement.

11. Procuring specific client instructions about prosecution witness statements

- The prosecution witness statements provide a useful starting point to question your client about the facts of the case and discover the relevant evidence which your client can give as a witness.
- In respect of each prosecution witness statement you should clarify whether your client agrees or disagrees or does not know about the accuracy of its content and, to the extent your client disagrees, you should procure specific instructions from your client as to what the correct facts are.
- Where your client instructs the true facts are different in respect of any particular content of a prosecution witness's statement, that is information which you or your counsel will need to know. You should ensure your client's evidence on the point is included in your client's witness statement.
- Ideally you should use the information obtained in order to generate signed instructions from your client in the form of a document listing each prosecution witness and noting what, if any, part of the prosecution witness statement (or evidence given at committal) is disagreed with, identifying it by reference such as a paragraph number, and stating what the correct factual position is.
- The advantage of such a document is that it is comprehensive – your client witness statement may not necessarily include all of the relevant disagreements with the content of prosecution witness statement – and is a useful tool to refer to when you or your counsel are cross-examining each prosecution witness, particularly with a view to ensuring your case is properly put to the witness (see the rule in *Browne v Dunn* (1893) 6 R 67).

- This document should be signed and endorsed like the client witness statement, both to protect you and to underscore the importance of accuracy in your client's mind.

12. Identifying evidentiary leads with the client

- Use your client not just as a source of information as a potential witness but as a source of suggestion for evidentiary leads.
- Explain to your client the value of corroborative evidence in support of your client's case from other witnesses. Prompt your client into thinking about the identity of persons who may have information or evidence to support your client's case.
- In a similar vein, prompt your client to think about the existence of potential exhibits such as documents or even digital information, such as photographs, phone records, text messages, Facebook records and even physical objects.
- Task your client with seeking out and providing further information so that you can follow-up and obtain such potential additional evidence.
- However, you should discourage your client from trying to question witnesses or taking statements.
- Explain to your client, in the event he or she does identify a potential witness, that you want the name and contact details of the witness so that you can contact the witness and discuss the case with the witness. Tell your client not to discuss the evidentiary detail of the case with the witness and explain why that compromises the value of the evidence. The witness will most valueable to the client if your client and the witness can each tell the court, if asked in cross-examination, that they did not discuss each other's evidence.

13. Advising about prospects and the course to be taken

- Use your words carefully in advising about your client's prospects of success. Do not overstate your certainty.
- Ensure clarity. Ensure your client understands the advice (regardless of whether your client appears to agree or disagree with it).
- Give reasons for your advice.
- Bear in mind the client may need time to absorb your advice and discuss it with loved ones.
- Bear in mind you may need to qualify your advice and modify it progressively as new information comes to light.
- If it appears your client is reluctant to follow your advice, do not react impatiently or intemperately. Consider the possibility (if you think your advice is sound) that your presumably sound advice is not being agreed with because it has not been effectively communicated by you.
- Your explanation of your advice will have the best prospects of being understood if it becomes a two-way discussion in which you are giving your

client a chance to speak and respond, thus giving you feedback about your client's level of insight and understanding of what you are trying to explain.

- Reality testing your client's expectations, if they are unrealistic, is important. But do not brow beat.
- Advise, do not direct.
- Remember that ultimately the decision is your client's to make. It is not your liberty which is at stake. If your client wants to chance his or her hand by going to trial in the face of an apparently strong prosecution case, then, as long as your client is aware of his or her prospects of success and the risks associated with going to trial rather than pleading guilty, you have done your job.
- Make a written record of the advice you have given and of your client's instructions in response and have your client sign that record as truthful and accurate, (see, for example, *R v Allison* [2003] QCA 125 [2], *R v Williamson* [2012] QCA 139 [33]).
- Record the reasons for giving your advice.

PART D – THE PRE-TRIAL CLIENT WITNESS CONFERENCE[2]

1. **The benefits of the pre-trial conference for you and/or your counsel:**
   - Confirm the witness has his or her statement, is literate and has refreshed his or her memory from it;
   - Confirm and clarify the evidence the witness will give, using questions of a kind likely to be asked in evidence in chief;
   - Confirm the witness's recollection accords with his or her statement(s) and or previous evidence;
   - Assess the reliability of the witness;
   - Confirm the witness's understanding of exhibits to be shown to the witness;
   - Check if the witness has special needs;
   - Gather information about the witness which might not be relevant to lead in chief but may assist in building a rapport with the witness and might even prove useful in re-examination.

2. **The benefits of the pre-trial conference for the client witness:**
   - To be informed about the process of giving evidence;
   - To get used to recalling their evidence;
   - To get used to answering questions of a kind asked in court;
   - To provide further information not included in the witness's statement;
   - To be forewarned about court process;

2. Much of the content of this Part duplicates observations made by me about pre-trial conferences in my paper "Proving the Plaintiff's or Prosecution's Case Persuasively" Cairns Judiciary CPD Series 2016/17 available on the Courts website.

- To have the witness's questions and concerns about giving evidence addressed.

3. **You must conduct a conference with the client as a witness before the trial.**
   - You and your barrister, if you have briefed one, must conduct a conference with the client well before the trial starts, at which you prepare the client to be giving evidence at the trial.
   - It is inescapable that your client is a potential witness at the trial. It follows you must prepare the client to give evidence. The fact you consider it unlikely that you will call your client as a witness at trial does not remove this requirement. You cannot predict the future with certainty. The trial may take an unexpected course, making it more prudent to call your client as a witness than you previously thought. Moreover in conducting the conference with your client you may realise that your client has more to offer as a witness than at first thought, making it more likely that you will call your client.
   - It is imperative that you conduct the conference prior to the commencement of the trial because information may emerge at the conference which is not otherwise apparent from a client witness statement and that information may have a bearing upon the conduct of the trial generally, for instance on matters to be raised in cross-examination with prosecution witnesses. It may identify a need to attempt to gather additional evidence prior to the commencement of the trial. It may even have a bearing upon whether the matter should remain a trial.

4. **Myths and excuses of the lazy lawyer for not conducting a client witness conference.**
   - Apart from ignoring the fallacious argument that a pre-trial conference is unnecessary until it is definitely known that your client is being called as a witness (which sometimes may not be until the closing of the prosecution case) you should also avoid believing the other myths and excuses associated with this topic.
   - "I won't have time" – rubbish, consult your diary well in advance and make the time.
   - "The witness is too far away to travel to a conference in advance of trial" – so what, have you not heard of telephones, skype or facetime?
   - "I'd better not talk to the witness in case there is an issue about what was said in conference" – if this truly is a concern then ensure you have more than one lawyer present and/or digitally record the conference.
   - "Pre-trial conferences breach the ethical rule against coaching" – nonsense, that rule only precludes attempts to influence or alter the substance of the witness's testimony. It prevents advising witnesses what answers they should give. It does not preclude asking questions about what the witness recalls. A copy of the like forms of the rule against coaching in our profession's *Conduct Rules* is attached to this paper. In *Professional Responsibility and Legal Ethics in*

Queensland (at 12.60), Corones, Stobbs and Thomas explain the rule against coaching does not prevent the advocate from preparing the witness by simulating the giving of evidence or cross-examination. They observe, quite correctly, that a barrister "would be derelict in his or her duty to the client" not to exercise the advantageous opportunity given by the pre-trial conference of gauging "how a witness will respond in court, and to identify aspects of the evidence which require clarification".

- A ruse of the lazy or unprepared advocate is to agree to hold a pre-trial conference, but only on the morning of trial when there is inadequate time to confer thoroughly, inadequate time for the witness to absorb what has occurred in conference and inadequate time to make further enquiry prompted by new information given in the conference. Pre-trial client witness conferences should be held well before the first day of trial.
- Another ruse is to agree to a pre-trial conference in advance of trial but to then confer at a pointlessly superficial level.

5. **The conference must be thorough.**
    - The pre-trial witness conference involves much more than merely checking that the witness has read the statement and that it is all correct.
    - You should ask and your witness should answer questions about the facts in full; questions of a kind the witness will be asked in court.
    - This gets the witness used to the question/answer format and informs you about the strengths and weaknesses of the witness and the witness's account.
    - The pre-trial conference should also involve some explanation of the logistics and court process relevant to the client as a witness in court. This should include what the client and his or her supporters will wear and how to behave at court and when arriving and leaving court.
    - A two-page document headed *Giving Evidence* is annexed to this paper and provides some guidance of what you should explain to the witness about the process of giving evidence.

6. **It may take more than a single client witness conference to prepare the client to give evidence.**
    - Consider the need to repeat the client witness conference another time.
    - The courtroom question and answer process is an artificial method of communication that may be difficult for the client to get used to after only one conference. You are likely to calm the client as a witness and improve the client's capacity to give accurate evidence (as well as your grasp of such evidence) if you conduct more than one client witness conference.

7. **The conference is not the only means by which your client should be preparing to give evidence.**
    - Ensure your client actually has a copy of his or her witness statement.
    - Emphasise the importance of your client reading and refreshing his or her memory from the contents of his or her witness statement, explaining that is the information that his or her lawyer will be working off when preparing the trial and asking questions in court.
    - Ensure your client is familiar with the disclosed prosecution materials. Your client, unlike any other witness, enjoys the advantage of knowing what the evidence in the prosecution case is going to be. It is not improper for your client to refresh his or her memory about the disclosed prosecution case.
    - An often overlooked area to refresh the client's memory from are prosecution exhibits. Ensure the client has refreshed his or her memory from them – they are often one of the most common props used by Prosecutors in cross-examination of the defendant.
    - If you intend that your client should prepare a sketch plan for you to tender during his or her evidence, then have your client prepare the plan in advance of trial.

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GIVING EVIDENCE

1. Tell the Truth.

(a) If you do not understand a question, say so... you cannot tell the truth if you do not understand the question.

(b) If you do not know the answer to a question, just say so. If a similar question is repeatedly asked, do not feel pressured into speculating or guessing. If you do not know the answer then, whether you are asked once or one hundred times, the truthful answer is *"I don't know"*.

(c) Similarly if you are asked about something you do not remember the truthful answer is *"I don't remember"*. However, if you have some memory on a particular subject but it is not a clear memory, it is okay for your answer to give that memory as long as you explain your memory of it is not clear, e.g. *"I do not remember exactly what was said, but it was words to the effect of... (etc.)"* or *"I do not recall the exact time but it was approximately... (etc.).*

2. Answer the Question

(a) A question and answer format is used with witnesses in court. Your duty is to tell the truth in response to the question you are asked.

(b) You should answer with as much information as is necessary to answer the question properly. Sometimes a simple *"yes"* or *"no"* may be enough, whereas other times longer answers will be called for. However, once you have answered the question properly, stop! Do not go off on a tangent, providing extra information that is not called for by the question.

(c) Witnesses who volunteer extra information not called for by the question asked usually do so because they think they are helping out the side which called them but they actually risk doing more harm than good. This is because they appear biased, as if they an advocate for the cause. Also, the uncalled information may, for reasons they are unaware of, be more damaging than helpful and it might even be a breach of the rules of evidence for the information to be given by a particular witness. In extreme cases the disclosure of uncalled for information may cause a potentially costly delay in the trial.

(d) Do not concern yourself with why a question is being asked, or whether the question is relevant or whether your question will help or hurt either side. That is for the lawyers to worry about. An honest witness is concerned with truth, not tactics. So, do not be evasive or argumentative, answer the question you are asked, it will not go away. If the truthful answer to a question involves making a concession then just make it.

3. Refresh Your Memory

(a) You probably will not be allowed to have your witness statement or affidavit in front of you while giving evidence. Therefore it is strongly recommended that before going into court to give evidence, you read through it at least several times so as to thoroughly refresh your memory.

(b) You are allowed to refresh your memory from a document in court if the document was made or received by you close to the time of the happening of the event you are asked about, that is, a contemporaneous record such as a diary entry, a file note, a photograph, a tape recording (or a transcript of it), a financial document, etc. It is recommended that prior to giving evidence you also peruse such contemporaneous records to refresh your memory.

4. The Sequence of Evidence

(a) Firstly, the lawyer who is calling you as a witness will ask you questions. This is known as *evidence in chief*. In *evidence in chief*, the lawyer cannot ask you leading questions, i.e. questions that suggest the answer you should give. It is therefore important that you have refreshed your memory before going into court, because if you forget a fact the lawyer asking you questions cannot tell you what you have forgotten.

(b) Secondly, the other lawyer may ask you questions. This is called *cross-examination. Cross-examination* is not literally *"cross"*. Unlike on television, lawyers are not allowed to be overly aggressive in asking questions. In *cross-examination* leading questions can be asked, so it is particularly important that you listen to the question to determine whether you agree with some, part or none of what is being suggested to you.

(c) Thirdly, the lawyer who called you as a witness may again ask you some questions. If this occurs at all, it will generally only be brief and is known as *re-examination. Re-examination* is only permitted if it is necessary to clarify something arising from cross-examination.

(d) After all the witnesses have been called the lawyers for each side make their closing speeches, attempting to persuade the court to accept their case. This is when the lawyers will hope to persuade the court their witnesses should be accepted because in giving evidence they truthfully answered the questions they were asked.

BAR ASSOCIATION OF QUEENSLAND BARRISTERS' CONDUCT RULES 2011

Integrity of evidence

68. A barrister must not:

(a) advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or
(b) coach a witness by advising what answers the witness should give to questions which might be asked.

69. A barrister will not have breached Rule 68 by expressing 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 encourage the witness to give evidence different from the evidence which the witness believes to be true.

70. A barrister must not confer with, or condone another legal practitioner conferring with, more than one lay witness including a party or client at the same time:

(a) about any issue which there are reasonable grounds for the barrister to believe may be contentious at a hearing, and
(b) where such conferral could affect evidence to be given by any of those witnesses,
unless the barrister believes on reasonable grounds that special circumstances require such a conference.

AUSTRALIAN SOLICITORS' CONDUCT RULES 2012

24. Integrity of evidence – influencing evidence

24.1 A solicitor must not:

24.1.1 advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

24.1.2 coach a witness by advising what answers the witness should give to questions which might be asked.

24.2 A solicitor will not have breached Rules 24.1 by:

24.2.1 expressing a general admonition to tell the truth;

24.2.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or

24.2.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not encourage the witness to give evidence different from the evidence which the witness believes to be true.