

GREENWAY CHAMBERS

Ethical (and Effective) Affidavits: Using Direct Speech and Other Potential Pitfalls

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Outline

1. Ethical considerations that bear on affidavit drafting.
2. The direct speech controversy.



Introduction – Affidavits

1. Instruments of persuasion, for tribunal and opponent.
2. Need to consider:
    a. Audience – decision-maker, opponent;
    b. Witnesses – best evidence rule, multiple witnesses, willingness to give evidence, personality and experience, how they will fair under cross examination, *Jones v Dunkel* inferences;
    c. Subject matter – issues in dispute, evidence in reply;
    d. Formal Requirements – Form 40, UCPR r 35, swear/affirm, Practice Notes; and
    e. Ethical considerations.



Ethical Considerations

The role of a solicitor in preparing an affidavit is to set out the "honestly held recollection of the individual": *Byrnes v Jokono Pty Ltd* [2002] FCA 41 at [14].

- Interestingly, in that case the witness was barely able to read, yet he swore two affidavits. This led to the court approaching the affidavit material with "great caution".



Solicitors' Conduct Rules / Barrister Rules (General)

Rule 3 (Bar Rule 23) – paramount duty to the Court

> A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

Rule 4 (Bar Rule 8) – other fundamental ethical duties

> A solicitor must also … avoid any compromise to their integrity and professional independence.

Rule 5 (Bar Rule 8) – dishonest and disreputable conduct

> A solicitor must not engage in conduct … which … is likely to a material degree to be prejudicial to, or diminish the public confidence in, the administration of justice.



Solicitors' Conduct Rule 24 / Barrister Rules 69-70

Rule 24 – influencing evidence:

a. must not advise or suggest false or misleading evidence;

b. must not "coach" by advising what answers the witness should give;

c. but not in breach by:

- "questioning and testing in conference" the version given by the witness, or
- drawing the witness's attention to inconsistencies and other difficulties;

Cannot encourage witness to give evidence different to what they believe to be true.

See, also, Bar Rules 69 and 70.



Solicitors' Conduct Rule 24 / Barrister Rules 69-70

Interview the witness as if you were leading evidence in chief in Court: *Hodgson v Amcor Ltd* (2011) 32 VR 495 at 520 [79].

Rule 24 may, however, be difficult to apply in practice.

That is because it draws a distinction between:

a. advising witness on answers ('coaching'), and
b. questioning or testing their version of events or drawing their attention to inconsistencies (which naturally and implicitly steers the witness toward a certain version of events).

Query what testing is permissible, and what is not.



Solicitors' Conduct Rule 24 / Barrister Rules 69-70

Majinski v Western Australia (2013) 226 A Crim R 552, 559 [30] (Martin CJ, Buss JA agreeing) (citations omitted):

> [30] Whether preparation amounts to "coaching" is inevitably a matter of degree, and is dependent on the facts...
>
> [32] Questioning of a witness moves beyond "proofing" to impermissible "coaching" when the witness' true recollection of events is supplanted by another version suggested by the interviewer or other party, whether by repetitive reading of a statement to the point where their testimony is mere regurgitation or by otherwise influencing the witness. A solicitor or counsel should not advise a witness as to how to answer a question…



Solicitors' Conduct Rule 24 / Barrister Rules 69-70

Re Equiticorp Finance Ltd; Ex parte Brock (No 2) (1992) 27 NSWLR 391 at 395 (Young J)

Permissible advice includes:

(1) advice that the witness should refresh his or her memory from contemporaneous documents;

(2) directing the witness' mind to the point about which questions may be asked;

(3) giving the witness a sketch of court procedure;

(4) directing the witness' attention to points in his or her evidence which appear to be contradictory or fantastic;



Solicitors' Conduct Rule 24 / Barrister Rules 69-70

(5) reminding the witness to bring to court all relevant documents;

(6) advising the witness as to the manner of answering questions (for example, "In cross-examination listen to the question, just answer the question asked with as concise an answer as possible"); and

(7) giving advice as to appropriate dress and grooming.

There may be other permitted areas.



Solicitors' Conduct Rule 24 / Barrister Rules 69-70

New Aim Pty Ltd v Leung (2023) 410 ALR 190, 219 [119] (Kenny, Moshinsky, Banks-Smith, Thawley and Cheeseman JJ)

[119] … There are various ethical requirements on legal practitioners … At the core of these is a requirement not to influence a witness's evidence…

[120] There is not one rule or practice which covers all experts or all situations. … one would ordinarily expect the report to be drafted by the expert rather than the legal practitioner. Nevertheless, a number of situations might arise where legal practitioners are involved in the process of recording an expert's evidence... Where these situations arise, care must be taken to ensure that the legal practitioner does not suggest what the expert's evidence should be…



Witness's language skills and sophistication

1. Best to let the witness speak through the affidavit.
2. Reduces the risk that they will resile from the written statement in cross examination.
3. Be conscious of the use of technical expressions ("held on trust", "dividend") as the witness may not have the language skills or sophistication to properly use or understand those terms.



Solicitors' Conduct Rules / Barrister Rules

Rule 25 – witnesses together:

a. must not confer with more than one lay witness at the same time:
   - about any issue which there are reasonable grounds to believe may be contentious; and
   - where conferral could affect evidence given,

   unless solicitor believes there are special circumstances;

b. but can confer with more than one client about undertakings, admissions or concessions, amendments to pleadings or compromise.

See, also, Bar Rules 71 and 72.



Solicitors' Conduct Rule 25 / Barrister Rules 71-72

1. Avoid joint conferences with multiple witnesses.
2. Caution your witnesses not to discuss their evidence.
3. Be careful not to disclose to a witness the evidence being given or likely to be given by other witnesses.
4. Generally permissible to show witnesses the other side's evidence.
5. Does not expressly apply to experts.



Solicitors' Conduct Rule 25 / Barrister Rules 69-70

Day v Perisher Blue Pty Ltd [2005] NSWCA 110; (2005) 62 NSWLR 731

- solicitors prepared an extensive document outlining "possible areas of questioning, (to be passed on to the respective witnesses)", which included suggestions as to appropriate responses.
- solicitors held a pre-trial conference in which multiple witnesses jointly discussed evidence to be given at trial.
- DC Judge held it seriously undermined the trial and "tainted" the defendant's case (first instance decision at [182]).
- conduct found to be improper and to undermine the trial process by NSWCA. Ordered a re-trial, overturning the DC Judge's decision to dismiss the proceedings.



Ethical Considerations – Judges Survey

Steele, Chin and Van Golde, 'Witness Preparation and the Corruption of Memory: A Survey of Australian Trial Judges' (2024) 48(1) *Melbourne University Law Review* 152

- Survey of 73 and interviews of 26 trial judges of superior Australian courts (FCA, NSWSC, QSC and VSC).
- Three main topics:
  - the judges' experience with witness statements;
  - views on witness preparation practices; and
  - opinions about potential reforms.



Ethical Considerations – Judges Survey

Judges' experience with witness statements

The survey indicated that:

- 42% of judges found that witness statements were materially contradicted or qualified in cross examination 'often' or 'very often'; and
- 61% of judges found that witness statements appeared to be in words other than those of the witness 'often', 'very often' or 'always or almost always'.



Ethical Considerations – Judges survey

Judges who were interviewed or provided comments typically identified the source of problems to be the way in which lawyers interviewed witnesses and produced their written evidence:

- Affidavits often overworked, over-lawyered and too polished.
- Some even doubted witness involvement in their preparation.
- Consequence is witnesses often depart from evidence under cross-examination.

Reinforces the importance of using the witness's language.



Ethical Considerations – Judges survey

Queensland v Estate of Late Masson (2020) 381 ALR 560:

[112] The oft unspoken reality that lay witness statements are liable to be workshopped, amended and settled by lawyers, the risk that lay and, therefore, understandably deferential witnesses do not quibble with many of the changes made by lawyers in the process — because the changes do not appear to many lay witnesses necessarily to alter the meaning of what they intended to convey — and the danger that, when such changes are later subjected to a curial analysis of the kind undertaken in this matter, they are found to be productive of a different meaning from that which the witness intended, means that the approach of basing decisions on the *ipsissima verba* of civil litigation lay witness statements is highly problematic. It is the oral evidence of the witness, and usually, therefore, the trial judge's assessment of it, that is of paramount importance.



Ethical Considerations – Judges survey

Witness Preparation Practices

The following practices were ‘generally unacceptable’ to a significant percentage of the judges surveyed:

- 87%: preparing witness for cross-examination by providing them with copies of statements of supporting witnesses.
- 87%: refreshing recollection by providing statements of other witnesses.
- 84%: suggesting what may have happened based on other evidence.
- 82%: prompting the witness to explain what probably or could have happened.

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Ethical Considerations – Judges survey

Witness Preparation Practices

Generally unacceptable:

- 67%: leading questions.
- 67%: providing statements of opposing witnesses.
- 64%: omitting unhelpful aspects of recollection.
- 57%: showing contemporaneous documents not created or seen by the witness at the time.
- 55%: suggesting wording.
- 51%: drafting statement in best possible light.

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Ethical Considerations – Judges survey

Witness Preparation Practices

Generally unacceptable:

- 44%: suggesting language
- 38%: practicing cross-examination
- 23%: identifying factual issues important to client's case

Provides a good guide as to what judges expect of practitioners when preparing witness statements.

Judges' principal concern was potential for these practices to 'contaminate' or 'distort' the witness's evidence.



Ethical Considerations – Judges survey

Potential Reforms

A percentage of the judges agreed with the implementation of the following suggested reforms:

1. Additional guidance in Rules: 74% agree.
2. Witness to state in affidavit how and when recollection refreshed: 64% agree.
3. Witness to state how well they recall: 32% agree.
4. Records of interview to be made available, where ordered: 32% agree.
5. Remove litigation privilege in some cases: 28% agree.
6. Expert evidence in some cases: 21% agree.



Ethical (and Effective) Affidavit Drafting

JP Bryson QC, “How to draft an affidavit” (1985) 1 Australian Bar Review 250 (at 251):

“…it is not possible to draft an affidavit properly without seeing the witness. When you see him, do not do all the talking — get him to talk. If this takes time, you must use time. The document you produce must be something which the witness will regard as his own document. He may be drifting along in the belief that because you are drafting the affidavit, all will be well and he need not think about it. Do not let this happen. Put on him the task of reading through the draft and telling you it is correct, or where it should be corrected."



Ethical (and Effective) Affidavit Drafting

JP Bryson QC, “How to draft an affidavit” (1985) 1 Australian Bar Review 250 (at 251) (cont.):

“… It is important to draw from the witness, and to get down in his affidavit, his relevant evidence, complete, as understood by him, and unembellished by anyone else's interpretation. He will only forget the embellishment and disavow it later. The court will soon compare or contrast the comprehension and powers of expression shown in cross-examination with the language of the affidavit. While the witness should come through, and his affidavit should be his expression, not yours, an affidavit should not sound like ordinary speech, because ordinary speech will not serve the purpose.”



The Direct Speech Controversy

1. There is a long-standing standard practice in NSW to express conversation evidence in the form of direct speech.
2. As witnesses often recall the gist rather than the particular words used, and to preserve some “wriggle room” in cross-examination, direct speech is often prefaced by “words to the following effect”.
3. Opinion evidence is generally inadmissible.



The Direct Speech Controversy

Barrett J explained the practice in *LMI Australasia Pty Limited v Baulderstone Hornibrook Pty Limited* (2001) 53 NSWLR 31 at [8] as follows:

"There is no rule of law, whether under the *Evidence Act* or otherwise, which makes inadmissible evidence of a conversation given in indirect speech, but there are obviously very good reasons why courts have, over the years, been astute to regard the direct speech form as the best form …"

Indirect speech may be unfairly prejudicial under s 135 of the *Evidence Act* because it curtails the opponent's ability to cross-examine on that evidence.



The Direct Speech Controversy

A statement in a conclusionary form such as “we agreed that …” is inadmissible.

“The reason … is because it is a statement of an opinion about the effect of the words spoken during the conversation. It is the task of the Court to determine the effect of what was said or the conclusion that is to be reached. Without recounting either the words spoken or the substance of the conversation it is not possible to test or consider if the conclusionary statement is well-founded.”.

Mpinda v Fair Work Commission (No 2) [2024] FCA 692 at [61]



Kane's Hire (Jackman J)

Recently, in *Kane's Hire Pty Ltd v Anderson Aviation Australia Pty Ltd* [2023] FCA 381, Jackman J said the practice was wrong:

a. Logically – because one cannot reliably derive the words used merely from a recollection of their gist;

b. Ethically – "because the evidence given as a result of that process conceals the true nature and quality of the witness's memory, and conveys a false impression of that memory"; and

c. Grammatically – because in conventional usage, quotation marks suggest the exact words are being quoted.



Kane's Hire (cont.)

Jackman J went on to suggest at [128]-[129]:

"The form in which evidence of conversations is given should reflect the difference between verbatim memory and gist memory. While in general terms gist memory tends to be more stable and durable over time than verbatim memory … it will often be the case that certain words or phrases can actually be remembered verbatim. It would appear that verbatim memory and gist memory of conversations are not merely different in degree, but are also different in kind: see Brainerd and Reyna, "Fuzzy-Trace Theory and False Memory" (2002) 11(5) *Current Directions in Psychological Science* 164-169.



Kane's Hire (cont.)

"Applying that reasoning, the following general principles apply to the form of evidence of conversations:

(1) The form of the evidence should correspond to the nature of the actual memory the witness has of the conversation...There is no reason in the abstract to think that evidence in direct speech is more reliable or credible than evidence in indirect speech, or vice versa.

(2) If the witness remembers only the gist or substance of what was said, and not the precise words, then the evidence should be given in indirect speech … in terms which reflect the witness's actual memory."



Kane's Hire (cont.)

(3) If the witness claims to remember particular words or phrases being used, then those words or phrases should be put in quotation marks to indicate that they are verbatim quotations, even if the evidence is otherwise given in indirect speech.

(4) If the witness genuinely claims to recall the actual words used in a conversation, then the evidence should be given in direct speech; that is, quoting the words as actually spoken ... [T]his may well be the case where the witness has made a detailed contemporaneous note of the conversation, and has refreshed his or her memory from the note (in which case this should be expressly stated along with the tender of the note).



Kane's Hire (cont.)

(5) Evidence given in direct speech should not be prefaced by the phrase that the conversation occurred "in words to the following effect". That expression blurs the important distinction between verbatim memory and gist memory, and leaves the Court unable to ascertain which kind of recollection is being claimed by the witness."



Kane's Hire (cont.)

In short:

1. If evidence is given in direct speech, it should not say that it is "to the effect of" as that confuses verbatim memory with memory of the gist of a conversation.
2. If a witness claims to remember the exact words but cross-examination reveals otherwise that may affect credibility.
3. The inability to cross-examine on indirect speech is not unfairly prejudicial.

Unless the witness remembers the actual conversation verbatim, the evidence should be given in indirect speech.



Gan v Xie (White JA)

Initially, the NSW Court of Appeal appeared to approve Jackman J's reasoning in *Gan v Xie* [2023] NSWCA 163 at [119] (White JA, Simpson and Basten AJJA agreeding):

'The fact that precise words used, and the specific occasion on which words were used, are not recalled, does not mean that a person's memory of the substance or "gist" of what was said must be rejected. I agree with the following observations of Jackman J in *Kane's Hire* …'



Wild v Meduri (Bell CJ)

However, Bell CJ responded directly to Jackman J in *Wild v Meduri* [2024] NSWCA 230 at [248] (26 September 2024):

“It is, in my view and with respect to his Honour, both unorthodox and undesirable for a single judge of any court unilaterally to arrogate to him or herself the “ending [of a] longstanding practice in New South Wales” ... Matters of practice are relied upon by practitioners in the discharge of their daily work, and unilateral change sows confusion and is apt to generate inconsistency and uncertainty amongst the profession.”



Wild v Meduri (Bell CJ)

Bell CJ (Kirk JA agreeing) then explained the approach to be taken in New South Wales at [254]:

"Many a witness has suffered by reason of the absence of any genuine recall even of the gist of a conversation, exposed under cross-examination. Experienced judges are alive to imperfection of memory and artificially precise recollections. With the guidance of *Watson v Foxman*, they remain the arbiters of what may or may not have been said. But such forensic realities are not a reason to depart from the established practice in New South Wales which Hammerschlag CJ in Eq has recently described as "salutary" and as conducing "to a disciplined approach in the recounting by a witness of what was said": *Chen* at [264]–[265]."



Wild v Meduri (Kirk JA)

At [356] per Kirk JA:

“In sum, insofar as a witness recalls actual words used then the witness should state those words in direct speech. Insofar as the witness recalls only the substance of what was said then they can give evidence accordingly. Such evidence can be in the form of direct speech — after explaining that it is recording only the substance, effect or gist of what was said — or in indirect speech …”



Wild v Meduri (Kirk JA)

“The aim should be to capture the best recollection of the witness with a level of detail appropriate and relevant for the issue in the case, doing so in a way that is not misleading with respect to the level of detail that the witness remembers, and which meaningfully captures what the witness remembers in a way that the witness has expressed and can explain. In instances where particular spoken words are the foundation of a legal claim it is desirable that the witness’s recollection of the substance of those words be put into direct speech, in terms indicating that the witness is testifying to the substance or gist of what was said.”



Wild v Meduri (White JA)

White JA maintained the position he set out in *Gan v Xie*, approving *Kane's Hire*: see [282]-[329]:

"I do not agree with the criticism of Jackman J's observations in *Kane's Hire* that the use of the expression 'words to the following effect' 'conceals the true nature and quality of the witness's memory and conveys a false impression of that memory'. In my view the practice carries that very risk."



Punchbowl v Rashays (Jackman J)

Jackman J's reply came in *Punchbowl Casual Dining Pty Ltd v Rashays Cafes & Restaurants Pty Ltd* [2024] FCA 1265 (1 November 2024) at [27]:

"All witnesses in the case who gave evidence of conversations did so in indirect speech, except on the rare occasions where the witness gave evidence of a verbatim recollection ... Accordingly, direct speech was used only where it faithfully reflected a verbatim memory, rather than a gist memory of the conversation. This was a commendable and welcome departure from the old practice in New South Wales …"



Punchbowl v Rashays (Jackman J)

At [30]:

“I regard White JA’s reasons in *Wild v Meduri* as compelling, and indeed unanswerable, and I gratefully adopt them. I wish only to add some particular remarks concerning the three propositions expressed by Bell CJ at [248] concerning my reasoning on the issue.”



Punchbowl v Rashays (Jackman J)

At [31]:

"Bell CJ's statement, read in context, was directed to judges of the Federal Court, but would apply equally to judges of the High Court. I do not express any view as to whether his Honour's statement is appropriate to be applied to judges of the Supreme Court of New South Wales, that being a matter for the judges of that Court to resolve in light of the intrusion on judicial independence which Bell CJ's view represents. However, to the extent that Bell CJ's view is intended to apply to judges of other Courts, with great respect, his Honour is asserting a supervisory power that his Honour does not have"



Punchbowl v Rashays (Jackman J)

At [32] as to risk of creating uncertainty:

"Bell CJ is, with great respect, starting at shadows. … on 26 September 2024 Bell CJ and Kirk JA delivered their reasons in *Wild v Meduri*. To the extent that there is now uncertainty, that arose only in September 2024. With great respect, Bell CJ appears simultaneously to have created and criticised legal uncertainty. Whatever private reservations Bell CJ and Kirk JA may have had in the 11 months during which their Honours reserved judgment in *Wild v Meduri*, that did not affect the unanimity with which *Kane's Hire* had been received and acted on …"



Punchbowl v Rashays (Jackman J)

At [33] as to the need for consultation before changing a practice:

“[F]or the last 35 years, I have heard practitioners and witnesses alike refer to the old New South Wales practice with unedifying epithets such as artificial, strained, misleading and fanciful. I have certainly never heard anyone express admiration for it until September 2024, in the two decisions to which I have referred.”



Best Practice

1. Always give careful consideration to whether direct speech prefaced by the phrase “in words to the following effect” is appropriate. Consider:
    a. The purpose of the evidence (is it needed to prove an element of the case such as an alleged representation?);
    b. the genuine recollection of the witness;
    c. what court you are in;
    d. the rule against opinion evidence; and
    e. the likely impact of cross-examination.



Best Practice

2. Subject to the purpose of the evidence:
    a. If the witness genuinely claims to recall the actual words used in a conversation, then the evidence should be given in direct speech and the strength of the recollection should be made clear.
    b. If the witness claims to remember particular words or phrases being used, then those words or phrases should be put in quotation marks or their verbatim nature otherwise indicated.
    c. If the witness remembers only the gist or substance of what was said then the evidence could be given in indirect speech, but that is not essential.





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Questions?

