


**How to survive giving evidence in courts & tribunals**

Tam McLaughlin  
Special Counsel

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**The 'How' is just as important as the 'What'**

*"As crucial as the decision to select the right expert to give evidence is, **even more important** is the portrayal of the expert through his or her report and through his or her in-court performance **as a person who should be believed** and who is **careful, reliable and authoritative** in his or her field."*

Ian Freckelton KC

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# Outline

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- The nature of expert evidence
- The rules of the courtroom
- The courtroom performance
- Common issues

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# The nature of expert evidence

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**General rule** is that evidence of an opinion is inadmissible to prove the existence of a fact - it is for the court to draw inferences from witnesses' observations of fact (s.76 *Evidence Act*).

**Expert evidence** is an exception (s.79):

*'If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.'*

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## Basis for admissibility

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Court must be sufficiently satisfied of the following before it will admit expert evidence:

- the witness is an expert in a field of 'specialised knowledge' by reason of demonstrated training, study or experience.
- the opinion evidence is 'wholly or substantially based' on the witness's expert knowledge.
- to the extent that opinion evidence is based on facts, these facts have been identified and are capable of providing a proper foundation for the opinion (*the basis rule*).

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## Proving the basis

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To meet the thresholds for admissibility, an expert report must contain the following:

- the **qualifications** of the expert witness.
- the **instructions** provided.
- the **information** relied upon.
- the **facts** considered.
- any **assumptions** made.
- compliance with **code of conduct**.

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## Duties of an expert witness

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*An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.*

Harmonised Expert Witness Code of Conduct

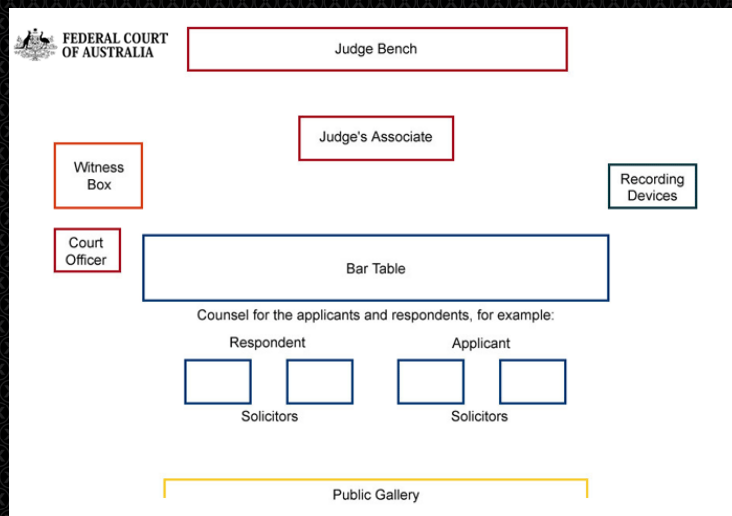
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## Rules of the courtroom

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- *Be familiar with the courtroom setup before you give evidence.*
- *Know who is who.*



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## Rules of the courtroom

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A courtroom is a **very unique place**:

- *No eating or drinking, using a mobile phone or talking.*
- *When the judge enters or leaves the courtroom, you must stand up.*
- *When you enter or leave the courtroom, you must bow if the judge is there.*
- *Address the judge as 'Your Honour'.*
- *Witnesses are generally not allowed in court before they give their evidence.*

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## The courtroom performance

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Be respectful of the formality of the courtroom.

*"a degree of formality remains important. It is one mechanism by which all participants are reminded of the importance of the proceedings both to the community as a whole and to the individual litigants and witnesses, for whom the outcome of the proceedings can have major financial and reputational ramifications."*

*Blackmores Ltd v Jestins Enterprises Pty Ltd [2020] NSWSC 1177 quoted in Freckelton (2019)*

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## The courtroom performance

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Be prepared. Be prepared. Be prepared.

- **Read** your report and any notes, as well as any reports by other experts.
- **Read** any studies, articles or papers referred to in your report, and make sure you actually understand them.
- **Organise** your materials so you can quickly refer to them if required.

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## The courtroom performance

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Answering questions (yes, it's that basic..)

- **Know** the process, evidence in chief then cross-examination.
- **Listen** to and understand each question before answering, take your time and clarify if needed (but don't quibble).
- **Answer** directly, concisely and politely.
- **Explain** the subject matter in a way that can be understood but avoid condescension or arrogance.
- **Give** your answers to the judge but be natural.
- **Keep calm**, this is an adversarial process but avoid being defensive or hostile, make concessions where necessary.

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## Common issues – Arguing

  
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*“I learned long ago never to wrestle with a pig. You get dirty, and besides, the pig likes it.”*

*George Bernard Shaw*

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## Common issues – Instructions

  
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- *Content, timing and recording of instructions given to an expert are critical to maintaining credibility.*
- *Instructions are the basis for the facts and assumptions underpinning expert evidence and can therefore affect the admissibility of the evidence.*
- *Unacknowledged contact or instructions will result in a loss of credibility or worse, a rejection of the evidence.*

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## Common issues – Who did the work?

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- *Often an expert relies on work done by others, such as junior accountants or admin staff involved in data processing or conducting basic checks.*
- *This work is then relied upon by the ultimate author of the report who is called to give evidence in court.*
- *The expert in the witness box has to both understand and clearly acknowledge this delegated work or it will result in a loss of credibility or worse, a rejection of the evidence.*

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## Common issues – Conflicts

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*Conflicts (actual or perceived) can arise from:*

- ***Professional connection** with another party in the dispute or even a professional connection with party seeking to engage the expert.*
- ***Personal connection** with another party in the dispute.*
- ***Must** be clearly and transparently declared.*
- ***Conflicts can be managed** but may go to the weight given to evidence.*
- ***Consider declining** an appointment if a conflict exists.*

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**Questions?**

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