Kristi Riedel (KR): Thank you everyone so much for joining us here today either in the room or online. It is wonderful to have you all here. I would like to start by acknowledging the traditional custodians of the land on which we meet today, the Jagera and Turrbal People. I pay my respects to their elders past and present and emerging.

My name is Kristi Riedel, I am a barrister here at Level Twenty Seven Chambers. I am joined today by my colleagues, Rachel De Luchi and Sarah Spottiswood. Today, we are talking all things affidavits and evidence related. We are really hoping that this topic will be interesting and provide you with some useful tips. What we have done is divvied up the topics into three separate segments. We will each talk about particular areas of the topic. Hopefully, we will have a little bit of time at the end to take some questions if any might arise during the course of the talk. We do have the facility, I understand, online via the chat mechanism. So, if you are online and you have a question, I think you could type in your question into the chat icon. We will be monitoring that and hopefully answer your question if it arises.

I will hand over to Rachel who will start us off on this topic.

Rachel De Luchi (RD): Thanks, Kristi. I am Rachel, I am going to start off with the topic of affidavit preparation.

[Slide 3] From my point of view, I think the starting point in preparing an affidavit is thinking first about the context in which it arises. How is the affidavit going to be used? I am going to talk about three ways that you might use an affidavit: evidence in chief, for an interlocutory application, and then just more generally, an affidavit that you might use on file or for briefing counsel with the general purposes of running a matter.

AFFIDAVIT PREPARATION

Evidence in Chief

RD: [Slide 4] Just starting off with affidavits that are used for evidence in chief. Rule 390 of the UCPR is relevant. Generally, evidence in proceedings started by a claim is to be given orally, evidence in a proceeding started by application is to be given by an affidavit.

[Slide 5] Sometimes a direction or an order is made to the effect that the evidence in chief will be by way of an affidavit. Before you start, I think a good thing to do is to think carefully about what evidence you actually require for the application or for the proceeding – what is relevant to the issues? What does the court actually need to see? Best evidence rule is a good one to take heed of, direct evidence is best. So, find the right person to give the direct evidence - that is evidence of what they saw and what they heard. When you are conferencing a person to get the best evidence, I think the good way to start that is to ask the

question how the person actually came to know what they are telling you. That will usually give you an idea of whether or not they are the best person to give that evidence.

It is critical to include everything that is relevant in an affidavit for this purpose but be careful not to volunteer irrelevant evidence. Part of the reason for that is just to remember that the person can be cross examined on the content of the affidavit.

As to things to avoid, I will cover this a little bit later.

Interlocutory Application

RD: [Slide 6] Let's talk about affidavits that you might use in an interlocutory application. There are similar considerations as to affidavits that are as used in evidence in chief but note rule 430 of the UCPR. You can use evidence that is based on information and belief, effectively hearsay evidence, in an interlocutory application. Otherwise, the same cautions I think apply, do not include things that are irrelevant. Keep in mind a person can be cross examined on it.

[Slide 7] In terms of affidavits that you might use just for the conduct of a matter for your own purposes, formalities are not necessarily as important. They might not be sworn, they might not necessarily be in the approved form, you might have your own format for doing them in the form of a statement rather than affidavit. In this case, in my experience, it is better to include more rather than less. Irrelevant material is not going to hurt you because it is not going to be something that is put before the court. You might find it relevant to background or as the matter developed to just confirm precisely what the client's story is. Prepare it sooner rather than later. I think as part of your ongoing conduct of a matter having the story from the relevant person, whether they be your client or another person, at the start of the matter or as early as possible is a good idea in the sense that, particularly where they are your client, you have a reference point to come back to when you need to say answer an amended pleading or decide some issue that is interesting that you need to deal with. It is a reference point for instruction and understanding precisely what your client's story is, so to speak.

Also, and this is probably a bit of a self-serving statement, if you are briefing counsel, they will probably want a statement. It just gives a level of comfort, I suppose, because there is that disconnect between when counsel is briefed and the client that is ultimately your client as a solicitor. Not necessarily always being able to speak to the client and take instructions directly, having that statement there which records precisely what they say occurred does add that level of comfort, from counsel's point of view.

General matters to consider when drafting any affidavits, I have noted the formal requirements under the relevant rules [on slide 8].

[Slide 9] An important one that you have probably heard before is to use the person's own words and they need to be able to understand what is in the affidavit and answer questions about it. There is an amusing exchange there [on the slide] from a High Court transcript which demonstrates just that.

[Slide 10] In terms of other general tips, to avoid tainting the evidence it is good not to conference the two witnesses together or have them prepare affidavits together. In fact, counsel them against doing that.

Relevance, again, ask the question whether the material is going to be relevant to the issues in dispute or relevant for some other reason. If it is not relevant, does it really need to be in there?

If the evidence is going to be used as evidence in chief in the proceeding, ensure that it deals with all the issues that are going to have to be covered.

Then just really basic things like page numbering - particularly of exhibits - paragraph numbering, getting the exhibits correct. These sorts of things are overlooked all the time but they are so critical, especially if there is a large amount of material and you are asking a judge to go to a particular part of the material. Having that sort of thing in order is pretty critical.

How do you start preparing an affidavit?

RD: [Slide 11] So how do you start preparing an affidavit? I am going to try to give you some practical ways to actually get a draft going.

[Slide 12] This ultimately does depend on the person so use your discretion and what you find to be most effective. It also depends on the client.

Ideally, I would say, arrange your conference with the person, taking detailed notes, and then preparing the affidavit from those notes, trying as much as you can to use that person's own words and then sending the draft to the person with instructions to review it very, very carefully.

[Slide 13] Alternatively, if that is not possible, you could send a document with topics or questions or prompts and then invite the person to use their own words to fill in those topic headings. You could then tidy up the draft by removing anything that is irrelevant, objectionable, argumentative but then be sure to have them review the final version as well to make sure that they understand it all, it is accurate and it is in their own words.

The benefits of the first option is that you that you can test the credibility of a person as a witness as you have got them there in person. You can also identify and explore some inconsistency in their evidence a little more easily. I find it is more time efficient because a lawyer will tend to ensure that the topics are covered properly. Whereas if you send a document to somebody they will often think that things are irrelevant or might not be important and not include them and then you might find out later that they just didn't think it mattered so they didn't put it in there. You also, as a solicitor or a barrister, you would also have a bit more of an idea as to how much detail is required as well.

What to avoid when preparing affidavits

[Slide 14] Generally, some things to avoid, pretty obvious things really. In terms of evidence that might be objected to: unqualified opinion, anything that looks like a submission, is argumentative or is just plainly a gratuitous comment does not need to be in there, also irrelevant material - almost goes without saying.

Also, keep in mind the possibility of confidential and privileged material. So legal professional privilege, as a potential waiver of this partial disclosure of privileged material, parliamentary privilege, privilege against self-incrimination or other confidential information. Just be mindful of those, not only in the affidavit but also in documents that might form exhibits.

[Slide 15] Just to head off my topic on the affidavits, I have put some examples up here [on the slide] of statements that would, or might be, objectionable or questionable. The question is, would you put in either of these statements into an affidavit? The first one there on the screen ["I refer to the affidavit of my wife Beryl Barnes sworn 1 March 2021. I agree with all statements made therein."], really suggests that the witnesses have collaborated or conferenced together, which is not a good look - avoid that one. In terms of the second one [*"The defendant's termination of the contract was manifestly unfair and unlawful because the continuum transfunctioner was not defective in any respect. The Court should award judgment in the plaintiff's favour."*], it really looks like a submission. It is a little gratuitous, and possibly also has the flavour of some unqualified opinion in there as well.

I wll now hand over to Kristi to cover her topic.

KR: Thanks, Rachel.

EVIDENTIAL ISSUES WHEN PREPARING AFFIDAVITS

KR: [Slide 16] I am going to be talking about some of those evidential issues you should bear in mind when preparing an affidavit. Rachel has already briefly touched on a couple and I am going to go into a bit more depth in discussing them. Before I do that, there are a couple

things I wanted to just highlight and emphasise. The first is that affidavits are a really important document. It is the deponent's evidence. So, when you are preparing the affidavit, it is really important, as I am sure you all do, to keep those things at the forefront of one's mind. As Rachel mentioned, whatever goes into the affidavit can become the subject matter of a cross examination, so be very conscious of the content of the affidavits that you are preparing. Make sure that it is first and foremost that is accurate and true and correct and really, accurately represents the deponent's evidence.

Resources to help prepare affidavits

KR: In preparing this section of the presentation, I came across a couple of really useful resources, I have put them up there on the slide. The first is a paper that was written by Justice Roberts, helpfully called 'Affidavit Evidence'. The second is another paper written by Allan Sullivan QC. I found them very useful so I have got the references up there for you to go and have a look at them at your leisure - I do refer to them a little bit throughout the presentation.

The other things that we will be talking about are both the *Queensland* and the *Federal Evidence Act* and drawing your attention to some relevant provisions therein.

Repercussions of poorly prepared affidavits

KR: [Slide 17] In terms of the repercussions, I have already told you that affidavits are really important. It is really important therefore that we get them right as there can be some serious repercussions if we fall foul of some of those evidential requirements. One runs the risk of the affidavit being held to be inadmissible, or parts of it being struck out. That is certainly not a position you want to find yourself in.

In the course of preparing, I came across a couple of cases in which the court made some comments about the affidavit material that was put before them. [Slide 18] The first case *Kinda Kapers [Charlestown Pty Ltd v Newcastle Neptunes Underwater Club Inc and Ors]* that involved a proceeding in which specific performance of the lease was being sought. Ultimately, the plaintiff was unsuccessful and an order was made by the court for the plaintiff to pay the defendant's costs. What was really interesting, for our purposes, was that the court actually said that the defendant was not to recover any costs associated with the preparation of a specific affidavit. I have extracted their [on the slide] a paragraph from the judgment which explains why that was so. Essentially, the court said that the affidavit had been prepared without regard to the rules of evidence. Once all the objections had been heard held, there was nothing of substance remaining. "The party's legal representatives have a responsibility to ensure that affidavits are prepared with regard to the use of evidence." That is certainly not something you want to read in a judgement about an affidavit you have been involved in in preparing.

In addition to those repercussions I mentioned at the beginning of the affidavit material being inadmissible. It highlights another repercussion, that is, you could end up with a cost implication if that affidavit is not appropriate

[Slide 19] Another decision that I came across was that of *Toll v Alphapharm*. In that particular judgment the High Court made some comments about the material that was placed before it. The High Court noted that attention was given to largely irrelevant information, the "…statements contained a deal of inadmissible material that was received without objection, the uncritical reception of inadmissible evidence, often in written form, and prepared in advance of the hearing is to be strongly discouraged..." because it "…distracts from the real issues, gives rise to pointless cross-examination and causes problems on appeal."

[Slide 20] On the next slide, I have extracted there from a decision of *Byrnes v Jokona*. I think it is a really helpful extract in that it highlights what our job as lawyers is. The court there said "Preparation of written evidence that reflects the honestly held recollection of individuals, assisted by sensibly ordered and presented documentary and other background material, is a difficult task and one requiring experience and skill." As I said, that is a really good place to start from and to keep in mind when you are preparing an affidavit.

The Process of Drafting Affidavits

KR: In terms of the process of putting together an affidavit, Rachel explained how she goes about it, I think that is a great way to start. I find it really helpful if I am settling an affidavit, or assisting solicitors with putting one together, is to identify the key topics that need to be addressed in the affidavit and then ask the deponent to basically write down their story as they see it. That then provides a bit of a blueprint as to what areas need to be fleshed out, what further questions should be elicited, because it is really about capturing, getting what is inside someone's brain and capturing it on paper. Sometimes, if you just solely ask someone specific questions and do not just ask them "Tell me what you think is relevant" you might miss out on something that takes you down a different path.

Certainly, you do not want a situation, maybe there has been some unfortunate instances where you have got a witness in the witness box, they have been cross-examined and they are asked "Why does your affidavit say that?" Then the witness turns around and says, "Well, my solicitor put it in there." You certainly do not want a situation where that arises.

So, it is really important to make sure that you are using the deponent's own words, as much as possible, and make sure that they are really involved in the process, as far as appropriate and possible, when you are settling that affidavit because you do want it to be their evidence.

The case of *Byrnes v Jokona* is an interesting example of a situation where there were some issues in that regard. The court actually approached the affidavit evidence in that matter with a great deal of caution because the affidavit material revealed a great deal of similarity, important matters that were dealt with in the affidavits were expressed in similar language. Significantly, one of the deponents was barely able to read but they had sworn affidavits.

As I said, it is really important to try and adopt the witness' own words in an affidavit as much as possible.

[Slide 21] The final case that I came across, that I thought was useful, is that of *Thomas v SMP*. I think it is an example of the kinds of comments you do not want to read about in a judgement. There, the court said that in "…the most neutral language, the affidavit is inappropriate, confusing and unhelpful. It is a prolix examination of minutiae carried out without any lawyerly discrimination. The majority of that is irrelevant…It can be fairly described as…difficult to understand and impossible to disentangle…[Its] length was oppressive." They are all things that you need to keep in mind when you are preparing affidavit evidence.

[Slide 22] I can hear you all asking, "how do we do that?" Helpfully, one of the papers that I took you to initially, that of Allan Sullivan QC, sets out a really useful checklist of evidential issues to keep in mind and at the forefront of your process when you are settling or preparing an affidavit. I am going to take you through that checklist.

1. The first topic on the checklist is that of relevance. That, of course, is a cornerstone of admissibility of evidence. The evidence needs to be either directly or indirectly relevant to a fact at issue in order to be inadmissible. Something is directly relevant if it bears upon the existence or nonexistence of the fact. Something is indirectly relevant if it affects the probative value of the evidence set to be directly governed.

   The *Queensland Evidence Act* is silent on these matters so we turn to the common law. But under the Commonwealth legislation, Part 3.1, and particularly s 55-58 are relevant to the question of relevance. Certainly s 55 of the *Commonwealth Act* says that evidence is relevant and proceeding, if it were accepted it could rationally affect, directly or indirectly, the assessment of the probability or the existence of the fact in issue at the proceeding.

2. [Slide 23] The next item on the checklist is that of competence. The question is whether or not the evidence that the witness or the deponent has the competence, ability and experience required to give the relevant evidence. The *Queensland Evidence Act* has some provisions about this. S 9 says that everyone, essentially, including a child, is

presumed to be competent. S9 A says that a person, if their competency is challenged, a person is competent to give evidence, if the court is of the opinion that they are able to give an intelligible account of events, which they have observed or experienced. We see similarities in the *Commonwealth Act* as well.

So, when you are drafting your affidavit, it is really important, if competence is going to be an issue, to make sure you spell it out. That might be particularly appropriate for an expert witness explaining why they are competent to give the evidence they are going give.

3. [Slide 24] The next item on the checklist is that of privilege. Rachel has already flagged the issue of legal privilege. It is really important when you are preparing either the body of the affidavit or identifying the documents to be an extra exhibit to it to make sure that one is not going to fall foul of those rules. Regarding privilege, obviously, there is legal professional privilege and one does not want to have a situation where that is waived. There is also self-incrimination privilege and that might be particularly relevant if you are dealing with an asset proceeding or regulatory matter. Certainly s 10 of the *Queensland Evidence Act* deals with that, as do provisions in the *Commonwealth Act*.

   In the *Commonwealth Act* it is a bit broader. It also identifies some other grounds of privilege such as journalist privilege. A journalist cannot be compelled to reveal their sources if it promises not to do so. And also situations of religious confessions. So, a member of the clergy does not have to disclose the content, or the existence of a confession, unless it is related to a criminal act.

4. [Slide 25] The next item on the checklist is that of the best evidence rule. What we are really talking about, and sometimes I see this in affidavits, a situation where the deponent is summarising the content of a document not actually exhibiting or indexing it. It is really important to make sure you have the best evidence so the actual document is included. The *Commonwealth Evidence Act* in s 48 deals with this. The *Queensland Evidence Act* has some interesting provisions dealing with situations where your original document might not be available. S 106 and 116 deal with instances where copies or reproductions of the document available are appropriate to use.

5. [Slide 26] The next item on the checklist relates to where the deponent is giving evidence without a conclusion or an ultimate issue. That can often be a problem for an expert. If you have a liability expert and they want to say it is affidavit evidence, that so-and-so was negligent, or thereabouts, that is potentially going right to the heart of the matter and would be inappropriate to give some evidence about that.

S 80 of the *Commonwealth Evidence Act*, however, does provide an interesting workaround. It says evidence of an opinion is not inadmissible only because it is about a fact in issue, or an ultimate issue, or a matter of common knowledge. Keep those things in mind when you are preparing your affidavits.

6. [Slide 27] The next item relates to opinion evidence. This ties back to what I was saying about competence earlier. It is really important when you are dealing, particularly with an expert, because expert evidence is an exception to the opinion rule. You need to set out why they qualify and why they are able to give this opinion evidence. Otherwise, unless you fall into a category such as lay evidence or evidence about Aboriginal Torres Strait Islander custom or law or rule, one is going to fall foul of that opinion evidence rule.

7. [Slide 28] We then come to the rule about hearsay. Obviously, if you are drafting an affidavit you do not want large sections, or any sections, of that affidavit to include hearsay. What we are talking about is using evidence or relying upon the evidence of a previous representation to prove the fact of the matter.

   There are obviously exceptions to that, Rachel touched upon where you are dealing with an interlocutory application or a proceeding. Rule 30 of the UCPR is relevant there, it says you can have hearsay material in an affidavit. Similarly, s 75 of the *Commonwealth Evidence Act* also provides the situations in which hearsay evidence is permissible.

   There are other situations where you can rely upon hearsay evidence, such as where the maker of the statement is unavailable. I have set out there on the slide the various sections of the legislation that apply.

8. [Slide 29] The next item on the checklist is where the evidence assumes a fact which is not at issue. It is really important when you are dealing with your expert witnesses to make sure that in any affidavit evidence you are setting out the assumptions that have been made and explain the basis for those assumptions. Certainly, it goes beyond your expert witnesses. Anyone who is making that assumption should be setting that out and setting out the basis for it.

9. [Slide 30] The second last item on the list is making sure your affidavit evidence does not include evidence that is confusing, misleading, ambiguous, vague or unintelligible. Rule 440 of the UCPR provides that if something in an affidavit is scandalous or oppressive,

the court can do a number of things, it can remove the affidavit from file, it can take it off the file and destroy it, or it can have that particular part of the affidavit struck out.

We certainly see similar discretions to exclude evidence coming through in sections 145 and 146 of the *Commonwealth Evidence Act*.

10. [Slide 31] The final element on the checklist, and one that Rachel touched upon, was making sure the evidence is not argumentative. The witness should not be arguing what conclusions should be drawn from the facts or how the case should be decided. If you have an expert witness their duty is to the court, they should not be arguing a particular case for a particular party.

[Slide 32] The final slide that I have there are just a few things that I extracted from a paper that was delivered by Paul Donohue QC to the New South Wales Bar Association Bar Practice Course in 1990. A bit of a tongue in cheek list of things that you might not want to put in an affidavit but you might want your opponent to. He suggests things like making the story very long, adopting obscure prose and showing your style. I will leave you to read through that list in your time and I will pass over to Sarah.

SS: Thanks Kristi.

EXPERT EVIDENCE

SS: [Slide 33] I am going to talk about expert evidence and cover four topics. First of all, I will talk a bit about the difference between a lay witness and an expert witness, then I will talk about when expert evidence is admissible. Third, I will talk about the procedural rules for expert evidence and expert reports. Finally, I will touch on the role of lawyers in preparing expert reports.

What is an expert witness?

SS: [Slide 34] First of all, what is an expert witness? Well, if we start from what is a lay witness, they can give evidence of fact and not opinions. As Kristi was saying, there is a thing called the opinion rule. That is basically that a lay witness cannot give evidence of opinion. Expert evidence is an exception to the opinion role.

What is a fact?

SS: What is a fact? A fact is something that a witness, for instance, saw, heard or experienced, and an opinion is an inference drawn from observed data. That is the key distinction.

[Slide 35] This slide is to illustrate that distinction and I have chosen the very underexplored area of COVID-19 to illustrate that. We will see if the audience wants to answer some of these questions. But let's start with number one.

1. "I received a vaccine", is that a fact or an opinion? That's great. That's a fact.

2. "She was wearing a mask", is that a fact or an opinion? Fact.

3. How about "he looked healthy", that is a really interesting one. It is borderline because it is an inference that can be drawn from a common experience that we all have. Generally, courts have found that that sort of observation goes into the category of facts that lay witnesses can make comments on in their evidence, things like temperature, speed, height, observations based on common knowledge. Even though it looks like an opinion, a lay witness is able to give that kind of evidence.

4. How about the fourth one, "Covid-19 was created as a Zoom viral marketing campaign", fact or opinion? That is obviously an opinion and there are very many opinions on COVID-19. Perhaps we should have this session for the whole internet.

When is expert evidence admissible?

SS: [Slide 36] Let's move on to when is expert evidence admissible. The one very famous passage explaining when expert evidence is admissible is the case of *Makita v Sprowles*. That sets out five different factors that are required for expert evidence to be admissible.

1. The first is that there must be a field of specialised knowledge. That basically means there must be an organised, recognised body of knowledge that the expert is able to speak to.

2. The second is that the witness must be an expert. So, by their study, training or experience, they have acquired some expertise in the area. One way of objecting to an expert's evidence is by saying they are not [an expert], or they do not have any study in the area that they are purporting to give an opinion on.

3. The third factor is that the opinion must be wholly based or substantially based on the witness' expert knowledge. They cannot just opine on anything they like, they have to base their report on their expertise.

4. The fourth is that the facts or assumptions must be identified in the report and ultimately must be proved by the party that is calling the expert witness.

5. The fifth factor really puts them all together. So, their specialised knowledge has to be applied to the facts and explained why it produces the expert's opinion.

[Slide 37] There is one further point on admissibility of expert evidence which Kristi previously touched on and that is the ultimate issue rule. It is not appropriate to include in your expert report the expert's opinion on the ultimate issue in dispute. I should say, this is the position in Queensland under the *Commonwealth Evidence Act*, that rule has been abolished, but in Queensland, the expert should not be giving evidence on things like for instance, in a contract, if the whole issue in dispute is about the meaning of a particular phrase or some words, then the expert should not be giving evidence on the meaning of those words, unless it is particular technical or specialised words that an expert is able to give an opinion on.

[Slide 38] To illustrate the rules of admissibility in relation to expert evidence I have three examples. The first one is that Cameron is an expert in procrastinating. He has a PhD from the eminent University of Sleep and he will give evidence on effective ways to procrastinate. Is this evidence admissible? Anyone want to have a go at answering that? Yeah, so he has got a field of specialised knowledge. The difficulty with this example is that probably procrastinating is something that is common knowledge, that is not something that you learn from training or experience. I think that maybe this one might not be admissible evidence.

Let's move to the next one. Sam is a psychologist and she will give evidence about the risks of crossing the road outside her house. Is that evidence admissible? No, that one is not because although she is an expert in psychology, she is not an expert in risks associated with crossing the road.

The third one is Kim is a cement truck driver and she will give evidence about the speed at which a cement truck driver can drive around a steep mountain pass. Is that evidence admissible? We have some nods…both ways…split the room. That is because this is a tricky borderline case that our courts have sometimes referred to as quasi expert evidence. It is not technically an expert opinion. It is seen as observed fact based on experience. That is also a field of evidence that is admissible. So that was a tricky one. Let's just say everyone is right.

The role of expert reports

SS: [Slide 39] So now we will move on to the roles of expert reports. I am going to, in the interest of time, focus on the *Uniform Civil Procedure Rules* here in Queensland, I won't look at the *Federal Court Rules*. The rules related to expert evidence in Queensland are in part five of chapter 11 of the UCPR. I will briefly talk through some of the key rules that you need to be aware of.

Rule 426 creates an overriding duty on the expert to assist the court. That duty overrides any obligation that the expert has to a party or the person paying their fee.

The next important rule is rule 427. That provides that an expert's evidence in chief must be by way of report that is disclosed in accordance with rule 429, or by leave.

Another important one is rule 428 which sets out what is required in an expert report. I will go into that a little bit more detail in the next couple of slides.

[Slide 40] Rule 428 includes a number of things that you need to check are in the expert report. It needs to be addressed to the court and signed by the expert. It needs to include things like the expert's qualifications, the material facts that the report is based upon, any literature or material that the expert relies on. The third factor on this slide is that if there is a range of opinion, the expert has to explain that range of opinion and say why they have adopted a particular view. That particularly arises in things like scientific evidence where there can be a range of valid views in the scientific community, none of which have been categorically disproved. There are things like valid minority views, valid majority views, different methodologies that may produce different views. What an expert in that kind of field needs to do is explore the range of views and say why they have adopted a particular approach. The the expert also needs to include a summary of their conclusions and a statement about whether any additional facts might help them reach a more reliable conclusion. Finally, in subsection three, there are a number of matters that the expert might set out at the end of their report, things like the expert has made all reasonable inquiries, that the opinions stated are genuinely held, and the expert understands and complies with their duty of the court.

The role of lawyers

SS: [Slide 42] Now we will move on to the role of lawyers. There are four key roles that lawyers can have when you are preparing expert evidence.

1. First of all, you need to ensure that the report is admissible. So that is looking at those *Makita v Sprowles* factors that I discussed earlier.

2. The second is, you need to ensure that the report complies with the procedural rules, the UCPR, *Federal Court Rules* or any particular procedural rules in the court that you are appearing.

3. The third one is a very important task for lawyers in preparing expert reports. That is to make sure that the report is digestible. What you have is an expert report from a technical expert and you need to make sure that it can be understood by the judge.

That involves making sure it is able to be understood by a non-expert in the field. Lawyers can play a very important intermediary role in ensuring that the expert report is clear.

4. The fourth important task when you are preparing an expert report is to test the witness. It is absolutely prohibited to coach the witness on the substance of their report but you can still go through and test the conclusions of the expert or make sense. Look for things like inconsistencies and gaps, ask the expert to explore In those matters. You can look for phrases or terms that you do not quite understand and ask the expert to clarify those things in their report. On the next slide, [Slide 43] there is a quote which supports that you can be involved in the form of the expert report, just not the substance.

To sum up, I have talked a bit about the difference between lay witness evidence and expert evidence, the rules of admissibility of expert reports, the procedural rules for your expert reports and finally, the role of lawyers in preparing expert evidence.

That also concludes our presentation. We welcome any questions in the room and online.

QUESTIONS

If someone truly believes an opinion to be a fact could that be therefore evidence of fact?

SS: The answer is probably no because that would fall foul of the opinion rule. If it is something like the COVID opinions [mentioned earlier in the presentation], if it is beyond common knowledge, if we do not have a way of knowing that categorically, from human experience, it is something that will require expert evidence to prove. It is not just a matter of asserting something that is an opinion and saying it is a fact. A fact is really what a witness has experienced, seen, or heard, their own personal knowledge. The more borderline one is where there is common knowledge inferences that can be drawn. For instance, as I was saying, temperature, height, things like that. If it goes beyond that it is really the field of expert evidence where you need someone with training and experience to give their views based on their field of study.

RD: Can I just add, with the COVID-19 example that Sarah had on the slide, it really demonstrates that the person who is trying to give that evidence has drawn a conclusion about something. There are some assumed facts in there. They have assumed some things to draw a conclusion. They are not giving evidence of just a direct fact, something they have seen, something they have observed. You can tell from the way, for that particular example, it is more of a conclusion.

In the example of "this person looked healthy" in the presentation, might you get your person to give evidence about the characteristics of that person they saw, whether they looked flushed or particular things that they observed?

RD: I think that is probably always a good idea. If you are seeking to lead that evidence from your own witness, having more detail is probably better, because observing that somebody looked healthy is, again, a little bit of a conclusion. The judge would probably benefit from knowing what observations the person had that led to them forming that opinion.

What is scandalous material? Could you hazard an example?

KR: I can talk about what comes to my mind but I will throw it to my colleagues as well. I guess when we have told you about scandalous material is things that are sort of inflammatory or do not have a basis. If you have allegations of someone is a liar, or they have stolen money, or they have done something outrageous and you do not have a factual foundation or justified explanation as to why you hold that view. Anything that is a bit inappropriate.

RD: I would just add that usually that sort of thing is not even relevant to the issues in dispute. It is when people put that sort of gratuitous stuff in that is just designed to be a bit of a mudslinging campaign that it often gets branded as being scandalous because it is just there to hurt the other side but it is not actually relevant to the real issues.

How can you distinguish between the evidence that some an expert can give in, for example, about whether there are major defects in a building which might affect the operation and a particular clause in a contract? Who ultimately determines whether, for example, there are major defects which would affect the rights of the parties or perhaps make a particular clause operable or a condition? Or maybe perhaps have right to terminate under a contract?

RD: I think the short answer to that is, if it is a question of law, in that it is a question of what the party's rights ultimately were under a contract, then it is something that the judge would ultimately decide because that goes to the ultimate issues in the proceeding. Whereas if it is a question of how defective a particular thing is, or whether or not it is in fact defective, then that is something that is more a question of fact, but it obviously requires expert opinion about what is defective, why this particular thing is defective. The expert would ordinarily give the evidence on whether or not something is, as a matter of fact, defective or not defective, and then the court would draw the ultimate conclusion.

How does one decide whether or not something might be a major defect or not a major defect?

RD: I think it possibly will depend on really what the contract says and if there are definitions in the contract that talk about what might be a major defect and what might not. I think it would be a combination of both in that the evidence would come out from the expert as to

how defective this thing was. Then there would be submissions made about that. Ultimately, it is really a question if it is contractual interpretation for the judge.

Do you guys have to add to that?

KR: No, I agree. I think your expert would go through and you would be looking at the clause in the contract that defines what a major defect is and ask your expert "Is this defect going to match up with how that is defined?" and using the evidence that way. Then you would be asking the court to make that determination in your submissions that the expert evidence lines up with the definition, or doesn't, of a major defect, therefore, the contract should be terminated on that ground.

If something is clearly a mistake in an expert report how can you test that without coaching the witness?

SS: The answer to that is really asking really open questions, "What did you mean, when you said this? How did you get to that conclusion?" If it is something like a spelling mistake then you are very entitled to correct that without worrying about coaching them. But if it is something that is a substantive observation by the expert and you think it is inconsistent, then you need to explore that further with the expert and ask them to explain why they have put that particular finding in the report.

KR: You should also bear in mind that if your experts sends you a draft report, in Queensland, that is inadmissible and is disclosable. Make sure your expert witness appreciates that if they send you a draft report you are going to have to disclose it and you might not want them to do that.

How do you counter that, how do you interact with your expert?

KR: Often, if I am involved in a case, say a medical negligence type of trial or whatnot, we will often have a teleconference with our witnesses beforehand and say "Look, we don't want you to prepare a report yet. We'll send you the letter of instruction with the questions we want to discuss with you. We want to have a discussion with you about your opinion on these issues. Only then, once we've spoken about that and understand what your opinion is, and whether or not it's of assistance to our client, will we ask you to commit that to writing". That might be one way of getting around that.

I think under the PIPA regime, if you make notes about it, like a file note, that would be disclosable. Often what solicitors will do is they won't take notes but they will draft an advice to the client and detail the content of that teleconference in the advice to the client.

What are your top three tips for preparing affidavits?

KR: In my mind, the top three things are, firstly, I think, it is really important to make sure the affidavit, the content of it is accurate and true.

Secondly, I think, it is really important to make sure that the affidavit complies with the stylistic type rules. So, make sure that pages are numbered, that exhibits all line up and are paginated and it all makes sense, and that you have got paragraph numbering.

The third one is keeping in mind all of those evidential checklist factors I ran through, but I think relevance is a really important one. Make sure what you are putting in the affidavit is actually relevant to what you are doing.

RD: I will just add one thing to that because you have made some really good points that I would probably repeat. Otherwise, I think a really important one is there can be a tendency, depending on what kind of matter you are in, that the client just wants to tell their story. Sometimes it is really, really difficult to whittle their story down to just what is relevant for the court to see. That can, in my experience, be almost one of the most challenging things when you are preparing affidavits that will go before a court. It can be the reason why affidavit evidence is struck out in a lot of cases, because solicitors just have not been firm enough to remove opinion evidence, or submissions, or just gratuitous comments where the client really just wants to have their say and the solicitor or the barrister has not said "No, look, that's strictly not relevant. I know, it's important to you but it's just not something that the court needs to see. If and when you get in the witness box, you'll probably have an opportunity to say these things but for the purposes of putting affidavit material before the court, it's not proper that it goes into the affidavit." Really, I suppose, explaining to the client, if this is a situation that you find yourself in, explaining to them the purpose of the affidavit and the fact that you have to comply with the rules of evidence and putting material in there. Perhaps it will just give them a little bit of understanding as to why you are not letting them tell the whole story. I think that is just a challenge that you probably find yourself faced with at some point and just one to be mindful of.

SS: The flip side of that, I have had situations where sometimes you have to drag the evidence out of someone because they do not know what the relevant issues in dispute are. If their affidavit does not cover something relevant, you might need to ask some further clarifying questions, "Why have you said this?" Ask them to give some more detail in some areas. That has proved very valuable, dragging evidence out where you need to address a particular issue.

RD: We might wrap it up. Thank you everyone for attending and for logging in.