

Nicholas Andreatidis QC (NA): Good evening everyone. It is an absolute pleasure to introduce humans to Level Twenty Seven after two years of looking at LED screens, so welcome. Thank you all very much for taking time out of your night out of a very, very busy day and evening to come spend some time with us chatting about what, on the face, probably sounds like a very dull topic but in reality, in our industry, is critically important. I am sure if you have not realised that already you will as your careers progress.

My name is Nicholas. I am joined by two fabulous human beings, Florence Chen and Oliver Cook. I have known Florence from the moment she came to the Bar. In fact, I interviewed her to get a readership room in a group that we were both originally at before we came to Level Twenty Seven. I think it is fair to describe Florence as - just assume that both presenters tonight are smart, hardworking, professional, all that is a given - but Florence is one of the most delightful human beings you can ever work with. She is pleasant, she is responsive, she is fun, she gets it right - always. If you ever have the opportunity to work with Florence you will enjoy that experience very, very much.

Oliver and I have only recently met. Our real meeting was a baptism of fire in the sense that on a Wednesday night at 7 pm I got a phone call from someone asking "Do you want to appear in the Court of Appeal tomorrow?" on a matter I had no knowledge about. It had been listed for an application. I said "Yeah, right." They said "Well, could you please do it because we're actually desperate." Oliver was the junior who volunteered to help. Neither of us had any real background in the matter, Oliver had some but not a lot. I turned up to Chambers at about 0430 and on my desk was marked up cases tabbed and noted, an oral script ready for me, the affidavit material tagged with bits that I had to pay attention to noted, and a set of written submissions. Between 0430-0900 I read it and by 0900 I was ready and we in fact won. None of that would have been possible without this young man's able assistance. So again, someone that you would benefit greatly from if you ever have the opportunity to work with him.

WHY IS THIS TOPIC IMPORTANT?

NA: [Slide 3] Now, moving on to what we are going to talk to you all about. I will start with you Florence. Why does any of this matter?

Florence Chen (FC): That is a really good question. The topic tonight is essentially 'Documents, eTrials and Practice Directions'. That relates to document management and how we can use technology in our practice. Part of the importance of that is in relation to communication. As we know, with the pandemic, the technology involved was Zoom and WebEx and all of that and the like, as well as online posting of documents because no one could come into the office, no one could have face to face meetings. What became apparent is that document management is so important for that, whether you are having a Zoom meeting and having to

bring up on a shared screen a document that you are talking about with your client or with counsel, as well as just emailing each other and saying "Could you look at this document and tell me what you think?" That requires, for all of that to run smoothly, proper document management. So, the communication that occurs is in relation to the client and the solicitor, but also the solicitor and the barrister – that is what we are going to focus on a lot today.

I like to say part of the barristers love language is a good brief. We will go into more detail about that but that is a form of communication.

Persuasion and presenting your client's case go hand in hand because essentially presenting your case you want to persuade the judge. A judge is human and what they want is to find out what is the easiest way to make a decision. The easiest way to make a decision is through some beautiful oral advocacy, some beautiful court documents, as well as a lovely presentation.

Talking about documents in that respect, often a client dumps a whole sack of documents. A solicitor works their magic, provides it to a barrister and we have to work it up, present the key documents to a judge. How do you do that persuasively? How do you do that so that it is easy? A beautiful set of written submissions, where when you actually reference a document, it is where it is supposed to be. So, if you say it is in an affidavit, page 22 of an exhibit, that is exactly where that document is. That is with the assistance of a solicitor preparing the affidavits but also just proper document management. We will talk a bit more about that because, again, proper document management for cross examination, submissions, that kind of thing can be very persuasive.

That leads to efficiencies. Obviously, technology and proper document management can lead to efficiencies in time and cost. So properly briefing a barrister, not just dumping all of your documents on the barrister, can lead to cost efficiencies for the client. If the barrister is only asked to read these ten documents then you are across the matter, that is really helpful. Sending them one hundred useless documents and for the barrister to have to find that. That is cost and time. Things like not having to meet in person, using Zoom meetings and the like, can also be really helpful. We are going to talk about a number of those points tonight.

NA: In terms of the persuasiveness and presentation, whether it is your client, the judge, Senior Counsel, partner at the law firm, if you demonstrate a knowledge of the documents and where they are, and there is that smoothness in producing them, both quickly and correctly, it leaves an impression on the audience, whoever that happens to be, and it is a lasting impression. We will touch on the scenario about how it looks to a judge in court as we proceed this evening. There is a big perception difference between a team that is running smoothly and when the counsel or the advocate asks for a document and it just gets produced, versus an opposing team where a document is called for and there is ten minutes

silence other than the rustle of the paper and they are looking at folders and there is a judge sitting there who may be being asked to exercise their discretion is becoming more and more irritated at having to be kept waiting. It is important at all sorts of levels.

Ollie, for junior practitioners, why is this a relevant topic?

Oliver Cook (OC): It is probably a question that I am relatively well qualified to answer having just come from the solicitor side and recently joined the Bar. In my experience, the two things that junior members of a team are routinely in charge of are making sure the technology works and managing the documents. That is not to suggest that is because no one else wants to look after those things. I think it can sometimes be pretty challenging when you are a junior and you have just come from university where you have not been learning about how to manage documents. Really, using technology is not the focus of what you have studied for the past five or six years. I think it is challenging and hopefully through this session we can kind of give you a few tips to make your life and your job a little bit easier. As Nic just said, it is one of the most important and consequential things that you do as a junior member of a solicitor and barrister team is managing the documents and making sure everything works. It is a really great opportunity as a junior to demonstrate your value to the team and is a good opportunity for you to get in front of people like Nic and to impress upon them the value that you bring to a solicitor team. Those are the two reasons that I think this topic is pretty important for junior solicitors and hopefully relatively interesting.

NA: It is also developing the discipline of our trade which is knowing stuff. There is a huge range of that which is not just the law. We all went to law school, so we know that bit and if we do not remember it we know where to look. But the document side of things, there is a real discipline in knowing how to find stuff and recalling where to do it. If you have a photographic memory that is wonderful, but plebs like me it is the discipline of, getting into the habit of...I have categories and colours and I will use the same system for every matter. So just the physicality of it means something to me. Developing that habit and doing it in a way that suits your personality is really important. I know that is hard on law firms where they have their own document management protocols but I suspect you can still adjust it to a point to suit who you are and how you function.

LEVERAGING TECHNOLOGY TO IMPROVE CLIENT COMMUNICATION

NA: [Slide 4] So Ollie, still with you, how can practitioners leverage the use of technology to improve their communication with clients?

OC: I think, and I would be interested to hear your experience as well, over the past sort of twenty-four months, I have used a variety of different video conferencing platforms, some of which I had never heard of before. I think what that has shown me is that you need to be flexible to use what it is the client wants to use. I think it is important to not be deferential but to

be open to using other ways of communicating that you might not necessarily be particularly comfortable with or experienced in. I think as a junior practitioner, one of the really valuable skills that you have is your flexibility and your ability to adapt to use whatever is provided to you in a way that is most effective.

In my experience, I have seen a variety of different models for managing client communications. At the top end, or the really bespoke model, I have seen whole websites set up just to manage the document flow between clients and the solicitor's team, which is wonderful and great, but it is obviously expensive and not suitable for every matter.

The other thing that I have picked up in my time is that you need to ask the client what they want in terms of communication. I think at law firms, a lot of the time, the operating assumption is that email is the best way to communicate. But often your instructor will prefer a text message or a phone call. They do not necessarily want a really long email or even an email with dot points. A lot of the time I try and condense what I write in email to dot points, but oftentimes it is not read or simply skimmed. I think that the two things that you need to keep in mind when you are managing your communication with clients, and this is not only clients externally but also your internal clients within a firm, is being flexible to adapt to what they want and also being open in terms of your communication with them about what they actually want. At the start of an engagement, asking a client how they would like to communicate with you is a really important thing and a really valuable thing, maybe something that gets missed sometimes.

I don't know if you have particular experiences about communicating with clients Flo.

FC: In terms of communicating with clients, I think as barristers we have to be fairly flexible. Usually the solicitors have already decided, the matter is already well underfoot, so they have already gotten all the documents on some sort of platform or they have their own way of creating Dropboxes and providing them to us. I think from the solicitor's point of view, if you are in a large firm, usually they do have top-notch beautiful websites and practices. If you are from a smaller firm, and maybe you have got a bit more discretion as to what you get to use and decide, a really effective way of communicating is through Dropbox because all the documents are active, if someone in the firm amends a document, it is amended and I can access it immediately. I found that to have been really good. Even in talking about getting all the documents, just having them, do not dump them all on a barrister but if they are all available to be clicked on and read when necessary, a lot of this technology actually has helped with that. Whereas previously they used to kill the forest to give us all the documents. So definitely, regardless of where you are, thinking small firm, big firm, thinking about how that technology is helpful or not helpful is always really good.

NA: Clients appreciate the streamline processes because it makes their job easier. Remember, we are a service industry with some fancy letters after our names but at the end of the day we are here to service people and help them with their commercial problem or their litigation or whatever it is you are being asked to do. Making the life of the client easier is really important and they do notice it. I was a solicitor for a very long time before I came to the Bar so I had the privilege of working with the clients at a different level to where I am now, it was great fun, and they noticed the people that understand the issues, understand the documents. If you embrace that stuff, as boring as it might sound, it really will help you with your career in what is a very competitive industry.

FC: Can I say one thing as well, it is not all about technology either. Last week I went and visited a prawn farm, just got out there went on site, met the clients, had a good chat with them, had a conference so they told us about the processes of their business, they are a family owned little business. That was really helpful as well. So as much as we love technology, do not forget that.

NA: But use technology while you are doing the site inspection. Turn up with an iPad or Surface Pro, with your electronic notebook and take photos of this stuff and automatically put it into the notebook and then start writing. They will ask "What are you doing? How does that all work?" All the people think it is magical, you young people do not understand, you grew up with it.

EFFECTIVE BRIEFS & DOCUMENT MANAGEMENT

NA: What about with the counsel team Florence?

FC: I would love to grab your ears and talk about briefs because that is the main way that solicitors communicate with barristers. That is usually the first time other than picking up the phone and asking "Are you available?" The next thing you usually see is a brief on our desks. That makes an impression on barristers. A good brief means that immediately you can trust what a solicitor is doing, the affidavits that they draft, if they say something needs to be done and why you don't really question it, you know this solicitor is pretty switched on.

Communication with counsel, what does it look like when it is bad? Getting a million emails with a million attachments and asking a million different instructions for advice to counsel is very painful. In a firm, maybe you are working on one or two matters and you are pretty in the trenches with it and you can really deal with it, or you are dealing with BD. For a barrister, we can have ten matters on the go, so having an email today, three emails tomorrow, four emails with a key document in there somewhere in that document is very painful. What can we do to improve that? I think the best thing is that electronic briefing has made a huge difference so "That email can be cancelled, we have updated the brief, can you just have a look at it?" So you go back onto Dropbox, or whatever the platform is, and see that three new documents

have been added. I say "Okay, that's good. I know where all the documents are." When the email says "Please look at this particular document" I know what they are talking about. I do not have to go through all my emails trying to search for those kinds of things, or even a hardcopy brief. But you do have to firstly ask counsel if they want hardcopy or an electronic brief. I have a huge preference to electronic. What about you guys?

NA: I cannot remember the last time I got a paper brief.

FC: I think COVID has helped those Luddites, for fear of COVID. I think electronic briefing is really good. Even if the counsel does not want an electronic brief, your document management in a firm probably should be electronic. What does that look like? It is about getting the documents and making sure that they are OCR'd so that they are text searchable, have a naming convention that makes sense. Think about how you are going to present those documents and who you are presenting them to.

The first person you can present them to is the counsel team so having a naming convention, like every file includes different documents. So the first one is a) court documents; b) correspondence; c) key documents; d) chronology, something like that. Then you add the documents into those folders. So a i) is one document; a ii) or iii). Also, keep in mind that this is not a static thing, a brief, it has to be amended, so new documents are found or further court documents are added. If you have a hardcopy brief, often it will be your job to run up to chambers and get the brief and physically put in new documents. But if you can convince a barrister or have a barrister who has electronic briefs then you can just do it from the comfort of your screen, you can update it, maybe it has to be document a) 1.1 but you can actually add it in. Whereas I have seen some indexes to briefs where it is just a stream of consciousness, it is 1- 200 and it becomes document 20.zz, or something ridiculous. Remember that it is not this static thing.

It is also helpful to have a hyperlinked index. So not just an index but a hyperlink index saves time. It might take you half an hour to do but it saves counsel hours and hours of time because we are constantly having to access these documents and in court, that means savings for your client in the long run.

Once you have got the brief, what do you do? You have got all the beautiful key documents, a set of observations is just so beautiful. I will just add that in. That is nothing to do with technology but it is an art. If you are in a firm, and you are not in the practice of preparing detailed observations, maybe think about it because I find that the best briefs have beautiful chronologies that reference the key documents already and have a well-considered question that they are asking advice on. It is a real art that takes time, has nothing to do with technology, that is just one of my pet hates.

What you can use that technology for is things like I mentioned before, when you ask for advice from counsel or counsel asks for further instructions, sometimes those can get lost in emails and you get this response out of the blue and you think I do not even know what you are responding to. What I have noticed that works really well is to have a Word document in which you have a table and you have advice or instructions and then a solicitor can respond to it. Then it is all in a centralised document that can be constantly updated and is updated on a Dropbox link, or something like that. I think that form of technology of having a Dropbox or Google Drive or WebEx documents have been really helpful.

When you are communicating with counsel, think counsel has to go to court and present these documents. So when you are preparing the documents, think about what would be helpful for counsel in court. So when you are communicating with counsel, when you are sending a brief, if they work on eBriefs, just think about that for everything being in PDF form because most of us use iPads, we have a program called Reader or Acrobat DC or Pro. It might be helpful for you guys to also download it so you can see what counsel is using and how we annotate and the like. Keeping that in mind when you are sending us documents might also help.

NA: With the programs we use and how we utilise them in court, I personally like native files or say emails because the native version is important to have on occasion. But they are entirely useless because you cannot mark it up. You cannot annotate it. So converting the email and the attachments into usable PDFs is really critical because when you are in court, the judge is asking a question and you have got multiple native files of text which 1) take too long to open, 2) you will have to go to multiple sources to work out why it mattered because you cannot mark it up. If you have got emails, attaching emails, attaching emails, attaching attachments, the clunkiness of scrolling through one at a time becomes obvious and inefficient. So please, if you could, when you are preparing the brief make the native emails into PDFs and in the index, make it clear that the 30th document is still an attachment to the host document that would be very, very useful.

LEVERAGING TECHNOLOGY TO ENGAGE WITH THE COURTS

NA: We are now going to talk about the use of technology and our engagement with the courts. I have done quite a few eTrials at all sorts of levels, Federal Court, Supreme Court and in arbitration. I love eTrials, they are so much easier to run and you are very mobile when you are using technology. Even the older judges once they get used to the idea they end up liking it because they see the efficiencies. I have not had one go backwards once we have started using it, as in insisting on hard copies being produced. But there are some things that are really critical and the judges are beginning to recognise it.

Where at the beginning of a matter, one just started a week ago, Justice Applegarth is managing the case and he directed the parties, there are about thirty different parties, to get

in the room together and agree on document protocols including "Which version of the contract are you people going to use? I don't want the same document thirty times referred to in thirty sets of pleadings, and then another fifty versions of it in fifty different affidavits. Pick the one and that is the one you are all going to use." That might sound a bit silly and why, but in a trial it is really important for the judge to know that we all agree that is the contract. If we do not agree that is the version that the other party says is the contract. Little things like that, they know, it is something that they are expecting you to know. I have never understood what forensic advantage there is in having my doc ID rather than someone else's . If it is the plaintiff's version and you are acting for the 30th defendant just use their version. No one pays attention to the doc ID other than calling it out. There is no forensic advantage in it so don't get tied up about that.

OC: I think that issue, we will come to talk about this when we talk about the practice direction, but that issue is being kind of addressed earlier on in matters now, probably as a result of the problems that have arisen in the past. But now before even a defence is filed, there is an obligation on the parties under the practice direction to meet and agree on a document exchange protocol, which in an ideal world would resolve some of those issues, not all of them, but some of them right at the outset of the matter. So that is an example of the way in which courts have tried to address these problems that are coming up with the sort of proliferation of, iterations of, various documents.

I was recently involved in a two-week trial in the Federal Court that was done virtually. The solicitor team was in Sydney, our barristers were in Perth, we also had some people in Brisbane, and the judge was sitting in the Perth registry of the Federal Court, which sounded very modern and efficient. I thought it was going to be a very painless process but it turned out to be a very painful process. There were a number of difficulties that we had with technology. It turned out that one of our witnesses who was giving evidence from Naru actually had better internet connection than we had in some of the law firm's offices. There were a lot of questions asked about why law firms were not able to provide a stable internet connection and appropriate microphones and connections to the court systems.

I think, increasingly, these virtual hearings are going to be the norm, there is a real move towards them. I am sure that some of you here have been involved in virtual hearings or online hearings during the course of COVID. I only think they are going to become more common. To the extent you can get comfortable with them and understand how they operate, I think that is going to stand you in good stead moving forward with your careers. I think there are a number of really important considerations you have got to bear in mind but when you are running one of those trials. One of the difficulties that I had in my trial is that our barrister was in Perth, others were in Brisbane. Communicating with that barrister in the middle of submissions, for instance, or cross examination or evidence became really difficult. There are a number of ways that we worked around that, we had a WhatsApp thread, we had a Teams chat...I think

he sent a photo of his set up and he had about five different screens in front of him because he was appearing from chambers, which sounds extreme but ended up working out. But there are a number of practical things that you need to think about before that starts.

Another difficulty that we faced was that the court had ordered a hardcopy court book and also an electronic codebook. We obviously had witnesses giving evidence from all over the world. It was impractical for us to provide them with a twenty-volume hardcopy court book in circumstances where they were being cross examined for fifteen minutes. That was one, as I understand it, one of the reasons why there was an electronic court book that had been ordered to be provided and prepared. But there are you know, we are going to talk about court books specifically, requirements for a court book can vary significantly based on the matter. I am so glad that there is a move now towards electronic court books because it means that people like me do not have to prepare twenty volumes of documentation.

I would be interested to know, just a show of hands in the room, how many of you have been involved in preparing trial bundles or court books? Quite a few of you. It is, for those who have not done it, it can be a pretty painful process. It requires engagement with the other side because that is the record, it is the universe of documents that the court is going to be taken to in the course of the trial. I have seen matters where there is a fifty-volume court book and I have seen matters where there are ten key documents. Realistically, in most cases, I think it is the ten key documents that actually win or lose the case, notwithstanding the fact that you have fifty volumes of material in front of the court.

One of the points that Florence raised earlier is you have got to think about what it looks like to the court when you are presenting your case because you want it to be persuasive. To the extent you can use technology to make it look more palatable, more digestible and simpler to the court, that is a really important thing that you can leverage technology to achieve, specifically through the use of an electronic court book. It is not particularly difficult or complicated but it is something that is really important and can really be an advantage too.

FC: Talking about the court book, if you have an electronic court book rather than a hardcopy court book, yourself or your counsel, you can have advantages with that. I have seen on multiple occasions being in court where our side are all working off laptops and iPads and so as soon as our counsel says "Can I take Your Honour to court book page 59." We will touch one button and we are already reading the document, we are just waiting for the other side as they are asking "What volume is that in?", opening the page, or it might be the judge. That buys you just that extra ten seconds of reading the document familiarising yourself, making sure it is all correct. There are some real advantages with an electronic court book or electronic documents and getting used to that.

You were talking about witnesses and being careful with leveraging too much technology. I have had instances where we had to cross examine witnesses via video, I think it is really painful. So much planning has to go into it. I had a matter where the witness' computer was running out of battery and started beeping at us, it was insane. He was just a lay witness and it was during COVID. We did not think you would have to turn up to a law firm or anything, it was just him in his home. He started to run out of battery, he did not have a power pack, he then had to switch to a phone, it was a nightmare. Technology is great but it takes a lot of planning.

OC: One other advantage that an electronic court book provides you with and if everyone has got a screen is that you can bring up native versions of documents, a spreadsheet for instance, and you can drill into what is actually driving a spreadsheet or an email, there are a variety of different things you can do.

NA: I have bought myself a 27" flat touchscreen that was \$600. For trials, I take it to court and stick it on the Bar table because I am old and I am blind. I have no interest in looking at spreadsheets on something this small. It is light so I can literally put them on the lectern and it is just a massive iPad. The hardware is so cheap. There are lots of things you can do to make the running of those trials, if you are going to court, really easy. The security guards, the staff, this was down in Victoria, they found it hilarious because every day I would rock up with this screen under my arm. It also made working in my hotel room really easy. There are little things like that that you can acquire and utilise.

With the court books, hyperlinking is really important and making sure the hyperlink directs to the same version is really critical. If you have been briefing counsel and your own versions are electronic, it is useless to have the hyperlink going to a new version of the contract because like a hard copy a soft copy has notes on it, it has been marked up, it has been indexed. Giving yourself or another member of your team a fresh copy that has got none of those annotations is unhelpful. Also, in an eTrial, you are going to be calling out document IDs and remember I said before, pick the version of the contract. If I have been working from a copy of a contract electronically for five years, we get to trial it is generally someone like you that has to then, and it is a different version of the contract, that has got to go through my version and pick up all the annotations and put them into the new version and you do not want to be doing that, especially if you miss something.

DOCUMENTARY EVIDENCE

NA: [Slide 5] So Florence, documentary evidence, does it matter, is it important?

FC: Nah, I always have a winning witness who remembers everything and never makes a mistake [laughs]. Civil litigation, as Ollie said, is won and lost on probably ten relevant documents. That is because, often, witnesses will make self-serving statements in the witness

box. Of course, they were going to say that X happened because the whole case depends on that. But if you can have a beautifully presented email, chain of correspondence, graphs of leases that lead up to what was the final lease, showing that there was no misleading deceptive conduct, there was no misrepresentations, you will win your case on that. So documentary evidence is really important. How do you get that? The client would have lived these events six years ago, ten years ago, cannot even remember what they had for breakfast yesterday, but have to try and remember what happened ten years ago on a handshake agreement, they will come to you as a solicitor. Often firms are really good. One of the firms that I worked with recently, they just took a person's laptop and just downloaded all the emails, all of their documents from that time and was able to run Relativity or Ringtail searches on all the documents for the document disclosure and for pulling it in. For smaller firms, if you do not have that you cannot just ask a client "Please provide me the relevant documents for that agreement" because they do not know, there are a layman. One thing you have to do is get that and then it will be your job to do the document disclosure of reading hundreds, if not 1000s of documents. I hope for your sake, one of the worst document disclosures that I did was a managing partner of a construction firm had a daily subscription to a porn site. That was a lot of filtering out. Hopefully you do not have that.

NA: I bet almost all of you do.

FC: Something will come up.

Once you have done the document disclosure, you have identified what documents are relevant, you have identified the key documents and you provided it to counsel, making sure that they are in the right place where you have proper document management capabilities is really important because, and that goes to how it appears in court, because there is nothing worse than being on your feet as a barrister, cross examining, you have a witness, you have them by the chain, you built the fences, and you found out you have trapped them in a lie. You are like, all I have to do is show you this document and you will realise how stupid your last answers to the past ten minutes were. You say "Witness, look at this page." They turn and they say "I don't know what this is." You look at it and realise that it is not the correct document and you have to say "Your Honour, please wait." Then you are faffing about for ten minutes, the judge is bored, the witness cannot even remember the question anymore, you have lost the persuasion, you have lost the presenting of your case, to the judge as well as to the other side, because you could try and negotiate a good settlement if the other side was persuaded that you have a strong case. Documentary evidence, how it is managed is really important.

What are some of the tips for you as juniors? I know document disclosure is really boring but it is your opportunity to get to know the facts of the case, get to read the primary documents, see the correspondence that passed between each other, what was said, what was not said. In fact, you might be the best person placed in a meeting, when you are asking "Was there a

conversation? Was this ever said?" And the client says "I don't remember if this was said." You can say "I've read all the emails, that definitely wasn't said" or "I've read all the emails, it is in an email, and it was in 2015. I'll find it but I haven't read it." That is something that you can bring to the team. Even when you are doing really boring administrative tasks, just think about, how could I use this to be helpful as a broader team?

Other things that you can do, produce really good chronologies because you know all the facts of the case, you have seen all the documents

NA: Please do it as you read the document, do not read the documents and then go back and start again. That takes more time.

FC: Having a little table of what are the key documents and where are they because sometimes you will be in a meeting with a client, you will say "Can we look at draft five of that lease? I think, you know, there was an amendment there. Where is draft five?" Instead of spending ten minutes with counsel, solicitors and the client you will say "I've got all the key documents and I know where they are on this little table that I've prepared previously." If you have time, that is really helpful. So think of ways that you can valuably contribute. A great observations sheet to counsel is a great use of time as well.

NA: I don't know how often this happens, but when I was a solicitor, one of the other employed solicitors and I, because we were the ones that knew the document, got to go to Denver and LA to do the document inspection of all the stuff because no one else had read the boring bits. So we got to go and that was a lot of fun. Again, I don't know how often that happens. It happened to me. I suspect that happens, could happen to anyone.

OC: I think in the technology vein, one of the things that is becoming more common is technology assisted review. So algorithmic review of giant data sets of documents. It is probably pretty different to looking at the hardcopy documents and records of companies.

FC: But when Nic was young...

NA: 100 years ago.

OC: To the extent you guys can get comfortable with that and familiar with how it works, that is a really valuable thing for you to have in your arsenal to deploy when you need to.

NA: With people making fun of my age, sometimes looking at the actual document is really important. I won't mention the matter for obvious reasons. In an arbitration, it was all done electronically but there was something weird about the document. I was counsel. I and one of the senior associates got sent to inspect the original. We inspected it, held it up to the light and

we found the liquid paper over all the dates. I can promise you that was put in cross examination by our lead Silk and it was a really bad look for the people on the other side. We would not have known that if we had not gone and looked at the originals. You have all got younger eyes, you can see. You never know how much fun you can have. Watching a really good Silk cross exam stuff like that is so much fun.

ACHIEVING THE OVERARCHING PURPOSE OF CIVIL LITIGATION

NA: [Slide 6] Overarching purpose of civil litigation, how is that achieved? Actually, what do you think the overarching purpose of civil litigation is?

FC: Rule five, whatever that it [Laughs].

OC: Judicious resolution. [Laughs]

NA: That is rubbish. It is all about winning. [Laughs] Of course, it is all about the real issues, but it is also about winning. How is that achieved?

FC: I think the overarching purpose of civil litigation is to win, but also to do it efficiently and effectively. How do you do that? There are a couple of stakeholders and they all have different opinions. You start with the client, the client wants it quickly and they want it as cheaply as possible and in a timely way. Often, they have no idea how long it is going to take, how much it is going to cost - they are a driving factor. You want to please the client, they set the deadlines and expectations so you try and work with it.

As a solicitor, what can you do? You pick up a piece of litigation, you might know how to do it because you are in a big firm, you run litigation day in day out, that is great. If you need to outsource things you can go to Law in Order, get them to prepare documents for you to help out if you cannot do that in house. But you know the strategy and you just bring in a barrister, you call up Ollie and say "I've got an interlocutory application, just come for this. Otherwise, we're sweet. I've done the advice. I've already told the client the path forward, we can do it." You just outsource little bits and pieces and that can be efficient.

But sometimes, if you are a small firm, you might not know, you have been given a handball pass, it is outside your scope of expertise. What do you do in those circumstances? Often, brief a barrister early because a barrister can help you with that. If you say "I don't understand the path forward, how do I get from right now to winning?" That is sometimes the most effective use of time because then a solicitor knows the steps that they have to go through to get them out to court. Shoot an email to a barrister, brief them, and ask "What's the strategy? How do we get there?" You then know we need to bring the security for costs application, we then need to have disclosure done, what we are looking for is these key documents. This is a really tough area of getting advice, put it on paper for the client. Prepare all the pleadings, do any

amendments if necessary, and have a mediation and then go to trial. You have got five steps to success, and you know how to do it. That can save you time and money, there is no sitting around for six months not really knowing what you are doing, what the other side is doing, making sure the other side is not trying to take you down a dry gulley and the like.

The fourth stakeholder is...so you have the client who can drive it, you have the solicitor who can drive it, or the barrister if the solicitor needs help. But then also the courts can drive this efficient conduct of litigation.

NA: Can? Do. And very well, for any judicial officers who happen to watch this. You are all fabulous. [Laughs]

FC: Practice Direction 18/2018 is really getting to that, how to have efficient and effective litigation. That is ordinarily through case management, bringing all the parties before the court and having a case flow review or having a review. If you did not already know, the judge will help you to work out how to get from A to B because they will timetable it in minute detail. It will be "You provide submissions by this date. Any further evidence by this day. Request for trial, that should be filed by this day. Then we're having trial dates here." Judges have become very interventionists, getting in early about documents, getting in early about progressing matters quickly.

NA: Don't be obstructive in the reviews. The courts have this expectation of cooperation and collaborative approaches because they are really interested in making sure that what actually matters is what you are having a fight about. As a general proposition, if your opponent asked for two extra days, unless that two extra days is the difference between the bill being blown up or not just agree, it is going to make no difference. If I asked for two years, that is a different thing. But the bench is getting very irritated by people picking fights about those things. There is something in court this week, or maybe it is next week, actually tomorrow, where the fight is whether the mediation should be before February or before March. Everyone is agreed but one party. You wonder, why are you are doing it? We will find out what the judge says about that.

OC: I think that expectation that you are talking about Nic from the bench is reflected in this practice direction. I am not going to talk about what is in the practice direction specifically. I have experienced this reluctance for people to read practice directions, everyone thinks the UCPR is the answer to everything. Oftentimes, the practice direction tells you what you need to do. That is certainly the case with Practice Direction 18.

FC: Have you all read practice directions? Very good. You do not really get taught it much in university so there is a whole lot of people who do not know about them.

NA: Really? There are always rules, there are always practice directions, there are always some cases, there is generally an act.

OC: A lot of the problems that we have spoken about, Practice Direction 18 tries to address. It has been around for a while and I have certainly seen matters where people do not comply with the practice direction. There have not really been consequences other than that the proceeding is pretty inefficient and you are having fights that you should have addressed when the matter started. The practice direction is called 'The efficient conduct of civil litigation'. That is really what it is about. It is about making the proceedings as efficient as possible.

The big thing to note is what we spoke about earlier which is that as soon as the statement of claim is filed, before you put on a defence, the parties have an obligation under the practice direction to meet and agree, if possible, an electronic document protocol and that relates to the exchange of documents. The practice direction is pretty prescriptive, it talks about specific formats of documents that you might agree about, when documents are to be exchanged, the types of documents to be exchanged. The practice direction also talks about having a resolution bundle, so a bundle of those ten core documents that we spoke about that the case can be won or lost on. It is a really detailed and helpful practice direction. To the extent you have not read it, I absolutely recommend you do. It is extremely helpful and I think to the extent people can comply with and follow the practice direction more closely, I think proceedings will be shorter, cheaper and more efficient generally. I think that is all I had to say about the practice direction.

NA: Any tips you want to pass on?

OC: I think Flo's suggestion about doing observations earlier is extremely helpful. Particularly for someone who is relatively new to the Bar, if you get a brief and it has observations it is a much more comforting prospect than receiving six volumes of material without any real direction about what is important in there, things you might look at and what the solicitor is thinking. So, to the extent you can, when you are briefing counsel, try to do observations, they do not need to be particularly long or detailed but they are extremely helpful on the receiving end.

NA: We are all part of the same team, it is a collaborative process. We are actually very keen to know your thoughts and where your mind is at because as a collaborative team you tend to get to the solution much quicker. It is nice for everyone to know that they are heading in the right direction. Actually, it is nice to know if someone disagrees. Sometimes the best cases are where the team internally and privately is arguing all the time so that by the time you get to court it is this slick, smooth, "well-rehearsed" but not rehearsed, but very well thought out strategy, plan and propositions, where the hard questions are asked and it is answered immediately. It looks fantastic, when in fact the work that went into that was quite intense.

Can I suggest a habit which I have gotten into, as something I started when I was an article clerk and have maintained it. As you read through the bazillion boring documents, when you get to a document that matters, put it into a folder, electronic or hardcore, critical bits or critical documents, and start compiling your own collection of the ten critical documents. You will always walk around with those ten. By having identified them, you get access to it really quickly, constantly.

FC: My top tip is speak our love language. A really nice brief makes us feel warm and loved.

NA: Just be careful about the #MeToo movement and how you express that.

FC: Any questions?

OC: For the benefit of the people who are joining us online, the question is about how you manage risks associated with newer technologies as they are brought into practice more commonly.

I don't know if either of you have any particular thoughts.

NA: We pay someone to make sure we have security in place here in Chambers. I assume law firms are doing the same. But you are right, it is a real problem. The ease with which things can be broken into by hackers is quite frightening. Again, I am showing my age, there was a time where you had to produce the original document. The reason that was a fairness issue and the courts wanted to know that the contract you were producing was not a forgery. It is so easy now through all those \$2 apps you can buy to fake stuff. I wonder whether we are going to start going back to something like that because how do you authenticate a document. It is easy to manipulate stuff.

FC: Even things like PDFs you can now move around with PDF Pro.

NA: Yeah, I have got lots of photos of me with Justin Bieber. Sorry, that is because there was a conversation we had before. I actually have no idea what he looks like.

FC: In chambers, we had KordaMentha come give a whole hour about...They were telling us about a cleaner could come in with a USB that you can pay for \$3 online that has a Trojan horse virus that as soon as you turn on your computer it will take all of you documents and send it to them and lock you out. It is really freaky stuff. Highly recommend you going along to a couple of seminars about that. If you are in a smaller firm, make sure you have the proper securities, which will usually involve paying someone to do it because even the big firms, they have had a few ransomware viruses, even two years ago.

NA: None of it is new. When I was young and I had hair, there was a guy that put a suit on, walked into one of the top five firms here in Brisbane in terms of size and literally went in and started copying stuff, he did not work there. This was in the 80s. That is why law firms changed their security protocols and we put security doors everywhere that you need a key pass for. This guy was literally walking in and randomly copying stuff, we have no idea what he did with it.

OC: That is the malicious side of things. There is also an associated risk with new technology generally which is sometimes we do not properly understand, what it is doing or how it works. I have a bit of experience with technology assisted reviews, I have been involved in some mega discoveries where that is the sort of mode of review, you get a computer to do a lot of the work for you. I think a lot of the fights have been had already and that seems to be more commonly used now. But for junior practitioners, I think if you are able to understand how that stuff works and explain it to more senior people it is incredibly valuable. It is a really impressive skill set that is so valuable to firms. I suppose addressing the malicious threat side, as Flo said, to the extent you can inform yourself about it, I think that is another way that you can add value to your firm's practice.

Audience: How do you decide on which copy of a document to use?

FC: Usually both parties agree. It is pretty rare that you provide a copy of a contract and someone else says that is not the signed executed contract, you do not really have that many. I had one where it was a forged signature. That was when we needed the document. We got a handwriting expert to prove that it was forged.

NA: But you can use technology to demonstrate the authenticity of the document because by having the native versions of the different drafts you can identify when it was created, who by, where they were sitting, all those types of things are now more accessible. So if someone happens to wipe all that information you start drawing inferences from it as well.

Audience: When you talk about observations, is that distinct from say a letter of instruction or slightly different?

FC: That depends on your firm's practice. Sometimes a letter of instruction will just be "brief to advise on". That is not observations. Observations are things like "This is our client. This is their business. This is a chronology of the relevant events." They specify the relevant document attached to it. "This contract was signed on this day. This is in Tab B of the brief." Then at the bottom it is like the letter of instructions "Counsel is instructed to provide advice on X,Y and Z." It depends, some firms in their letter of instructions include a set of observations.

NA: The observations that are helpful say "Here is the contract, clause nine and three are critical ones, we think these four words are the bit that matter. Our views about that are this. Here is the case that says this but here is the case that says the opposite. We are not really sure which one relates to this construction and which one to that construction, can you have think about that. He is an expert that is really unhelpful, we will try and bury him in the desert." That type of stuff is really, really helpful. Again, collaborative team effort, it is wonderful to get it.

FC: It is great for you guys as well because you can have a go at trying to work out what the answer is. You have asked advice from counsel but you can go research, see if you find that case on point or the case that is in opposition and put it to counsel. Then they will say either actually there is this other case that is more on point or have higher authority but at least you kind of get a bit of feedback. You have a go yourself and then you can talk to counsel, how did you find that case? What did you do to work that out?

Audience: Something that is probably subject to personal opinion, but what will elevate good observations to excellent observations?

OC: You two are probably more experienced than I am at receiving observations - excellent observations no doubt most of the time.

FC: One, not asking the right question, and that takes a bit of experience. Sometimes we will get observations that say "We want counsel to advise on evidence." You say "Actually, we need to look at the causes of actions, we need to look at pleadings, we need to check all these things." Or they will say "We think the construction of this clause in this contract means this, please advise." You say "Who cares about that clause? What about the one over here which might actually boil our entire case?" Asking the right question takes skill and expertise and experience. Showing that someone has had a go at answering the questions and maybe doing a bit of the grunt work of finding some of the relevant cases, that is a really good set of observations. Having it all just beautiful, like starting a nice proper document management, and then a set of observations. So not just "Here is this document, I am not even going to number it. Here is this other document, I am not going to number it." Having an index, maybe even starting to have a category A documents, Category B documents.

What do you think?

NA: I suppose it is all a matter of degree. Excellent observations are those that are written in the form of a submission that you want to see in court. So "We win for these three reasons, I will develop that as I go along." So, "Why we win. The facts. The legislation. Here are the three sections that matter. Here are the four leading cases." Properly cited in the authorised way, the way the practice direction requires. An analysis, which is not just a recitation of the facts, but an analysis. There is a big difference between reciting facts and analysing them. Then a

conclusion. We get those and they are beyond excellent, if there is another word for it, that is what we should be using. Good ones do the more mechanical process of "This is the dispute. Here are all the facts. Here are the documents. There are ten cases, please read them and tell us what you think." They are still great.

FC: You know, what I do? I look at them, I OCR that PDF document and I cut and paste it into submissions and that forms the basis of an interlocutory application. If you have a beautiful chronology, some of the argument is already set out.

NA: Without fail, every solicitor who has given me submissions like that has ultimately come to the Bar because you can tell they want to be the advocate. That is not to say that the other way is a bad thing or being a solicitor is a bad thing. I loved being a solicitor. But you can tell that extra level of enthusiasm that goes into it and there is a hidden barrister in everyone.

Audience: In relation to the briefs, do you prefer to have a combined brief with bookmarks or the documents separated?

NA: Separated.

OC: I prefer separated if I can have it. Do you really like the one PDF?

FC: No no, I prefer separate but I have seen a Silk that I worked with who wanted it combined. And I did see it work really well with bookmarks,

NA: But how do you add stuff into it without losing all the stuff you have already done?

Audience: That was another part where I was wondering with your having said how you annotate, do you normally have a live document that you are sharing with the solicitor?

NA: If they want it they can have it.

Audience: That makes sense. I don't think at Law and Order we get your version for the trial bundle.

NA: I want my annotations to be my annotations. I want my version in my version of the trial bundle and I want it to be the right doc ID.

Audience: My other question was just in relation to the PD 18/2018 and document management plans and the DPP. Do you decide the infrastructure, naming conventions and search terms or is it the solicitor?

NA: I am always asked for input. Ultimately the solicitor is much better at that stuff than I am but quite often I am asked for my views about certain things. And I have views so I share them.

Audience: In relation to the actual exchange of documents?

NA: More in terms of what I expect to see. Familiarity with the judge helps, knowing what the particular judge prefers and on what we through experience know.

OC: I think, at the really early stage when parties are exchanging the document management plans they sort of deal with the more mechanical issues. I certainly have not in the five weeks that I have been at the Bar been asked to advise on that. That is probably not saying anything about anything. When I was a solicitor, I generally would not engage counsel for the sort of more mechanical aspects of the exchange protocols, just because it is really the firm that is driving that. The counsel team is sort of on the back end, as Nic says advising as to particular searches or issues, documents that the court would expect to be seeing, that you expect to be exchanging as part of the ordinary discovery process. But I think there probably is scope for people at the Bar to advise on document management plans.

Audience: Seems to be a mixed bag. I was wondering because when I talk to clients I was wondering if there is a norm. Because the practice direction was brought in two years ago now and I was wondering what has actually come into play.

FC: It also relates to the sophistication of the solicitor. I have had a couple of small firms who do not really do a tonne of litigation or big Supreme Court litigation and then they will come to me and be like "I don't know how to do this." It is very comprehensive, the table that they want, as compared to what it used to just be "produce a document list which has the date, the name of the document, and who prepared it." Now it has to have different names, where did they come from, you know.

FC: I think that we might wrap it up.

NA: Thank you all very much.

Helen Driscoll (Queensland Young Lawyers): I just want to thank you Nic, Florence and Oliver so much for your presentation.

For those who have not been to one of these before. This is our fourth in the CPD series here at Level Twenty Seven. It has been wonderful. We started with courtroom etiquette. Then we moved on to rules of evidence. Then we did affidavit drafting and particulars. Now we are finishing off with Docs, eTrials & Practice Directions. Next year we are going to continue this. So if there are subjects that you want to hear about, we would very much like your suggestions. I

already have a few in mind. But the idea is that it is helpful things for that lawyer in the 1-3 year bracket, things that you do not get taught at uni, you have no idea about and expected to know the moment you walk into practice. If you have any ideas, please shoot them through to our QYL email address. Otherwise, thank you again for your attention and enjoy.

Liability limited by a scheme approved under professional standards legislation