



Witness Preparation: Helping you help your client



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www.witnesspreparation.com.au

What is witness preparation?

Witness preparation is, at its most fundamental level, preparing a witness to give evidence in legal proceedings in a truthful, clear and straightforward manner.

Witness preparation also refers to the assistance witness preparation consultants provide the barrister, instructing solicitor, clients, or their other witnesses, in their effort to increase witnesses' understanding, comfort and confidence in the process of giving evidence, improving their ability to give cogent evidence, improve their conduct in court and improve their understanding of what is occurring around them.

Why prepare witnesses?

We have all seen witnesses who get in the witness box, and botch their evidence. They often:

- Don't swear up to their affidavit material;
- Behave non-responsively – more as an advocate in their own cause than a witness of truth;
- Appear to be cocky, or angry, or partisan in silly ways (being apparently unable to make appropriate concessions)
- Seem to be completely overborne by the process of giving evidence

Giving evidence is a nerve-wracking experience for most people and very few are prepared for the rigours of cross-examination. Being in the witness box is a crucial time. The evidence given is weighed by the judge and how a witness answers questions, sits in the witness box, engages with opposing counsel and the Judge, all present a narrative to the Judge.

Many in the legal profession dealing with a client believe they do this, but often what a client gets in terms of preparation is inadequate.

Your client engages your services because you are a family lawyer and they are dealing with the breakdown of their relationship, property settlement, and, if there are children, the vexing issues around who gets what time spent with the children.

Your client is, to say the least, focussed on their problems and disinclined, and at times, unable to take your advice or hear anything contrary to what they want to hear.

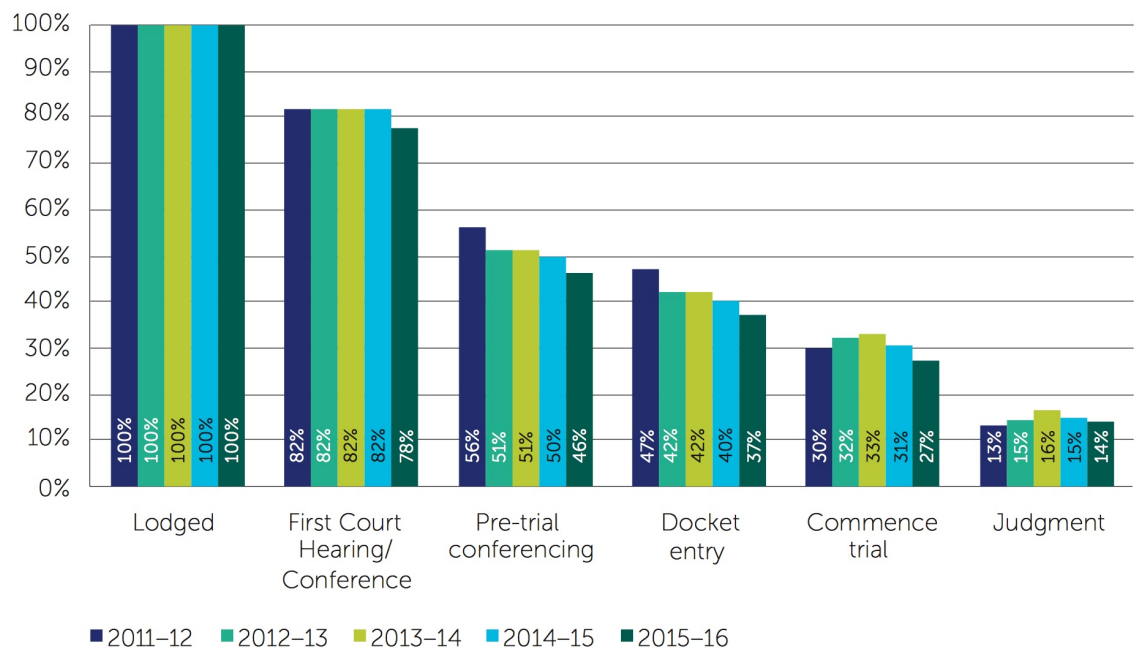
You've all had those kinds of clients, right? Of course, you have. I'm not describing anything you don't already know.

Your clients are all embroiled in family law disputes, or they wouldn't be in your office contemplating legal proceedings.

They are anxious, nervous, angry, resentful, hurt, betrayed and frustrated. And that's just at their ex, let alone the system that is soon going to grind them down and spit them out.

The Annual Report of the Family Court of Australia highlights that nationally 14% of cases lodged go to full judgment.

Figure 3.4 Attrition and settlement trend in the Court's caseload, 2011–12 to 2015–16



This means that approximately 86% of the cases you start, settle between filing and the final hearing. So, pat yourselves on the back for having 86% of your cases settling. Well done!

But that means 14% are high-conflict, difficult-to-manage cases, often high in conflict and attitude between the parties, and sometimes, even, to some degree, the legal practitioners.

Lawyers and barristers are aware of their obligations not to drag out their client's cases, but unfortunately, this isn't always possible; your clients don't want to listen, and they often can't.

Why can't clients just get on with it and help themselves?

Clients are focussed on their internal pain and need for revenge, justice and making a point. Often, they think their time in court will provide this. They are after their day in court where they believe that they will be telling their side of the story; their truth.

"Principles" so often get in the way of a good outcome.

Clients don't understand the trial process well, no matter how many times you tell them about it in your office.

Clients are overwhelmed and relying on you to guide them.

You refer the client to a barrister for a conference, and the barrister is just another person who intimidates and overwhelms the client, no matter how nice they might be.

All this talking goes right through a client, who isn't legally trained and might not have the capacity to take it all in no matter how intelligent they are. Being involved in court proceedings can make even the most intelligent and rational person feel like they're stuck in quicksand and unable to move.

And there is the dilemma. As legal practitioners, you need your clients to give you instructions, they need to do things to help themselves, yet they often can't because their emotions cloud their judgement and the capacity to think calmly and rationally goes out the window as they get caught up in the he said / she said toing and froing of the adversarial system, even though it's a no-fault jurisdiction.

Every client wants to be vindicated, be right, stand on their principled digs and hold on for dear life to their righteous position.

You pull your hair out wonder how your client will survive as they get mauled in the witness box by opposing counsel.

What a mess.

If only there was a way to manage this from the beginning, or at least a way of minimising the harm to your client when they are in the witness box.

There is; it's called Witness Preparation and Familiarisation.

Wait, you already do that, I hear you say.

But, do you?

Of course, as trials approach, you admonish your client to make concessions; to appear reasonable in the witness-box; to overcome their apprehension of going into court. And you explain, in general terms, the process of giving evidence. Occasionally, you will give advice about dress and deportment.

But, is it enough? The experience in the USA and Great Britain suggests that it isn't:

While witness preparation is in its infancy within Australia, in the US and UK it has a significant presence.

In the US witness preparation is simply part of a larger, much more established service called Trial Consultancy, within which witness preparation is but one aspect, along with jury selection, trial observation, post-trial juror interviews and so on.¹

In the United Kingdom, the preparation of lay witnesses, as opposed to expert witnesses, is called witness familiarisation. A firm called Bond Solon is, according to its website, the largest independent provider of such services, and describes the process thus:

¹ American Society of Trial Consultants - <http://www.astcweb.org>

What is Witness Familiarisation?

It is a training process by which witnesses receive a comprehensive understanding of the theory, practice and procedure of giving evidence, applicable to the specific hearing in which they are due to appear. Witnesses will also consider the roles and responsibilities of the various people at the hearing, as well as lawyers' techniques in cross-examination and how to overcome these. Most importantly, witnesses will experience cross-examination and practice evidence giving in a mock-hearing, led by an experienced lawyer trainer.

Who can conduct Witness Familiarisation?

Strict rules apply to the provision of Witness Familiarisation and sessions must not be conducted by anyone with personal knowledge of the matters in issue in the case. Bond Solon is perfectly positioned to offer this type of service as we are an independent training company dedicated to offering legal training to non-lawyers and not a law firm or barrister chambers.

Benefits of undertaking Witness Familiarisation:

- *Mitigates against the risk of a poor performance under cross-examination*
- *Enables witnesses to practice and hone their evidence giving technique*
- *Allows witnesses to experience cross-examination prior to a hearing*
- *Builds confidence in nervous witnesses*
- *Helps eliminate over-confidence in witnesses*
- *Run by experienced lawyers who are also professional trainers*

The process of witness preparation in Australia, as I conduct it, is done with all the above in mind, holding firmly to the Victorian Bar Practice Rules which state²:

44)

- a) *Under no circumstances shall a barrister advise or suggest to a witness that false evidence should be given.*
- b) *A barrister shall not coach a witness by advising what answers the witness should give to questions which might be asked.*

45) *A barrister will not have breached Rule 44 by expressing a general admonition to tell the truth or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.*

Similarly, the Victorian Bar Good Conduct Guide³ lays out these responsibilities;

Clients and Witnesses

3.29 *The court relies upon counsel to deal fairly with witnesses, the vast majority of whom are unfamiliar with courts and the legal system. Counsel are prohibited from coaching witnesses as to appropriate answers and must never advise a client or witness to give false evidence. Counsel may advise clients to tell the truth and are entitled to test the version of evidence to be given by a witness by the identification of inconsistencies in the witness's evidence with other evidence.*

Except for prohibitions on coaching witnesses, and general admonishments not to coach, preparing witnesses for court can be a hit and miss process.

² *The Victorian Bar Incorporated - Practice Rules* - RULES OF CONDUCT AND COMPULSORY CONTINUING PROFESSIONAL DEVELOPMENT RULES Effective 22 September 2009 - [Victorian Bar Rules of Conduct](#)

³ **Good Conduct Guide** - Professional Standards for Victorian Barristers - Chapter 3 - Duties to the Court pg 41 **Good Conduct Guide**

You want your client to be at their best, but you've got no control over the outcome, and often will sit in court silently wishing your client would just shut up.

Barristers and lawyers are caught in the cross hairs of their obligations not to coach, and their focus is rightly on the presentation of the legal aspects of the case.

Your attention is on the conduct of the file, not necessarily the conduct of the client or the emotional toll giving evidence will take on their actual experience.

You want your client to get a positive result, but have a duty not to get emotionally invested in your client.

The judge wants to hear clear and unambiguous evidence. It's in your client's best interests to answer fully and frankly, while also being concise and truthful.

“With prepared witnesses, they don't have to waste time with admonitions such as as ‘Speak up,’ ‘Answer the question,’ or ‘Your behaviour is not helping, Mr. Jones.’”⁴

Barristers don't always ask questions in a clear and articulate manner, leaving witnesses exposed and thinking they must attempt to answer every question put to them, particularly the ‘rolled-up’ question seen so often.

Clients don't want to appear ‘dumb’ in court, and so attempt to answer every question put to them regardless if they understand it or not.

The ‘rolled-up’ question is one that can make even observers of a trial scratch their head, so imagine the dilemma facing the witness who is under enormous pressure and scrutiny to answer. Some barristers use rolled-up questions so pervasively that counsel often does not object just to shorten the time their client needs to be in the witness box. If counsel does not object, who then assists the confused client who doesn't know what a rolled-up question is, or how damaging it can be to their case if they answer in a way that needlessly damages their case.

⁴ Lewis, E. (Winter 2010). *Witness Preparation: What Is Ethical, and What Is Not. Litigation*, 36(2), pg 56.

This is just one of the many vagaries of the court system that witness preparation addresses.

Witnesses who are unprepared can use the witness box to grandstand – we've all seen this occur, and while witness preparation cannot ever create a perfect witness, it can assist a client to recognise when they should in fact just shut up.

Witnesses who are unprepared can evade, answer inappropriately, appear less credible and take up an extraordinary amount of court time being admonished to respond to the questions put to them.

Witness preparation should enable your client to navigate their way through the giving of evidence with confidence rather than arrogance.

The client should feel certainty about the appropriate way to answer in court, answering questions in a timely, frank and honest manner, with no attending inappropriate responses or attitude.

Appropriate witness preparation and familiarisation can assist your client to be more comfortable and more familiar with the process.

This reduces stress and gives your client, as the witness, the best opportunity to be seen as frank and candid.

How can I help you?

I practice strictly according to the rules that apply to you, the lawyer and barrister.

I learnt this working for my barrister husband.

I'm familiar with the rules and limitations on what can be done, by being actively involved in the cases my husband ran.

My husband has guided me professionally into the level of experience I have today, adding to my existing knowledge and skills.

As an independent person, with no personal relationship or knowledge of your client, I provide an opportunity for your client to be as prepared as possible for giving evidence in court without attachment to his or her emotional narrative or journey.

I take your client step by step through the process. I delve into the detail that, at the hundreds of dollars per hour that you are obliged to charge as part of your legal practice, your client just cannot afford you to go through with them, except in the rarest of big-money cases.

I figuratively hold their hand and walk them through the courtroom layout, talk about how to manage shaky hands, where to sit, how to sit, how to listen, pay attention and present as a clear witness to the best of their abilities.

In all the hullabaloo of the trial and the hot emotions, it's easy to forget that the client is not an expert at giving evidence, even if they are the experts in their life story.

Clients are often itching to tell their side of the story. Their story is *the truth* after all, and the other side are the liars.

Witness preparation brings clients back to the reality of their case. Truth is merely the story we tell ourselves, from our perspective, and lawyers have great difficulty getting this through to the client, who sits in their perspective of what is truthful.

Witness preparation punctures this delusional state and brings clarity into the client who hasn't been confronted before, or been willing to hear the challenge, about their case.

Witness preparation assists clients to see the flaws in their case through the experience of mock cross-examination.

Providing a thorough experience of cross-examination is an essential part of witness preparation and familiarisation. Clients don't spend hundreds of hours observing trials, seeing the art and theatre of cross-examination being played out day in and day out; I do.

Witness preparation is a specialised niche area. Currently, I am the only insured, non-lawyer practitioner, who focuses solely on the family law jurisdiction, able to offer this service within Australia.

Who Is Lisa?

I am a trained counsellor who has been caught up in the law for over a decade.

For many years, a dedicated junkie of public speaking events – from Local Council Committee meetings to Trials in the Magistrates', County, Family, and Federal Circuit Courts, I found an opportunity to become more intimately involved when I started working for, and then married, a barrister.

My experience in supporting clients through the court process, including watching them give evidence in court, has given me a unique perspective into the mechanics of trial preparation.

As well, I have developed the independent layperson's perspective on how trials pan out – mistakes, shortcomings, good points, and all.

My skills in assisting clients and their associates in presenting in the witness box have enabled those people to achieve far better outcomes than they ever would have without help.

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