



Trial Preparation & Running a Trial in Australia

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The modern Australian litigation framework. Case management & overarching obligations.

- Strong case management philosophy seen in *Civil Procedure Act 2010*(Vic), Commercial Court Practice Note SC CC-1 and Federal Court Central Practice Note CPN-1.
- Overarching obligations on parties and practitioners.
- Prescribes steps in the litigation process.
- Compliance is not optional & is integral to effective trial preparation.

Early case assessment & development of trial strategy.

Identifying the Case Theory

- Foundation of every successful piece of litigation.
- Works toward a single compelling narrative.
- A simple, clear theory is easier to understand and accept.
- Must be consistent.
- Supported by evidence.
- Supported by legal principle.
- Develops progressively through the litigation process.
- Plays a critical role in strategic decision making.
- Must be persuasive at both a legal and human level.
- Case theory maintains discipline.

Pleadings: Defining the issues for Trial

Primary function

- To define the issues in dispute between the parties and to provide a framework within which the trial will be conducted.
- Identify the material facts not the evidence.
- Narrows issues in dispute.
- Courts rely on the pleadings to understand the nature of the case and manage proceedings efficiently.
- Regular review of pleadings during preparation. Can avoid inconsistency between evidence and pleading.
- Poor pleadings can undermine an otherwise good case.
- Pleadings shape the conduct of the trial itself.

Discovery and documentary evidence

Primary function

- Central pillars of modern civil and commercial litigation.
- Most civil and commercial disputes determined by contemporaneous documents.
- Obligation to give and parameters of discovery is controlled by procedural rules, Practice Notes and court orders.
- Generally, critical documents must be discovered together with other documents on which a party may rely, and documents which may adversely affect their own case or support another party's case.
- Not limited to paper documents.

Discovery and documentary evidence cont..

- Documentary evidence serves several key functions;
 - Proves facts directly;
 - Used to test and challenge the credibility of witnesses;
 - Provides context and supports the overall case theory;
 - Be aware of privilege issues.
- Document chronologies are among the most valuable tools in trial preparation.
- Be aware of s.69 *Evidence Act* - business records exception to the hearsay rule. Wide application and can be crucial.

Witness Preparation

Lay Witnesses

- A lay witness is a person who gives evidence about facts they personally observed, heard or experienced.
- Lay witness preparation is a critical component of trial preparation as they can establish key events, explain documents and provide the factual foundation upon which your case is built.
- *First step* in preparation is to understand their evidence. Obtained by conferring and preparing a detailed proof of evidence. Need to obtain a full and accurate account of the witness's recollection. Requires a careful and methodical approach. Avoid speculation.
- Be alive to s.59 Evidence Act – hearsay rule and the exceptions.
- Take witness through documents that witness was author of or received or is otherwise relevant to his evidence.

Witness Preparation (lay witnesses cont)

- *Second step*; once evidence understood, it is typically summarized in a witness outline or recorded in a witness statement or affidavit. No coaching. Must be in the witness's words.
- *Third step*; take witness through any outlines, witness statements or affidavits of your opponent. Prepare reply or answering material.
- *Fourth step*; familiarise witness with court process. Explain court room layout and the roles of judge and counsel and sequence of evidence.
- Prior to trial, go through witness's evidence and documents, address weaknesses or difficult issues.

Witness Preparation

Expert evidence

- Unlike lay witness's, experts are permitted to give opinion evidence within their field of specialized knowledge.
- Their role is not to be an advocate for a party but to assist the Court impartially.
- Identify whether expert opinion is truly required.
- The proposed evidence must be relevant, necessary and within a recognized field of specialized knowledge.
- Expert's discipline and instructions must align with the issues defined in the pleadings.
- Select the right expert.
- Once engaged, the expert must receive clear and carefully drafted instructions.

Witness Preparation (expert evidence cont)

- Expert report must comply with any procedural requirements. It must set out expert's qualifications, training and experience, the materials relied on, assumptions made, methodology adopted and conclusions reached. Reasoning process must be transparent.
- Preparation for trial is more than serving the report. The expert must be thoroughly familiar with their own opinion and the underlying material and that of any opposing opinion and be prepared to make concessions if warranted.
- Courts may require a joint report identifying issues agreed and disputed. 'Hot-tubbing' may be ordered.

Subpoenas

- Subpoenas are a vital tool in trial preparation.
- They can assist in filling in any gaps in your evidence whether oral or documentary.
- Enhances case planning. The collection of documentary evidence and the knowledge of a witness being available to give evidence assists in the planning of the case.
- Can have strategic importance. Your opponent may be concerned with what a subpoena may furnish or what a subpoenaed witness will say.

Pre-Trial Preparation

Trial Plans

- Usually governed by Court orders.
- Should include chronologies, witness lists, issue list, tender lists, opening outline.

Court Book

- Usually governed by Court orders.
- Must be accurate, properly indexed, consistent with Practice Note requirements/court orders, in chronological order, avoid duplication, avoid unnecessary documents.

Pre-Trial Preparation

Pre-Trial Conferences

- Refine issues
- Identify evidentiary issues
- Prepare witnesses

Running the Trial

Opening Submissions

- Should explain;
 - The issues.
 - The evidence.
 - The legal framework.
 - Be consistent with case theory.

Examination-in-chief

- *Critical. Need to prove your case. Don't expect to win by cross-examination.*
- *Witness preparation is critical.*
- *Be aware and prepare for evidentiary issues.*

Running the Trial (cont)

Cross-examination

- Proper planning is essential
- Has to be purposeful and fit with case theory
- Check list of what needs to be put to witness helpful

Closing submissions

- Synthesise the evidence and the law.
- Structured.
- Evidence based.
- Persuasive and consistent with the Opening and case theory.

Settlement strategy, Calderbank offers and Cost consequences

- Settlement offers at strategically advantageous times.
- Must be clear and capable of acceptance.
- Document advice to clients regarding settlement risks.
- Reassess settlement strategy as evidence develops.

Common Trial Preparation Mistakes

- Failure to develop case theory.
- Poor document management.
- Inadequate witness preparation.
- Failure to comply with Practice Notes/Court orders

Trial Timelines

- Usually governed by Court orders.
- Check availability of witnesses.
- Issue subpoena for attendance.
- Application to adduce evidence remotely.

Questions?
