Crown Solicitor's Office

2020 CPD CONFERENCE

13 MARCH

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Session 3B: Professional skills for litigators

Chair: Cheryl Drummy, Assistant Crown Solicitor

Briefing experts

Holly Morgan, Solicitor Advocate

Protecting costs

Ava Hurley, Senior Solicitor

Mediation

Lynn Boyd, Senior Solicitor

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Briefing experts

Holly Morgan, Solicitor Advocate

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Briefing experts: keep it clean

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Outcomes

- Limiting Costs
- Maintaining Privilege
- Admissibility of Report

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Pre-litigation experts

MAINTAINING INDEPENDENCE:
Court expert or party expert?

Pre-litigation experts

1. Tension between privilege and administrative transparency
2. Privilege issues when not within litigation
3. How to quarantine documents

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Choosing experts

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Choosing experts

SAME
- **Save costs**

SAME
- **Avoid duplication of work**

SAME
- **Avoid inconsistent opinions**

NEW
- **Preserves independence**

NEW
- **Avoids contamination**

NEW
- **Protects privilege**

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Choosing experts

DIRTY EXPERT

- Advocate for the client's interests;
- Be involved in strategic decisions as to how independent experts should be briefed;
- Generally inform lawyers on technical matters.

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What documents?

What documents?

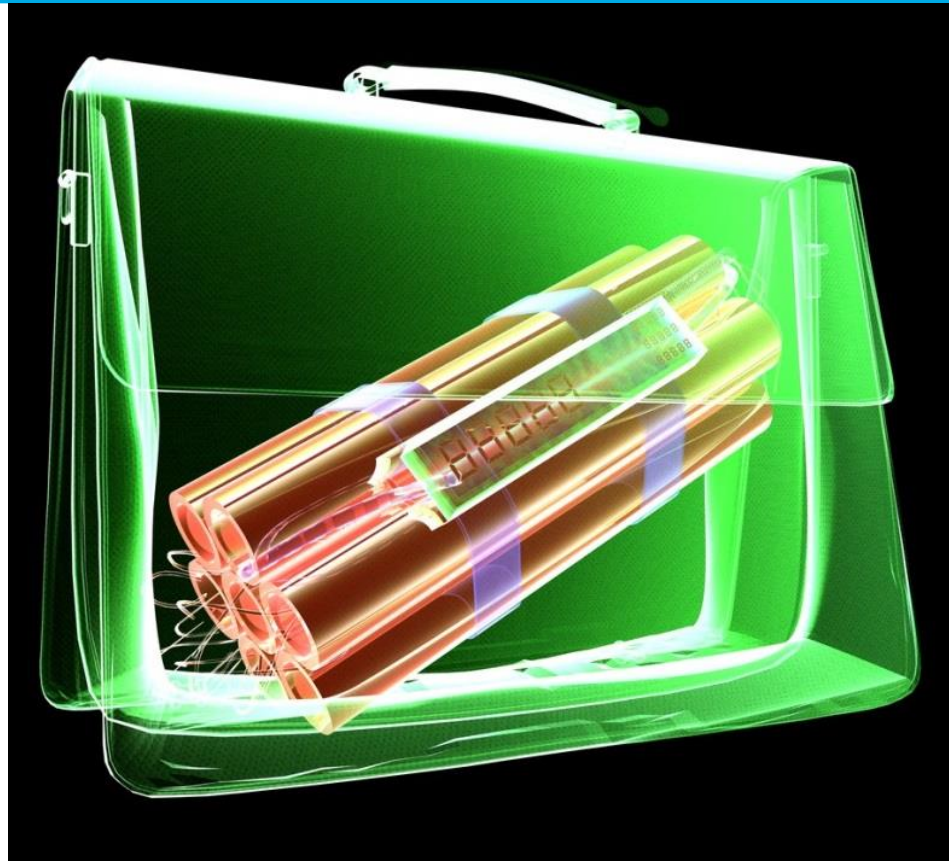
DO

- All relevant evidence
- All documents needed to prove facts
- Relevant unfavourable documents

What documents?

DON’T

- Advices
- Submissions
- Draft statements
- Confidential or sensitive documents



Privilege

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Privilege

EXPERT'S BRIEF

- Documents used by an expert to form their opinion will not remain privileged.
- Assume documents provided to an expert may be called upon.

Privilege

LETTER OF INSTRUCTION

- The service of an expert’s report creates an implied waiver in the letter of instruction.

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Privilege

DRAFT REPORTS

- Expert’s own drafts won’t be privileged but drafts created for lawyer comment will.

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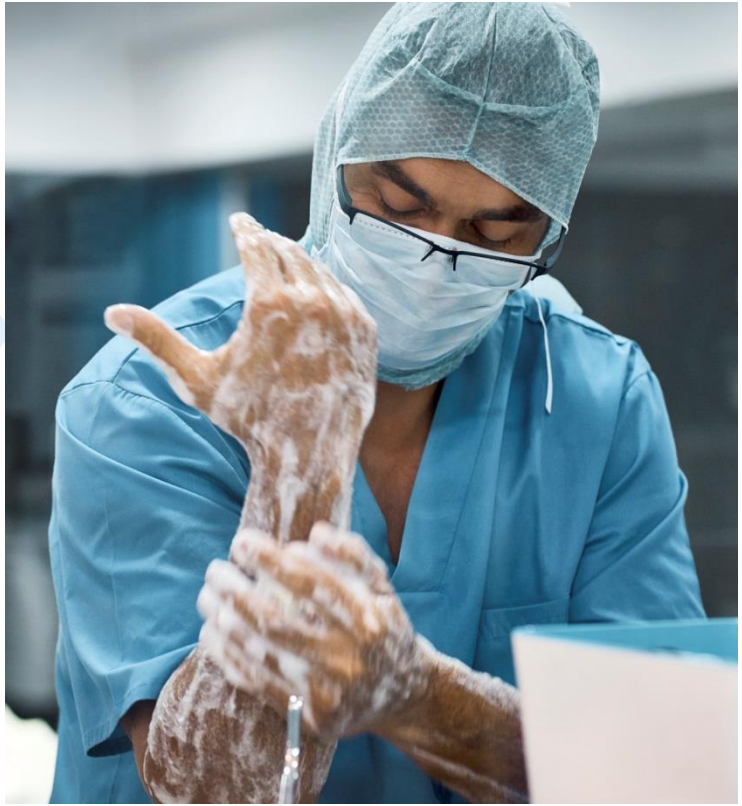
Privilege

OTHER COMMUNICATIONS

Verbal communication > written communication.

In conclusion



- Quarantine the expert from the adversarial process;
- Scope the expert’s task carefully;
- Be mindful of what and how you communicate.

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Protecting costs

Ava Hurley, Senior Solicitor

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Protecting costs in civil litigation: **security for costs**

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Power of the Court

- Inherent jurisdiction/ implied power to prevent abuse of process
- Statute, e.g.:
  - UCPR r. 42.21
  - *Corporations Act 2001* s. 1335
- Discretionary power

Threshold: UCPR r. 42.21(1)

- Application of defendant
- Plaintiff ordinarily resident outside Australia (a)
- Plaintiff's address not stated / misstated in originating process, and reason to believe with intention to deceive (b)
- Plaintiff changed their address after commencement of proceedings, and reason to believe change was made to avoid consequences of proceedings (c)
- Reason to believe plaintiff, being a corporation, will be unable to pay defendant's costs (d)
- Plaintiff suing for benefit of some other person (e)
- Plaintiff divested assets with intention of avoiding consequences of proceedings (f)
- If any of the above, court may order plaintiff give such security as court thinks fit, in such manner as court directs, for defendant's costs of proceedings and that proceedings be stayed until security is given

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- If any of the above, court may order **plaintiff** give such security as court thinks fit, in such manner as court directs, for defendant's costs of proceedings and that proceedings be stayed until security is given

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Threshold: UCPR r. 42.21(1)

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- Plaintiff changed their address after commencement of proceedings, and reason to believe change was made to **avoid consequences of proceedings** (c)
- Reason to believe plaintiff, being a corporation, will be **unable to pay** defendant's costs (d)
- Plaintiff suing for **benefit of some other person** (e)
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- If any of the above, court may order plaintiff give such security as court thinks fit, in such manner as court directs, for defendant's costs of proceedings and that proceedings be stayed until security is given

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Obtaining information about the plaintiff

- Do your research
  - ASIC search
  - Landholdings
- All States and Territories
- Ask for more information!
  - Financial statements
  - Tax returns
  - Ledgers
  - Bank statements

Considerations: UCPR 42.21(1A)

- prospects of success / merits (a) and genuineness of proceedings (b)
- impecuniosity of plaintiff (c) and whether attributable to defendant's conduct (d)
  - NB r. 42.21(1B) if plaintiff is natural person, need more than impecuniosity
- plaintiff effectively in position of defendant (e)
- order would stifle proceedings (f)
- involves matter of public importance (g)
- admission or payment in court (h)
- delay by plaintiff in commencing proceedings has prejudiced defendant (i)
- costs of proceedings (j) and security sought is proportionate to importance / complexity of subject matter (k)
- timing of application for security for costs (l)
- order for costs enforceable within Australia (m) and ease / convenience of enforcing NSW judgment / order in plaintiff's country (n)
- Any other matters the court considers relevant

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(1A)(l): Timing of application

- Timing is important
  - Bring an application sooner rather than later
- Changing circumstances
  - Expansion of claim and change to financial position

Quantum and form of security

- UCPR r. 42.21(2): Security to be given in such manner, at such time and on such terms as the court may direct
- Adduce evidence of costs incurred and likely to be incurred
- If circumstances change, consider revisiting quantum – court may vary or set aside order
- Payment into court, but also deed of indemnity, bank guarantee, undertaking

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Consequences?

Proceedings can be stayed pending provision of security (UCPR r. 42.21(1))

Court may order proceedings be dismissed if plaintiff fails to comply with a security for costs order (UCPR r. 42.21(3)

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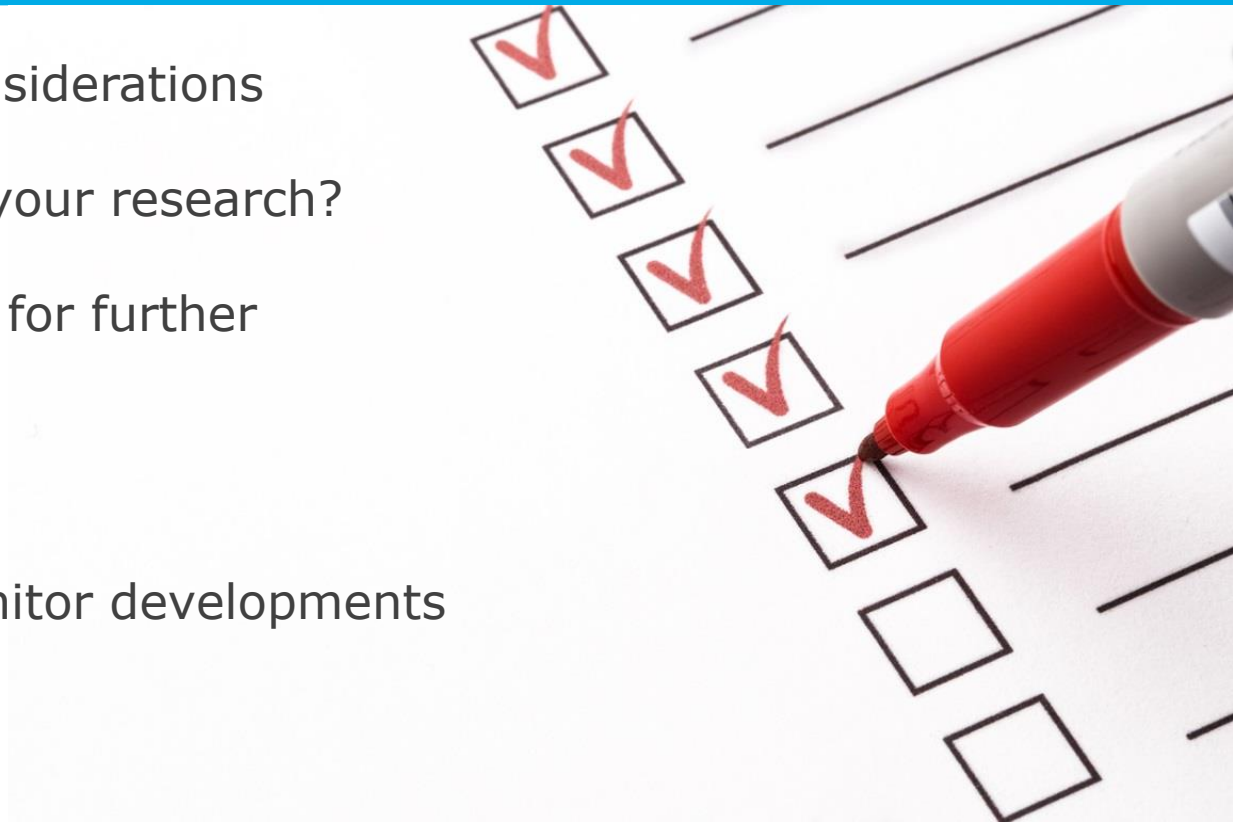
Recap

- Threshold + considerations
- Have you done your research?
- Have you asked for further information?
- Don’t delay
- Continue to monitor developments



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Mediation

Lynn Boyd, Solicitor Advocate

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Chief Justice Warren E. Burger:

"Traditional litigation is a mistake that must be corrected ... For some disputes trials will be the only means, but for many claims trials by adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for really civilized people."

Chief Justice Warren E. Burger, (Ret.) U.S. Supreme Court.

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Hearing

"(1) an independent judge applying (2) pre-existing legal norms after (3) adversarial proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong."

Schapiro, M. (1981) Courts: *A Comparative and Political Analysis*, Chicago and London, The University of Chicago Press.

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Chief Justice Wayne Martin:

"It seems to me that in some respects our justice system is analogous to this Rolls Royce, in that many Australians simply lack the financial means, knowledge and endurance to participate fully in its processes. While they can take some comfort that they live in a country which has such a justice system, to them it is inaccessible and, to that extent, of limited relevance."

Chief Justice Wayne Martin, Western Australia Supreme Court

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In 1996, then Chief Justice of the High Court, Chief Justice Gerrard Brennan, said:

"Although the courts must continue to hear and determine disputes, the public interest in the administration of justice does not require the expenditure of resources, both of personnel and material, on litigation that can be settled or on litigation that is disproportionate to the importance of the subject matter. Alternative methods of settling such litigation or of resolving such disputes must be encouraged ..... in the enthusiasm for diversionary techniques, there should be no misunderstanding of the sea-change in attitudes and outcomes involved. Lawyers brought up in the adversary system would be expected to temper adversarial zeal with the sweetness of compromise, litigants claiming an entitlement to their rights will be sent on a detour on arrival at the courthouse; solutions reached by diversionary procedures may deliver cheaper **but also a less satisfying form of justice**."

G Brennan, "Key Issues in Judicial Administration", Speech 15th Annual Conference of the AUA, Wellington 20-22 September 1996 at 6 and 9.

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Professor Hazel Genn, UCL Laws Professor of Socio-Legal Studies, has described the mediation in these terms:

"Both the ideology and practice of mediation can encourage a zealot-like adherence among recent converts - perhaps people weary of adversarialism. New recruits to mediation often appear as shiny-eyed evangelists for whom litigation and adjudication are horrors not to be contemplated, while mediation offers a nirvana-like vision of the world rid of conflict, with only peace. For passionate adherents, there is no value in judicial determination, there are no legal rights, only clashing interests and problems to be solved."

Genn, HG, Judging Civil Justice (2010)

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Why does mediation work?

- When you are dealing with common law disputes lawyers often believe that making "reasonable" settlement offer will be taken by their opponent as a sign of faint heartedness.
- In many cases the lawyers lack negotiation skills. Some lawyers believe that negotiation means pounding the table and telling their opponent why they cannot succeed.
- Mediation provides the opportunity for all parties to meet at the bargaining table for the express purpose of discussing settlement.
- Each party is given the opportunity to directly educate and influence their opponents.
- Mediation offers each party a "realistic" look at their case and what results they are likely to achieve in court or arbitration.

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A successful mediation?

Sir Lawrence Street always said a successful mediation means all parties leave slightly disgruntled and concerned they settled for too much or not enough.

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You catch more flies with honey than vinegar

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Over 20 years ago, Lord Reid, one of England's greatest judges, debunked the notion that judges declare but do not make law by saying:

"Those with the taste for fairy tales seem to have thought that in some Aladdin's Cave there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words 'Open Sesame'!' That was certainly not my experience when I was appointed as a judge."

The Judge as Law-Maker: The Hon. Sir Anthony Mason AC, KBE: The 1996 Mayo Lecture, James Cook University

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