



# Précis Paper

## Advocacy Basics

A discussion about the basics of advocacy, such as the importance of atmospherics and context, setting your agenda, the form of questions, and using silence.

### Discussion Includes

Contextual information

Examination in chief

Cross examination

Closing address to the fact finder

Summary

# Précis Paper

## Advocacy Basics

In this edition of BenchTV, Hugh Selby (Barrister, Sydney) and Steven Griffiths (Director, BenchTV, Sydney) discuss the basics of advocacy, focussing upon asking questions of your own and the other side's witnesses.

### Contextual Information

Context and atmospherics are always important. This is seen in this video which uses a nursery rhyme as the background. The contextual information which forms the basis for our adult recollections of such a rhyme typically comes from our childhood experience of how the rhyme was told and shown to us.

When considering contextual information it is important to establish who is telling the story, their capacity, and their opportunity.

We break the story up into stages and then tell the audience what the stages are; for example, who are these people, what were they intending to do, what did they actually do, and why things went wrong. This is an agenda.

The atmospheric in which we recreate the story with the witness is important: how a story is received is influenced by where, when, and by whom it is told.

### Examination in chief

Examination in chief allows you to ask questions of your witness to establish who they are, what their intention was and is, and what they and others actually did. You should ask short questions of your witness, each question building upon the answer to the previous question.

Many wrongly believe that you must only ask open questions of your witness. While you will mostly ask open questions because this ensures that the witness – not you – tells their story, you may ask closed questions for answers that your opponent agrees with and so will not object to.

For example, it is likely that any given witness will have an imperfect recollection of any story and it is likely that there will be some part of the story where the witness has a weakness. This provides a later opportunity for the opponent to cross examine. As a result, you should try to minimise that opportunity by asking your witness a question or questions which

minimise the problem. This is called 'confess and avoid'. It is usually done with short, closed questions – permissible because the opponent agrees with the facts being elicited.

### Cross Examination

Only cross examine when the likely result will improve your case.

In cross examination it is not useful to be nasty until you have exhausted the benefits of being nice.

Novice cross examiners are worried about their ability to elicit something useful from the witness; however, it is important to remember that it is the witness who will give you the material to make your cross examination effective. Inexperienced witnesses fear the coming cross examination. Being stressed leads to them saying things that would not have been said otherwise. Their unexpected words are your opportunity.

Taking account of witness affect is important: note not only their words but also the way in which they present them - such as their tone, pausing, and physical affect such as looking away or down.

Use silence: it gives you and the audience the time to think about the implications of the questions and answers.

Occasionally it may be useful to ask 'D' questions, such as "did you?" or 'does it?'. However, use sparingly as they do not sufficiently control the witness.

### Closing addresses to the fact finder

There is not much evidence that a closing address persuades a fact finder to come to a conclusion that they were not moving towards prior to your address.

Work on the basis that you have conducted the case in such a way that the fact finder is already leaning your way before closing address.

### Summary

Be conscious of the atmospherics in the courtroom.

Ensure that the fact finders are able to follow the route you are taking with both your own and the other side's witnesses.

Ask short questions.

Establish a context.

Listen to the answers and think – so pause with silence - before asking the next question.

Use your questions to reveal your argument to the fact finder before your closing address.

## **BIOGRAPHY**

### **Hugh Selby**

Barrister, Sydney

Hugh Selby is a barrister practising in criminal law for both defence and prosecution. With former Justice Terry Buddin SC, he runs the UOW's LLM Criminal Practice. For thirty three years he edited *Expert Evidence* . For a useful reference to expand your advocacy skills download his 'Advocacy in Court: Preparation and Performance' from Amazon Kindle. He can be contacted at [hughmselby@gmail.com](mailto:hughmselby@gmail.com)

### **Steven Griffiths**

Director, BenchTV

Steven Griffiths graduated from the Queensland University of Technology (QUT) in 2003 obtaining a Bachelor of Laws. He had previously studied at University of New South Wales, obtaining a Degree in Sport Science. He was admitted as a solicitor in 2004 to the NSW Supreme Court and worked as a Government solicitor from 2004 to 2017 advising senior departmental staff and appearing in a wide variety of matters in NSW courts and tribunals including Supreme, District and Local courts as well as the State Parole Authority and Coroner's Court. He opened his own practice in 2017 specialising in criminal law and is currently the Director of Bench TV.